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Fijian Native Land - A Mataqali Owned Canoe sailed by a Foreign Crew.

-What, Who and Why is the real beneficiary of Native Fijian Land not the Mataqali Landowning Unit.

A dissertation presented in partial fulfilment of the requirements of the University of Auckland for the degree of Master of Laws

Joeli Baledrokadroka*

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* Joeli Baledrokadroka LLB(Otago) is a Barrister and Solicitor of the High Court of the Republic of Fiji

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Abstract

The mataqali[1] is recognised as the landowning unit under the Land Laws of Fiji. What is the legal effect of a mataqali owning native land in Fiji?

By the Deed of Cession Treaty 1874, Fiji became a British Colony. It became an Independent Sovereign Democratic State in 1970 and a Sovereign Democratic Republic in 1988 when it relinquished all ties to the Queen of England. Yet the mataqali has been adopted since Sir Arthur Gordon the first Resident Governor stopped all land sales and set up the first Royal Commission to investigate Fijian land ownership in 1876.

The vesting of control of native land in the Native Land Trust Board (NLTB) creates a statutory trust relationship between the Board as trustees and the native owners as beneficiaries.

While Customary Law and Traditional Rights are recognised and entrenched in the Fijian Constitution to protect the Mataqali the writer believes that this operates to the disadvantage of the very people it was designed to protect. In addition, they do not have a voice nor do they participate in the decision-making processes made by the NLTB in the administration of their resource.

This paper examines the Laws of Fiji that leaves the Mataqali Landowner a *'Landowner'* on paper and by name only while the NLTB continues to steer the destiny of its canoe fraudulently in the 21st century. And why it is opportune under the current Government's Blueprint policy to reform Fijian land laws to enable the Mataqali to be the master of its own canoe.

JM Baledrokadroka
School of Law
University of Auckland
New Zealand
28 June 2004

[1] Pronounced *"Mutt'n Gully"*

1. Introduction

Land under Fijian customary land tenure is held communally in units[2] and in pre-cession days such units were recognised as the Yavusa *(iwi)*, Mataqali *(haapuu)* or Tokatoka *(whanaau)*. The mataqali was adopted as the landholding unit but the legal status of the mataqali and the rights of the basic proprietary unit has often been a source of conflict between the Native Lands Trust Board (NLTB) and the native owners[3].

Although the responsibility for the management of land resources is divided amongst several government ministries, the NLTB administers and controls all native land[4]. While the ordinary Fijian landowner may feel secure that he still owns 83% of all Fijian land, the ownership of native land and user rights have been the source of some frustration to the landowners[5].

Unfortunately, the Fijian Mataqali landowning unit has never been in control of its land for over 60 years, since the NLTB was set up in 1940 by the Colonial Government. There are several reasons for this.

Firstly, while the "Mataqali" is recognised under Fijian statute as the landowning unit, it is not a legal entity as such.[6]

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[2] See Appendix A

[3] "Native Owners" is defined in Section 2 of the Fiji Native Lands Act (Cap. 133) to mean:
"the **mataqali** or other division or sub-division of the natives having the customary right to occupy and use any native lands"

[4] Section 4 Native Lands Act (Cap. 134)

[5] Their position was explained by Mr Justice Kermode in *Namisio Dikau No. 1 and Ors. V. Native Land Trust Board,* Supreme Court, Civil Action No. 801 of 1984 as follows:
"...legally, no individual Fijian can be said to 'own' native land in the sense that the word own usually conveys. Fijians in landowning units have customary rights to occupy and use native lands, but individually, they are not 'owners' of such lands."

[6] See Page 22

Secondly, all Native Lease Titles registered under the Fiji Land Transfer Act are indefeasible under the Torrens system of registration.

Thirdly, leases on native lands, whether they be agricultural (50%), residential (38%), educational, recreational, religious (6%), commercial (5%) or industrial (1%) are contracts privy only to the contracting parties namely, the landlord (NLTB) and the tenant. This fact is further complicated by the indefeasibility of titles under the Torrens system which legally allows encumbrances on the land through charges and mortgages to banks and/or other financial institutions.

While the consent of the mataqali members is essential for the approval of leases, only the consent of the NLTB is required for the approval of mortgages. In the event of the tenant defaulting or fleeing the country (which has become a regular occurrence since the first military coup of 1987), the mataqali landowner is left to drift at the whim of the mortgagee.

Fourthly, the control of native land by the NLTB is usually guided in its administration according to the development plan needs of the government of the day. This fact is obvious when one considers the full government subsidy that the NLTB has enjoyed from successive Fijian Governments, notwithstanding the 25% of total lease monies they deduct from the mataqali landowners as administrative expenses.

Fifthly, Rent Control in the Agriculture Sector in Fiji is governed by the Agricultural Landlord and Tenants Act (Cap 270) whereby a lessor of Native Agricultural Land is entitled to 6% of the

Unimproved Capital Value of the leased land as his or her annual rent.

Meanwhile, the Indian Farmers who were brought in originally as indentured labourers have moved from sugarcane farming into Fiji economy's rapidly growing sectors of trade and services which has ironically become a major source of the country's income over the last six decades, leaving the Fijian landowner a mere spectator.

This paper will therefore analyse the laws of Fiji in an attempt to show what laws affect Mataqali landowners, who the real beneficiaries of native land are and why there is a disparity in income-earning capacity between the Mataqali Landowner and the Tenant. I will examine the governance structures of institutions such as the Native Land Trust Board, the Great Council of Chiefs and the Fijian Administration, in attempting to answer these questions.

2. The Colonial Legacy

Fijians are a place-based people who have a profound spiritual, cultural, social and economic relationship to their total environment, which includes their lands, territories and resources. When Fiji was ceded to the British Crown in 1874,[7] the question of customary resource rights was of major concern to the High Chiefs, most of who wanted to attach conditions regarding their land and fishing grounds before agreeing to the cession of the country.

With the arrival of Ratu Sir Lala Sukuna[8] in the 1920s there was greater pressure to alleviate the Fijian plight. He was of the view that the guiding principle of Fijian Native Administration should be to develop the social, economic and political outlook of the governed through institutions well recognised and having roots in the people, in order to fit them, progressively and surely, to play an ever increasing part in the development of their country.

There was a desire to protect Fijians and help them manage change and competition in politics and the cash economy. Fijians had moreover placed the trust of their land assets in British hands with the establishment of the Native Lands Trust Board in 1940.

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[7] See the Deed of Cession document in Appendix B

[8] **Ratu Josefa Lalabalavu Vanaaliali Sukuna** was a soldier scholar and a statesman educated at Oxford, England. He was known as the 'Father of modern Fiji'.
The way he was revered by Fijians, he was 'Just a couple of rungs below God'.
K.C.M.G., K.B.E., Med. Mil., B.A. (Oxon),
Barrister-at-Law of the Middle Temple,
Born 22/4/1888, died 30/5/1958
High Chief of *Yavusa* Kubuna and *Yavusa* Lakeba
Head of the *Veitarogivanua* or Native Lands Commission District and Provincial Commissioner Chief Reserves Commissioner
Member of Legislative Council and the Council of Chiefs
1934-1944 *Talai ni Kovana* or Secretary for Fijian Affairs

The Native Land Trust Ordinance of 1940 established a new basis for the administration of native land. The main purpose was the creation of the Native Land Trust Board. The selling point for the creation of this colonial institution was that it was going to be an independent body outside the control of government.

More significantly, it was intended that the NLTB administer all native land "for the benefit of Fijian Owners". It was to make general policy relating to the administration of Fijian land, the approval of new leases and renewal of leases, collect and distribute land rent on behalf of the native owners, improvement in the pattern of land subdivision and help improve landlord and tenant relations.

The NLTB administers[9] Fijian land and has the authority to lease indigenous land that is not required for occupation by members of the *mataqali*.[10]

The NLTB derives its existence from the Native Land Trust Ordinance[11] of 1940. By 1880 it was realised that all land recognised to be owned by Fijians would have to be recorded and registered and also that there would have to be an authority to settle boundaries and ownership disputes. A Native Land Commission was established in 1880 to enquire and investigate claims to land by the indigenous landowner.

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[9] Section 4(1) NLA states:
The control of all native land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the Fijian owners.

[10] Section 9 NLA states:
No native land shall be dealt with by way of lease or licence under the provisions of this Act unless the Board is satisfied that the land proposed to be made subject to such lease or licence is not being beneficially occupied, by the Fijian owners for their use, maintenance or support

[11] Laws of Fiji Cap. 133 (Ed. 1978)

At the same time a leasehold system was created where land could be used on a 21-year lease. Negotiations were carried out directly between the Fijian landowner and the prospective tenant. Apart from a brief period between 1905 and 1909 outright sales of native land have continued to be forbidden.

Initially problems developed between the European planters and the Fijian landowners, since the Europeans considered 21 year leases were too short to justify the investment required to develop plantations in virgin land. Apart from copra all other plantations required much permanent improvement to land first. The two main complaints were:

- That the 1880 Ordinance did not require payment of compensation for improvements on the land, at the end of the lease when the land reverted to the land owners and that those wishing to lease land had to indulge in frustrating negotiations with many members of a mataqali to obtain their consent.
- At this time the government was involved only in the registration of leases negotiated between the tenant and the landowner and not in negotiating the actual terms.

However, as the plantation system declined and Europeans left agriculture the land problem became one peculiar to Indians.[12] Their need was different: they wanted small family farms. At this stage the land problem can be summarized as follows:

1. Obtaining lease was cumbersome and expensive for the prospective lessee.
2. The Indians were naturally choosing only the best land for their leases thus bringing about the haphazard piecemeal pattern of land use.
3. So in 1916 a Native Lease Ordinance was passed which handed over all land available for leasing to the Government, which would lease the land on the owner's behalf, and leases were now to be for a period of 21 years with a possible extension of 10 years.

[12] Indians were brought to Fiji by the British Government as indentured labourers to work on sugarcane farms. At the end of their term, they were given the option to return to India or remain in Fiji.

The Ordinance failed to solve the difficulties as Indians still had to negotiate directly with the Fijian owners for leases of better quality agricultural land.

During this period the land problems of Fiji became more acute due to important developments in the country such as:

1. Abolition of the indenture system that led to large numbers of Indians becoming free settlers in Fiji which led to a sudden pressure for more farming land.
2. Active encouragement by government and the Colonial Sugar Refining Company of Indians to settle in Fiji and become agriculturists, especially cane farmers.
3. Rapid growth of both Indian and Fijian population.

The Fijian owners also had their grievances:

1. Under the 1916 legislation they were required to pay compensation to the lessee for improvements to the land in the event of non-renewal of a lease which would be very costly;
2. Some Fijians were becoming anxious to enter commercial agriculture for themselves; and,
3. They were anxious to safeguard the availability of the land for themselves and their descendants.[13]

There were many debates in the 1930's about the land issue in the Legislative Council, in the Great Council of Chiefs meeting, in Fijian villages and Indian settlements, and; in Government circles. The government held discussions with leading chiefs with the view to devising a better system of landlord and tenant relations.

The leading figure in these discussions was the late Ratu Sir Lala Sukuna.[14] In 1936, the Great Council of Chiefs resolved that it was in the best interest of the native race that all lands not required for the maintenance of Fijian owners be opened for national development.

[13] Supra at n.39
[14] Supra n.37

By the time indentured labour was abolished in 1919 there were more than 60,000 Indians in Fiji.[15] The Indian community, which had been prevented from owning land, moved into small business holdings, trade and bureaucracy, or took out long-term leases on farms.

As material progress advanced, the interests of natives and non-natives began to clash, and as the Government found it more and more difficult to replace chiefs of the old school and Fijian education lagged far behind economic progress the Colonial Government turned to a separate Fijian Administration in 1944 to regulate village life.

This was not a new idea. Arthur Gordon, the first Governor, organised the first Fijian Administration designed to preserve the traditional mode of production, way of life and authority structures of Fijian society.

Gordon appeared to be genuinely concerned about preserving the Fijian way of life. He saw the need to protect the Fijians from the ambitions of the settlers and the corrosive effects of a capitalist plantation economy.

On the other hand, it was necessary to preserve traditional structures in order to facilitate rule, control and the exploitation of land and resources. The result was the creation of an organised, structured and selective customary law where new leadership roles and customs had never existed before.

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[15] See Appendix C - The statistics showing the population trend in Fiji since the arrival of Europeans and Indians reveals that anxiety and the fears held by indigenous Fijians with respect to the immigrant community, in those early days were well founded. Within forty years, the Indian population grew from 588 in 1881 to 60,634 in 1921.

The new authority structure was formed by developing the Fijian Regulations and the Administration Courts. This institutionalised court system and law prohibited many customs and provided guidelines for the creation of new ones.

Fiji was divided into fourteen provinces. A Roko Tui was appointed in each province – preferably but not necessarily of chiefly descent. The Roko Tui was directly responsible to the Governor and chaired the Provincial Councils.

Under the Roko Tui and responsible to him was the Buli, appointed to keep good order in the province. The Turaga-ni-koro or village headman was directly responsible to the Buli for the good order and welfare of the village.

However, in theory the judicial functions were separated from the executive by the appointment of Native Stipendiary Magistrates. In fact the close involvement of the District Commissioners in the courts and the prosecutorial functions of the Buli (because their functions to keep good order in the province overlapped), meant that there was no clear line between the administrative and judicial functions in the Fijian Administration.

The Provincial Courts was presided over by two Native Magistrates and the District Commissioner and the Tikina Courts was presided over by one Native Magistrate. The structure of the courts was formal, the procedure followed that of the English Courts, and the Criminal Offences Code was drafted in Western legalistic terms.

The Fijian Affairs (Courts) Regulations Cap 120 of the Laws of Fiji divided the Civil and Criminal Jurisdiction of the Fijian Court, provided for legal representation by Barristers and Solicitors of the Supreme Court of Fiji and made procedures for prosecuting, hearing and sentencing offenders in the Fijian Courts identical to those in the Central Courts.

While a concession to Fijian custom was the provision in section 7 of the Fijian Courts Code Regulation Cap 100 Fijian Affairs Ordinance that "The language of Fijian Courts shall be Fijian", the procedure in the Fijian Courts was as alien to the Fijians as were the substance of the law that applied in them.

The Fijian Affairs (Provincial Councils) Regulations required all mataqali landowners to pay land rates to the Provincial Council. Section 5 of Regulation 7 of the Provincial Funds Regulation Cap 100 Fijian Affairs Ordinance provided as follows:

> "The Provincial Council by by-law shall have power, subject to the approval of the Fijian Affairs Board, to impose a rate to be called the Provincial Rate of every adult male of a province not exempted under section 14[16] herein. Every such by-law shall state the amount of the rate and the method and time of collection."

Section 6 stated that:

> "(1) Every male person shall within two months after he reaches the age of seventeen years, register himself, at a provincial office or at the Central Fijian Treasury, as a ratepayer of the province in which he is a **landowner**.

[16] Section 14 dealt with Liability to pay and exemption from paying rates and levies:
"Rates and levies for a common benefit imposed in pursuance of this regulation shall be paid by every male Fijian between the ages of eighteen and sixty save and except the following –
(a) such Fijians approved by the Board as may be undergoing a system of training or instruction;
(b) Fijians detained as patients in any leprosy or mental hospital;
©Fijians incapacitated from work by physical disability on production annually of a certificate under the hand of a Government medical officer;
(d) such other individual Fijians recommended by Provincial or Tikina Council as the Board or the Secretary for Fijian Affairs may approve, as the case may be.

> (2) Any such person who, without lawful excuse, fails to register himself in accordance with the provisions of this section shall be liable on conviction to a fine not exceeding two pounds or to imprisonment for any period not exceeding two weeks."

Section 15 stated that all monies owing by any person to Provincial Funds the recovery of which is not otherwise provided for by any regulation may be recovered by civil proceedings instituted by the Roko on behalf of the province and the provisions of sections 39 to 50 of the Fijian Courts Code (which deals with the powers, practice and procedure of civil proceedings in Fijian Courts).

The current Section 7 of the Fijian Affairs (Provincial Council Regulations) (Cap 120 Ed. 1978) still has provisions dealing with land rates. Regulation 28 says that subject to provisions of Regulation 39 (that deal with exemptions); each Provincial Council shall have the power to levy a uniform rate (hereinafter referred to as the "land rate" upon the unimproved value of land owned by Fijians in the province. Regulation 29 states:

> "(1) All land of whatsoever tenure, including freehold land but excluding all land within a town, owned by Fijians within the province shall be rateable land for the purposes of these regulations.
> (2) Subject to the provisions of paragraph (1) and regulation 39, **a land rate shall be levied on all Fijian owners of land in the province**."
>
> (Authors emphasis)

Thus the total effect of the Fijian Regulations and the Fijian Court System was to confine the Fijians to the villages, to ensure the payment of rates and taxes, and to preserve the Fijian form of subsistence agriculture.

Sir Arthur Gordon placed the Council of Chiefs over the entire Fijian Administration – made up of all the paramount chiefs of Fiji, the Governor, the Rokos and provincial representatives. The

Council was solely an advisory body, but the structure of the Administration portrayed the Council as the only recognised voice of the Fijian people – a voice that became increasingly conservative and reactionary through the years bolstered by the apparatus of the Colonial Government.

On the reconstruction and review of the Fijian Administration, Sir Donald Cameron said:

> The great principles to be followed throughout are those of building on the existing organisation and ideas of the people, of leaving it to the people themselves, assisted by sympathetic advise, to devise and develop their own institutions, and of resisting the temptation to play the part of 'King-maker' or constitution maker: many ideal states have been devised by theorists for mankind, but the only true political development proceeds from within by evolution.[17]

Throughout, the British had been articulating a philosophy of the paramountcy of native interests and the Fijian Administration of 1944 gave substance to that principle. It consolidated Fijian attachment to the British Crown and Fijian sense of loyalty to their British rulers.

The positive aspects of this separate administration were that it secured Fijian land; it kept political control in Fijian hands, sustained Fijian unity at important times and nurtured the chiefly system.

On the other hand, the Fijian Administration in practice, had become a state within a state and since independence in 1970, unease has surfaced on matters of sovereignty. Some observers

[17] Sukuna (1944)

see this administration as over cautious and as delaying wider Fijian economic involvement.

The writer submits that by creating the Fijian Administration (1944) and the NLTB (1940) well before giving Fiji independence status on 10 October 1970, the British Government did not return the Fijian loyalty it had enjoyed since 1874. Although mataqalis are legally recognised as landowners any dealings on their land is controlled by the NLTB.

While Customary Law and Traditional Rights are recognised and entrenched in the Constitution of the Republic of Fiji[18] to protect Fijian rights to land, customs and tradition the writer believes that this operates to the disadvantage of the very people it was designed to protect. The NLTB administers and controls all native land.[19] The vesting of control in the Board creates a trust relationship between the Board as trustees and the native owners as beneficiaries.

In *Guerin v. R. and National Indian Brotherhood*,[20] an Indian band agreed to surrender to the Crown a portion of valuable reserve land for lease to a golf club, on the understanding that the lease would contain certain terms and conditions. A surrender document was accordingly executed, granting the Crown to lease the lands "upon such terms as it deemed most conducive to the welfare of the band". In fact the lease varied significantly from what the band had agreed to, and was substantially less valuable.

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[18] See Sections 185 and 186 of the Constitution of the Republic of Fiji in Appendix D
[19] Section 4 Native Lands Act (Cap. 134)
[20] (1984) 6 W.W.R. 481

The Court found that the Crown owed a fiduciary obligation to the Indians with respect to their lands, and at page 376 said that:

> ...the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.

And further at page 379:

> It does not matter, in my opinion, that the case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands.

The Court stated that the Indians' legal right to land is derived from their historic occupation and possession which is a pre-existing legal right, and is not created by the Royal Proclamation of 1763 Section 18(1) of the Indian Act, or any other legislation. Their legal right coupled with the discretion vested in the Crown to deal with surrendered land gives rise to a fiduciary obligation.

The fiduciary obligation described in *Guerin* was affirmed in *R. v. Sparrow*[21] a case concerning aboriginal fishing rights. *Sparrow* not only confirmed that the Crown had a fiduciary relationship with aboriginal peoples extending to land and to rights; it explained the relationship between the fiduciary obligation and s.35(1) of the *Constitution Act, 1982 which* states that:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.

At page 1109, the Chief Justice wrote:

> There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet we find that words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some

[21] [1990] 1 S.C.R. 1075 (S.C.C)

> restraint on the exercise of sovereign power. Rights that exercised and affirmed are not absolute. Federal legislative powers continue, including of course, the right to legislate with respect to Indians pursuant to s.91(24) of the *Constitution Act, 1867.* These powers must now be read together with s.35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick, supra* ([1983] 1 S.C.R. 29), and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen, supra.*

While *Sparrow* specifically recognises that the constitution contemplates challenges to policy objectives embodied in legislation, the court observed at page 1110 that:

> The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.

It is submitted that both *Guerin* and *Sparrow's* case apply to the legal rights of mataqali landowners of Fiji. The term "Native Owners" is defined in Section 2 of the Native Lands Act to mean:

> "The mataqali or other division or sub-division of the natives having the customary right to occupy and use any native lands"

The Mataqali's legal right to land is derived from their historic occupation and possession which is a pre-existing legal right and is not created by the Deed of Cession, the Native Lands Act or any other legislation. Accordingly this right, coupled with the discretion vested in the Crown to deal with surrendered land gave rise to a fiduciary obligation similar to a trust since the British Crown held surrendered mataqali land as an agent for the benefit of the mataqali land owning units.

The Colonial Governments power must be reconciled with the Colonial Governments duty and the best way to achieve that reconciliation is to demand the justification of any Fijian Government regulation that infringes upon or denies mataqali landowning rights. The Crown breached its duty however, when it returned the control and administration of native land to the Native Land Trust Board instead of the appropriate landowning mataqali.[22]

In 1876, a commission under Victor Williamson was set up to investigate all claims to title to these lands. Many claims were refused many more reduced. Even so, some 400,000 acres were registered in freehold title as Crown Grants from the total amount of approximately 4.37 million acres[23] of Fijian land.

These freehold lands represent a substantial proportion of the best agricultural land in Fiji. This area is now approximately 351,101 acres and the intention to seek compensation for this land 'taken' during colonial rule was raised in the Fiji Parliament in 1999 by the then Leader[24] of the predominantly indigenous Soqosoqo ni Vakavulewa ni Taukei (SVT or Fijian United) Opposition party, to the Chaudhary government.

The relationship between the indigenous Fijians and the NLTB has been the subject of numerous protests and litigation by the beneficiaries who quite rightly detest the apparent lack of transparency, competence and capacity in the dealings of the NLTB supposedly on their behalf, which leaves it open to corrupt practices.

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[22] Refer to the discussions on the absence of "mataqali" and "native owners" in the Constitution of the Native Land Trust Board on pages 42 onwards

[23] See Statistics in Appendix E

[24] Kubuabola, Fiji Post, October (1999)

While the ordinary Fijian landowner may feel secure that he still owns the majority of all Fijian native land, the ownership of native land and user rights has been the source of some frustration to the landowners. Mr Justice Kermode in *Namisio Dikau*[25] explained their position as follows:

> "...Legally, no individual Fijian can be said to 'own' native land in the sense that the word own usually conveys. Fijians in landowning units have customary rights to occupy and use native lands, but individually, they are not 'owners' of such lands."

Fiji was a British Colony for 96 years until it became independent in 1970. Since sovereignty was handed back to the leaders of Fiji, there have been two attempts at usurping the powers of the democratically elected government of Fiji because they were perceived not to have the interests of the indigenous Fijians, and were therefore a threat to Fijian control over their land.

Cakobau, the self-proclaimed King of Fiji, attempted to form a western-style government in 1871, but it collapsed after just two years. In 1873 the acting British Consul JB Thurston sought British annexation of Fiji, and on 10 October 1874 it was pronounced a British colony and a capital established at Suva.

Governor Sir Arthur Gordon sought economic self-sufficiency for the colony through plantation crops, such as cotton, copra and sugar cane, and productivity was boosted when Gordon began importing indentured labour from India. Hopeful Indians saw Fiji as an escape from poverty but plantation life was a predictable melange of human rights abuses, crime, suicide, rape and disease.

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[25] Supreme Court of Fiji, Civil Action No. 801 of 1984

Australians came to dominate the local economy through sugar production and gold mining, while Europeans manipulated the racial tensions between the Fijians and the Indians in an effort to maintain a stranglehold on economic and political power.

Traditional Fijian society was therefore 'god-made' for the 'god-sent' British colonial system. The Fijian State motto of 'Fear God and Honour the King' which still stands today is a living example of colonialism which is rooted in Fijian society and Fijian institutions like the NLTB, Fijian Affairs Board and the Great Council of Chiefs, in the 21st Century.

After nearly 60 years some re-thinking is necessary, as with all institutions confronted with new imperatives including globalisation and rapid change. The Fijian Administration is currently being reviewed by the Fiji Government and there are a lot of different views on what path a new administration should follow at the beginning of this new century.

In the writer's view any review or reform of the Fijian Administration and Laws affecting Fijian rights to land, resources and the economy of Fiji should be carried out without compromising the needs and aspirations of the current and future mataqali landowners.

3. Litigating Indigenous Fijian Rights and Concepts

'Indigenous' is described in the Concise Oxford dictionary as born or (especially of flora and fauna) produced naturally in a region; belonging naturally. Paragraph 26.1 of Agenda 21 of the 1992 UN Conference on Environment and Development in Rio de Janeiro, Brazil; noted that 'indigenous peoples and their communities have a historical relationship with their lands and are generally descendants of the original inhabitants of those lands'.

Dr. Erica-Irene Daes[26] the chairperson rapporteur of the Working Group on Indigenous Populations, with the assistance of Indigenous legal experts, members of the academic family and modern international organizations and legal experts, established four relevant factors that inform the concept of "Indigenous peoples":

> (a) Priority in time, with respect to the occupation and use of a specific territory;
> (b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions;
> (c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
> (d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, or whether or not these conditions persist

Making up the majority of the Fiji population[27] in recent years, it is submitted that the definition of indigenous peoples above, apply to Fijians who were the first inhabitants of Fiji. 'The earliest forms of Fijian society of which there are hints in tradition were those of independent agnatic family groups. They were tillers of the soil. Ties of cognate blood attracted intermarrying groups to the same locality; but each unit

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[26] Battiste and Henderson, 2000, p.64
[27] Supra at p.19

had its own village, its own defined and recognised arable land, and the group was ruled by the senior male whose powers might be compared to the *patria potestas* of the Romans in its earlier stages'.[28]

Battiste and Henderson[29] argue firstly that the problem in understanding Indigenous knowledge from a Eurocentric point of view is that Indigenous knowledge does not fit into the Eurocentric concept of culture.

Secondly, it is not a uniform concept across all indigenous peoples. It is a diverse knowledge that is spread throughout different peoples in many layers. They further argue that those who are the possessors of this knowledge often cannot categorise it in Eurocentric thought, partly because the processes of categorisation are not part of Indigenous thought.

The third problem is that Indigenous knowledge is so much a part of the clan, band, or community or even the individual, that it cannot be separated from the bearer to be codified into a definition.

Those who have the knowledge use it routinely, perhaps every day, and because of this, it becomes something that is a part of them and unidentifiable except in a personal context. This practical, personal, and contextual aspect of Indigenous knowledge makes it a sensitive subject of study and discussing it out of context may be viewed as intrusive or insensitive.

The current land tenure patterns and policies were based on the views of Gordon, the first substantive Governor of Fiji. He set up a framework, establishing the Lands Claims Commission, under which the

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[28] Sukuna, 1932, p. 116
[29] ibid

validity of European claims were determined and the protection of native forms of tenure systems were recognized. Among other issues the *mataqali*[30] was accepted as the main land-owning unit in Fijian Society.

In Fiji 83% of the land is owned in trust by indigenous Fijians. The residue is state land and freehold. As a result the Fijians (indigenous Fijians) remain a proud race and have retained strong spiritual and family connections with the land.[31]

The legal status of the Fijian mataqali was decided by Mr Justice Rooney in the unreported Supreme Court of Fiji case of *Timoci Bavadra v. NLTB.*[32] The plaintiff applied for an order under Order 15 rule 13 of the Supreme Court Rules that he be granted leave to institute a representative action against the defendant on behalf of i Tokatoka Werecakaca, Mataqali Elevuka of Viseisei village, Vuda. The plaintiff had claimed damages from the defendant for the unauthorised payments of trust funds to the Fiji Development Bank and an order restraining the all deductions by the defendant to the Fiji Development Bank of future rental income due to the i Tokatoka[33] Werecakaca in satisfaction of outstanding debts of the defunct Elevuka Co-operative Society Limited.

His honour refused leave because there was no evidence before him that the plaintiff represented the majority of the i Tokatoka Werecakaca and stated that:

> "A **mataqali** cannot be equated with any institution known and recognised by common law or statute of general application. The composition, function and management of a **mataqali** and the regulations of the rights of the members in relation to each other and to persons and things outside it are governed by customary law separate from and independent of the

[30] Supra n.5
[31] Boydell and Reddy, (2000)
[32] Supreme Court, Feb 11, 1986 (unreported)
[33] See the definition of *i tokatoka* including the discussion of the traditional Fijian order of succession and the application of the principle of male primogeniture on pages 32 and 33

> general law administered in this court ... If the plaintiff wishes to pursue this case further he has to establish within the framework of common law that **i tokatoka** or **mataqali** has a right to sue or be sued in the Courts. It is as far as the applied law is concerned, an alien institution which is neither a corporation nor unincorporated association."
>
> (Authors emphasis)

It has been claimed that the present Fijian Land Tenure system whereby the ***mataqali*** is recognised as the landholding unit, was really an English idea, introduced by the Colonial Administration (Ron Crocombe, 1971). Bavadra's case is an example of the failure of the common law to comprehend indigenous concepts such as the Fijian Mataqali.

The writer contends that according to Mr Justice Rooney's definition above in the High Court of Fiji, the concept of ***mataqali*** is indigenous knowledge, which is different from the internal view of the ethnographic tradition in Eurocentric thought.[34]

In *Milirrpum v. Nobalco Pty Ltd and the Commonwealth of Australia*[35] the plaintiffs commenced proceedings seeking a declaration, amongst other things, that they were entitled to the occupation and enjoyment of the land under dispute free from interference, under a customary right. The court held that the plaintiffs who were native aborigines had no legally recognisable rights in their ancestral land. The two reasons given by Mr Justice Blackburn for its decision were that:

> (1) The common law had no doctrine of communal native title. Where native rights had been recognised in other jurisdictions, it had been an express recognition by statute and executive policy.
> (2) The 'Act of State' doctrine applied on the acquisition of territory, thus the subject could not resist the Crowns' appropriation of what was his property under the previous sovereign.

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[34] Battiste, M and Henderson, J (Sa'ke'j) Y; Protecting Indigenous Knowledge and Heritage - A Global Challenge, Purich Publishing Ltd, Saskatoon, Saskatchewan, Canada, (2000), p.35

[35] [1971] 17 F.L.R. 141

The cases of *Waisake Ratu No. 2 and Epeli Koroitamudu v. Native Land Development Corporation and the Native Land Trust Board*[36] recognise customary tenure of native lands by mataqali native owners. The plaintiffs were farmers and were members of the mataqali who were the proprietary unit registered as owners of the land in question. Their main contention was that by virtue of the provisions of section 3 of the Native Lands Act, they both had an estate for life in the land which they occupy.

In delivering the judgment of the Court Mr Justice Cullinan observed that once a native Fijian establishes the infringement of a customary right, the infringement of such right could be nothing else but the infringement of a legal right, and that a native Fijian is entitled to apply to the Court for a remedy. While Fijian customary law may be alien to the law of England, it could not be said to be in any way alien to the Constitution and the statutory law of Fiji. He further said that:

> "... the Fijian does not depend upon the provisions of section 3 of the Native Lands Act for his right of access to the Court for the land he occupies. He has the same right as anyone else. But Section 3 states how and by whom native land is held and empowers the Court to determine the particular custom and usage and to determine the case thereby. I would thus be slow to hold that Fijians could not seek a remedy in this Court in respect of any infringement of a customary right. Once the Court by the reception of expert evidence and possibly assisted by expert assessors, determines such right, I cannot then see how such right could be regarded in any alien to the general law practiced before the Courts. It must be remembered that the litigant seeks not a customary, but a common law or equitable remedy. Once the right is established as part of the customary law of Fiji, and therefore as part of the general law of Fiji, how then can the right be regarded as other than a legal right? Again once it is established that a legal right has been unlawfully or unjustifiably infringed I cannot see why, in an appropriate case even a declaration of injunction, much less damages would not follow."

[36] Unreported decision of the Supreme Court, Civil Action No. 580/1984

What then was the Fijian's idea, the content of his notion, of the ownership of land? Sukuna contends that land to the Fijian was in the first place absolute in the unit, something like the right of chattel ownership in the individual at English Common Law.

Secondly, he agrees with Rev. Lorimer Fisson[37]who states that 'it is certain that though the Taukei (the Fijian equivalent of *tangata whenua)* may be driven from their lands by a stronger tribe, they do not acknowledge the most crushing defeat as an extinction of their title. In fact they consider their title to be inextinguishable as long as they themselves are not extinguished. It may be held in abeyance, but it cannot be destroyed'.

Thus with the Fijian, the right of ownership over land was absolute and indestructible. This extreme, unpractical, and partially accepted view was preserved for them by Victor Wilkinson, the first Native Lands Commissioner set up in 1876 to investigate all claims to title, in his tribal joint tenancies.

The Yavusa was in the majority of cases a collection of unrelated and cognate families joined together primarily for the purposes of defence. From being an agricultural association, the Yavusa became by force of circumstances a political entity with sovereign rights over a defined area. As a result the Yavusa's organisation came to be regarded as something preordained, the leader as a personage descended from the Tutelary Deity - he was now conceived as Tribal Chieftain.

The tribal wars of the last two centuries gave birth to the rise of powerful states and High Chiefs. This factor together with the introduction of new values consequent on the advent of the European moved Fiji rapidly on towards the Feudal system, a development that

[37] Fison (1880)

was only arrested by the Cession when as yet far from maturity. Tenure therefore in the sense of English Real Property law, was unknown at custom.

In pre-European contact times the *yavusa* or *vanua* land-holding unit usually held tenure over adjacent mangroves, lagoons and reefs, together with exclusive ownership of sea floor, water, marine life and rights of passage. This is unlike land, the rights to which are held by the *mataqali*.[38]

Sea territories were defended to the death against outsiders operating without permission. In pre-European contact times boundaries were in a state of flux owing to conquest and changing alliances, population pressures, marriage and adoption. As elsewhere in Melanesia, fishing rights areas (*qoliqoli*) are an integral part of a tribal land-sea 'estate' (vanua) that extends from central watershed seawards, generally to the outer margin of the seaward slope of the fringing reef.[39] Fishing rights areas extended from the high-water mark to the outer reef. The adjacent right-holding group did not always traditionally own areas beyond the reef. These fishing rights areas are worked communally.

Fijian people have identified closely with their natural environment for centuries. This is manifest throughout their social structure, spirituality and language. The early Fijians are reported to have lived in relative harmony with their natural environment, and for the most part adopted practices, which conserved rather than exploited the natural resource base.[40] On the island of Matuku for example, villagers claim that they

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[38] Ravuvu, 1983; Fonmanu, 1991

[39] The comprehensive term *vanua* essentially describes the totality of a Fijian community. Depending on the context it is used to refer both to a social unit and to the territory it occupies, thereby expressing the inseparability of land and people, as well as to the supernatural world and worldview (Ravuvu 1983, 1987).

[40] *Country Report for UNCED, Fiji* (1992) South Pacific Regional Environmental Programme 52,53

have grown dalo (taro) in the same swampland over many generations without adding fertilizers and without affecting yield.[41]

According to Ravuvu,[42] traditional practices and beliefs still form a very important part of the Fijian ethos even though they are not applied as widely today. Whilst there has been little documented about traditional resource management systems, this by no means indicates that these practices and beliefs do not still feature in modern society. It has also been suggested by Pulea that an appreciation and legislative endorsement of the traditional Fijian approach to resource management be incorporated into future strategies to protect the environment.[43]

It is arguable that while the solution to most environmental problems requires community participation, the levels and extent of this participation varies with the problem in question, which in turn, is influenced by both national concerns and international obligations. The development of rules of international law concerning protection of the environment is of little significance unless accompanied by effective means for ensuring enforcement, compliance, and the settlement of disputes.[44]

The concepts of "mana" and "vanua" in traditional Fijian society were central to ensuring that the environment be sustained for future generations. Mana was a spiritual power derived from the gods and was possessed by all things, animate and inanimate. It was a belief that a violation of mana would lead to drastic consequences. The abuse or

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[41] Siwatibau, S., Traditional Environmental Practices in the South Pacific - A case study of Fiji. *AMBIO, A Journal of the Human Environment,* Volume III No. 5-6 (1984) 365

[42] Ravuvu, A., *Vaka i Taukei, the Fijian Way of Life* (1983) University of the South Pacific, 70.

[43] Pulea, M. The Law, Custom and Development, *Report of the Workshop on Customary Tenure, Traditional Resource Management and Nature Conservation.* South Pacific Regional Environment Programme, Noumea, 28 March - 1 April 1988, 41.

[44] Birnie & Boyle (2001), p.137

exploitation of a fishing ground for example could result in loss of abundance, illness, or misfortune to the offender.

Vanua is seen as a living entity encompassing physical and spiritual dimensions. Literally translated as land, vanua is the Fijian version of existence, which is traceable throughout the Pacific. Physically, vanua represents the ecosystem including the coastal waters. Spiritually, vanua links a Fijian's past and future to the natural surroundings. The practice of planting a tree above a newborn baby's umbilical cord is symbolic of this affinity, and provides a physical and social identity to the individual. As well as its guardian and protector, the Fijian treats the vanua as an extension of himself, and to defend his rights and interests in it is second to nature. Thus, the traditional Fijian is one with the vanua.

"Na sau ni vanua" or the intrinsic life of the land is the Fijian philosophy, which linked sacred beliefs with daily practices. It provided self-regulating mechanisms by which Traditional Fijian society could utilise the environment only to the extent that its mana was preserved. As a result, the early Fijians developed a social structure and range of customary practices, which had the effect of both fulfilling spiritual obligations and maintaining the natural resource base.

The customary imposition of "tabu" (prohibition) over particular resources was the most explicit form of control. A tabu could apply to a particular area of land or sea, a particular species or a particular season or occasion. A typical example was a tabu placed over a "qoliqoli" (customary fishing ground) following the death of a high chief. Usually this meant that the waters could not be fished for up to a year. During this period, fish stock would replenish to ensure a plentiful supply of seafood for the traditional ceremonies associated with the lifting of the tabu.

Sometimes the tabu was of a permanent nature. In such cases particular resources would be reserved only for high chiefs. For example, the prized native hardwood "vesi" was to be used only for a chief's house or canoe. The felling of vesi was restricted to certain members of the village who had an intimate knowledge of forest ecosystems. Similar practices also applied to the consumption of sea turtles and certain fish species.

In many ways the traditional Fijian practised what is today viewed as the sustainable management of natural resources. Daily needs were met without compromising the ability of the environment to provide for future use. The introduction of western values, technology and development to Fijian society however, brought significant changes to the way the environment was perceived and utilised.

Since the latter half of the last century, many traditional practices have given way to Western concepts of short-term use with limited consideration for long-term impact. In Fiji, the Government has yet to pass the Fiji Sustainable Development Bill which has been scrutinised by three different governments since 1994.

Section 5(1), the interpretation section of the proposed Bill defines "approving authority" in respect of development proposal, to mean the ministry, department, statutory authority or local authority given responsibility by or under a written law for approving the proposal. The definition of "landowner" in the same section includes a mataqali. It is submitted that the definition of mataqali in Section 2 of the Native Land Trust Act should be retained in this new Bill.

This will allow the mataqali to participate in all the decision-making sections of the Bill with respect to development activities or undertaking likely to alter the physical nature of the land in any way; including the

construction of buildings or works, the deposit of wastes or other material from outfalls, vessels or by other means, the removal of sand, coral, shells, natural vegetation, sea, grass or other substances, dredging, filling, land reclamation, mining or drilling for minerals.

The only reference to the participation of landowners in the Bill is in Section 46(1)(c) which deals with the Approval Process for Code. It states that upon receiving a draft Code of Environmental Practice for approval under Section 42(8), the Director must review it and verify;

> ...(c) insofar as the activities of any facility may have an adverse impact on human health or the environment, that all affected parties, including landowners located near the facility, have been consulted and consent to the proposed code.

The successful implementation of environment impact assessment (EIA) in the Bill demands a commitment from leadership that is more than simply lip service, the passage of legislation or an innovative approach such as the Blueprint of Qarase's government

The writer believes that this Bill is an avenue whereby the Government can help influence and encourage the participation of mataqalis by including them in the consultation and management process of any development carried out on their land.

4. The Exercise of State Sovereignty in the Republic of Fiji

The policy of the early British Colonial Administrators was to ensure as far as possible that the Fijians were governed in accordance with their ancient customs and traditions. In Fiji there is a sense of belonging and interconnectedness between the indigenous Fijian and the land (vanua or whenua in Maori). Within the Fijian language, the i Taukei (which is the name taken by the nationalist movement associated with the recent unrest) and kai vanua literally mean 'land people'[45] or tangata whenua in Maori.

The Fijian, as with many other indigenous groups, views the land with sacredness and spirituality. Philosophically and spiritually there is a deep-rooted belief in the stewardship of land. Scarr[46] has stated that there is an inner connection between the land as actual turf and land as a religious symbol for the Fijian.

The Native Lands Commission in its investigation of land titles under Wilkinson in the 1890s and again under Maxwell after 1910, determined as a result of its investigations, that both the membership of landowning groups and title to office were transmitted in the male line. The order of succession, with few exceptions, was found to be based on the principle of male primogeniture.

A report by Commissioner Maxwell in 1913 enumerates the main principles as follows:

> A *yavusa* consists of the direct agnate descendants of a single *kalou-vu* or ancestor god, and every *yavusa* ... traces its origin in this way...
> Each 'god' appears to have been accompanied by sundry female relations and the traditions ...

[45] Walter (1978)
[46] Scarr, (1983)

> containing details as to the journeys of the 'god' ... before he finally settled ... took to wife a woman of some neighbouring *yavusa*, and founded a family. If only one son was born, the *yavusa* of necessity did not expand: the first family of two or more brothers, whether sons or later descendants of the original founder, gave rise to the divisions known as *mataqali*, the descendants of each son founding a separate *mataqali*.
>
> In a similar manner the first family of sons in each *mataqali* founded the various *i tokatoka*.
>
> The members of an original *yavusa* in its integrity were united by the tie of common blood and common worship, but in the inevitable wars and dissensions which took place subsequently complications arose by which *yavusa* became broken and scattered, and others became strengthened by the admission of other parties. There are cases in which a *mataqali* or even a small section of people, having either by choice or necessity, become separated from its original *yavusa* and discarded its own 'god' in favour of the 'god' of its adoption, has continued to live with that yavusa and has been allotted definite portions of land. In some cases the leader of the new arrivals, presuming when possessing extraordinary personal qualities, was accepted by the adopting *yavusa* as its chief and the position has been held by his family ever since.
>
> ... most of them claim to be able to trace their origin back to their original *kalou-vu*, and most of these pedigrees consist of about eight generations, ending in the senior living member. In the course of time, when the country became more closely populated, struggles for territory and other fighting took place, and while on the one hand many *yavusa* became broken and scattered, there arose on the other hand, confederations whereby several *yavusa,* or what remained of them, united together for mutual protection under a selected chief. Such a confederacy was know as a *'vanua'* ...[47]

In the absence of contrary evidence, it would be feasible to proceed from this to the conclusion that every Fijian must belong to some *i tokatoka* of some *mataqali* or some *yavusa.* Ability to name *yavusa, mataqali* and *i tokatoka* became an almost necessary condition for the admission of land claims.

[47] Fiji Legislative Council Paper No. 27 of 1914, pp.1-2

On this basis, the Native Lands Commission recorded titles to all Fijian lands in terms of these social groups, the membership of which is now kept current by the Native Lands Commission in Suva, Fiji through birth and death registrations or Vola ni Kawa Bula. It is accepted that the current generation has a responsibility in respect of the land that relates to the spirits of their forefathers along with the expectations of their descendants, in addition to the needs of the current generation.[48]

There is also a view[49] that the perception of tradition or 'custom' is a moving idealism, and is varied and recreated as needed to reinforce and support a particular stance, which we now see manifest as nationalism. The traditional economy has evolved whilst traditional social and political order is being reinforced and entrenched.[50]

The framework developed for the control of Fijian Affairs and Fijian land closely followed the principle of Indirect Rule by the Colonial Government through an indigenously-based leadership hierarchy that is the Great Council of Chiefs. The membership, functions, operations and procedures of the Council as established under Section 3 of the Fijian Affairs Act (Cap. 120 Vol. 7 Laws of Fiji, 1985 Edition) continues under Section 116 of the Constitution Amendment Act of Fiji 1997.

Sections 185 and 186 of the Republic of Fiji Constitution Amendment Act 1997 deals with group rights and entrenches the rights of Fijians with regard to the alteration of certain Acts like the Fijian Affairs Act, Native Lands Act, Native Lands Trust Act and their customary laws and rights. These entrenched provisions were also a special feature of the 1970 Constitution of Fiji, when Fiji became an Independent State and

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[48] Boydell, S; *"Coup's Constitutions and Confusion - the Abrogation of the Constitution and the Arrogation of land in Fiji"*, The Cutting Edge Conference (2000), p.6
[49] Lea, D. (1977), Ward (1995)
[50] Overton (1987), p.141

the 1990 Constitution of the Republic of Fiji when Fiji relinquished its ties to the British Crown. Section 185(1)(k) states that:

> A Bill that alters any of the following Acts ... is deemed not to have been passed by the Senate unless at its third reading in that House it is supported by the votes of at least 9 of the 14 members of the Senate appointed by the **Council of Chiefs**.

State (formerly Crown)[51] land today consists of State Schedule A (the land of extinct native owners) and State Schedule B (land that had been unclaimed by the native Fijians at the time of Cession). Section 19[52] of the Native Lands Act illustrates how the Crown legitimises its actions using the power of the NLTB, with respect to vacant native land. This is a good example of how the Colonial government used the Native Lands Commission to legalise the alienation of native land. Under the act, any subsequent government of Fiji has had the power to determine vacant Fijian land and declare it as State land.

Mr Justice Rooney also observed in *Timoci Bavadra v Native Land Trust Board*[53] that modern development had transformed the **mataqali** into major landlords commanding revenues much greater than those contemplated by the Board and it was inevitable that disputes could arise with different interests as a result of these developments.

Bavadra's case is authority for the proposition that mataqali landowners cannot sue the NLTB in the courts through a representative action taken by their leaders. The only other legal remedies available to them can be summarised as follows:

> (a) The landowners as beneficiaries can sue the NLTB as trustee for breach of fiduciary duty;
> (b) They can sue for loss of a right by breach of their statutory duty under section 4 of the Native Lands

[51] When Fiji was declared a Republic after the second coup in September 1987, effectively removing the Crown, the President of Fiji replaced the Queen of England as the Head of State
[52] See Appendix E
[53] Supreme Court of Fiji, Civil Action No. 421 of 1986

> Trust Act, that the action taken by the NLTB has not been for the benefit of the landowners;
> (c) They could seek a judicial review of a decision made by a statutory body on grounds of procedure and natural justice. In this instance, the landowners would have the locus standi as the aggrieved party.

Although the responsibilities for the management of land resources is divided amongst several Government Ministries, section 4 of the Native Lands Trust Act vests the control of all native land in the NLTB. The vesting of control in the Board creates a trust relationship between the Board as trustees and the native owners. Ownership of native land and user rights has been the source of some confusion to the landowners.

Rooney J. cited the following passage from the judgment of Mr Justice Kermode[54] in *Serupepeli Dakai and Others v. Native Land Trust Board* explained the position in *Naimisio Dikau's*[55] *case* as follows:

> "... legally, no individual Fijian can be said to 'own' native land in the sense that the word own usually conveys. Fijians in land owning units have customary rights to occupy and use native lands, but individually they are not 'owners' of such land."

Mr Justice Kermode noted that native land must be controlled and administered by the NLTB, which is of particular significance as confusion over the ownership rights of native land continues to persist. He further elaborated that the:

> "Fijian land system is one which in the modern commercial world requires a legal entity to control and manage the land. The English legal system, which we have adopted, was not designed to cope with a land system, which has no physical or corporate legal owner. Creating trustees by law and vesting control and administration of all native land in trustees, which as a Board is a body corporate with perpetual succession, is not only a practical and legal necessity but is eminently desirable in the best interests of the Fijian people and unborn generations of Fijians."

[54] Unreported decision, Supreme Court of Fiji, Civil Action No. 543 of 1979
[55] Unreported Civil Action 801/1984 at p.3

With respect, I do not agree with Mr Justice Kermode's observation. If the English system that the Fijians have adopted, has not worked for the benefit of the Fijians in the current Fijian land system, then it should be replaced and the legislation amended for a system which would enhance the Fijian's ability to develop their land for their benefit.

Massive demonstrations and anti-government marches by indigenous Fijians preceded Rabuka's Coup in 1987; and Speight's attempted Coup in 2000. Fijians have equated the loss of political power with the potential threat of the loss of their land, with any Fiji Government not dominated by Fijians. Yet legally, Fijian land, customs and institutions have always been safely protected (because of this potential threat), by the entrenched provisions in the 1970, 1990 and 1997[56] Constitutions of Fiji.

The 1970 constitution provided for a 52 member House of Representatives with 22 seats each for the indigenous Fijian and Indo-Fijian communities and 8 for General Electors. Electors were given a vote in both Communal and National seats. The Senate comprised 7 nominees of the Prime Minister, 6 nominees of the Leader of the Opposition, 1 nominee of the island of Rotuma and 8 nominees of the Great Council of Chiefs. Constitutional changes required a two-thirds vote of both Houses.

The relevant provisions of the 1990 Constitution which dealt with the protection and enhancement of Fijian and Rotuman Interests is section 21(1) which states:

> "Notwithstanding anything contained in Chapter II of this Constitution Parliament shall, with the object of promoting and safeguarding the economic, social, educational, cultural, traditional and other interests of the Fijian and Rotuman people, enact laws for those objects and shall direct the Government to adopt any programme or activity for

[56] See Appendix D

> the attainment of the said objects and the Government shall duly comply with such directions."

And 21(3) which states:

> "In the exercise of its functions under this section, the Cabinet shall act in consultation with the Bose Levu Vakaturaga (**Great Council of Chiefs**), or the Council of Rotuma, as the circumstances may require."
>
> (Authors emphasis)

Contemporary and Conceptual Claims have hit the headlines of Fiji's media in recent years. These claims have been for the continuing use of native lands that were originally taken for public and national needs and purposes, but have never been returned once they were no longer needed.

One such example is the International Airport at Namaka, Nadi which was originally acquired during the second World War in the 1940s by the United States Army as a strategic Air Force Base. After the war, the land was never returned to the landowners, nor was an agreement negotiated for the use of the said land.

Today, Nadi Airport is the South West Pacific Regional Flight Co-ordination Centre; servicing international carriers for re-fuelling, catering and engineering repair purposes. Nadi Airport charges for landing fees and aeroplanes that fly over Fiji's air space. The landowners do not participate in the operation of this million-dollar business and have never been compensated for the use of their land.

At Ratu Kadavulevu School[57] in Lodoni, Tailevu North the Colonial Government exercised its powers under Section 3 of the Crown Acquisition of Lands Act.[58] The section states that:

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[57] An exclusive boarding school for Fijian boys located on the east side of the main island of Viti Levu, 40 miles from Suva the capital

[58] Cap. 135 Vol.VIII, Fiji Law Reports (1985 Edition)

> Subject to the provisions of the Constitution and the other provisions of this Act, an acquiring authority may acquire any lands required for any public purpose **for an estate in fee simple** or for a term of years as he may think proper, paying such consideration or compensation as may be agreed upon or determined under the provisions of this Act.
>
> (Authors emphasis)

The appropriate compensation for the said land has still not been paid to the indigenous owners of the southern portion of the school. The owners have no recourse, as there is no tribunal to hear their case, but often recall the morning when, a number of bulldozers came to their village while they were still asleep; and physically uprooted their houses and the occupants from their village, which is now the site of the school.

In the early 1970's, the government under Ratu Sir Kamisese Mara,[59] acquired land at Monasavu, in the highlands of Fiji, to build a hydroelectric plant to generate cheap power for Fiji. The landowners have not received any compensation whatsoever, for the use of their land that is producing power, which is consumed nationally, and is generating income for the government-owned Fiji Electricity Authority. To add insult to injury, the landowners still use firewood, kerosene and benzene for cooking and other domestic needs, and do not have access to electric power, which is generated on their land.

Tourism leases are equally controversial with owners obtaining a rental based on a half to 3% of the gross turnover of the resort, but with little forward planning in respect of hotel depreciation and re-investment over time. As explained earlier, the increase in protest activities since Fiji became independent from Britain in 1970, and especially when an

[59] Ratu Mara was groomed by the late Ratu Sukuna to be a leader of Fijian people. He was trained at Oxford and spent most of his working career as a Civil Servant and Administrator. He became Chief Minister of Fiji from 1967 until Fiji became Independent in 1970, then became Prime Minister until 1987 when he lost the General Elections.

Indian dominated Government comes into power, must send signals to the nation and internationally, that something must seriously be wrong.

For one thing, education and interaction with people from various cultures, has changed the Fijians worldview. For another, the enlightened Fijian is now more aware of the enormous untapped potential that can be developed for economic return and which is readily available to him or her through his land and natural resources; if only the NLTB or Government could facilitate their endeavours.

Investors, banks, international donor agencies, foreign governments, Indian tenants, and the ordinary Fijian resource owner have seen and proven that the governance structure of native Fijian land under the trusteeship of the NLTB is not transparent and is therefore open to corrupt practices. More importantly, it is not working for the benefit of the beneficiary mataqali landowner.

This is because the trustee who is supposed to look after their interests as beneficiaries is not accountable to them; but to their Board of Trustees, consisting of members appointed by the Council of Chiefs; and the Government.[60]

Moreover, indigenous mataqali landowners do not participate in any of the decision-making regarding the area to be leased, the amount of rent to be paid, the frequency of re-assessment of rent nor the choice of tenant who should be given approval to lease on their land. This is the sole discretion and responsibility of the Board.

It is generally assumed that members of the Council of Chiefs represent Mataqali Landowning Fijians on the Board of NLTB. This assumption is a fallacy because the Native Lands Trust Act (Cap. 134) Laws of Fiji

[60] See discussion of Section 3(1) of the Native Land Trust Act on pages 42 and 43

does not specifically define the duty of care owed to the mataqali, by the Board as Trustees of mataqali land.

While "native owners" is defined in section 2 of the Act to mean the mataqali or other subdivision of the natives having the customary right to occupy and use any native land, section 4(1) states that the control of all native land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the **"Fijian owners"**.

The use of the inclusive term "Fijian owners" in section 4 above instead of "native owners" suggests that the Board represents Fijians in general. It is arguable that as long as you are registered in the Vola ni Kawa Bula as a Fijian the Board has a duty to administer native Fijian land for your benefit, irrespective of which I tokatoka, mataqali or yavusa in the Fiji Islands you happen to belong to. Consequently the representation by the Board and the subsequent duty of the Board that flows from it is not confined only to the native mataqali landowners but to all "Fijians" in general.

It is tantamount to fraud on the mataqali native landowners that the terms "native owners" and "mataqali" do not appear anywhere in the Constitution of the Native Land Trust Board which is set out in Section 3 of the Native Land Trust Act.

The provisions of Section 3 state as follows:

> "(1) There is hereby established a board of trustees called the Native Land Trust Board which shall consist of –
>
> the Governor-General (now represented by the President of the Republic of Fiji) as President, the Minister as Chairman, five Fijian members appointed by the Great Council of Chiefs, three Fijian members appointed by the Fijian Affairs Board from a list of nominees submitted by Provincial councils to the Fijian Affairs Board, and not more than two members of any race appointed by the Governor-General (President).
>
> (2)(a) An appointment shall not be made under subsection (1) so that more than one of the appointed members, other than Fijian appointed

members, is a person holding an office of emolument under the Crown.

(b) Appointed members of the Board other than Fijian appointed members shall, unless they die or resign, hold office during the Governor-General's (President's) pleasure. Fijian appointed members of the Board shall, unless they die or resign, hold office for a period of three years.

(3) At all meetings of the Board, the Governor-General (President) or in his absence, the Minister shall preside. In the absence of the Governor-General and the Minister, the members present shall elect one of their numbers to preside.

(4)(a) Five members shall form a quorum one of whom shall be the person presiding. At least two of the other four shall be Fijians.

(b) Questions before the Board shall be decided by a majority of votes of those present and in the case of equality of votes the person presiding shall have a second or casting vote.

(5) The Board may from time to time make rules as to its own proceedings under this Act and the carrying out of the powers vested in the Board by this Act.

(6) The Board shall be a body corporate with perpetual succession and a common seal, and may, in such name sue and be sued, borrow money and enter into contracts, and may acquire, purchase, take, hold and enjoy real and personal property of every description and may convey, assign, surrender and yield up, charge, mortgage, transfer or otherwise dispose of or deal with or in real or personal property vested in the Board on such terms as the Board thinks fit.

(7) The common seal shall be affixed in pursuance of a resolution of the Board by one member of the Board and the Secretary who shall attest the same.

(8) All courts of law and persons acting judicially shall take judicial notice of the common seal of the Board when affixed to any document and shall presume that it was duly affixed"

Therefore while the mataqali legally own most of the land in Fiji, the governance structure of the NLTB legally excludes them from any dealings to do with their land.

The mataqali landowning units do not have a forum where they can exchange ideas on how best to attract investors for joint-venture development on their land. They do not have a common voice like a Council of Mataqalis (similar to the Great Council of Chiefs).

The writer believes that this scenario is a political minefield that will come back to haunt the Great Council of Chiefs, the NLTB and the government if it is not corrected urgently.

Given that the Native Lands Trust Act (formerly the Native Lands Trust Ordinance) was enacted by the Colonial Government; a Land Claims Tribunal is an avenue whereby mataqalis of Fiji can inquire into legislations, policies and practices of the Crown that have prejudicially affected them.

In the alternative, a process of direct negotiation between the mataqali and the Government (because Fiji has relinquished its ties to the Crown) should be set up to address this issue. The Supreme Court of Canada's landmark decision in *Delgamuukw v. British Columbia*[61] established a new constitutional benchmark in the relationship between the Crown and First Nations. It affirmed that the Crown is under a duty to consult with a First Nation before undertaking action that might interfere with a First Nation's Aboriginal title. Lamer C.J.C,[62] in the context of urging that aboriginal claims be settled by negotiation rather than litigation, said at p.1123, that:

> "... ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve ... the basic purpose of s. 35(1)- 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. ...the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith

Havemann[63] quite rightly queries the roles that the legal and political institutions and processes imposed upon indigenous peoples play in a continuing process of colonial domination in settler colonies. One can also ask what contribution, if any, they make to the progressive emancipation of indigenous Fijians in Fiji.

Examples of these institutions and laws in particular include the Native Land Trust Board, Great Council of Chiefs, the Native Lands Act, Native

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[61] [1997] 3 S.C.R. 1010 (S.C.C.)
[62] quoting *R v. Van der Peet* [1996] 2 S.C.R. 507, at 539
[63] Havemann, P.; (1999), pp. 2

Land Trust Act; and the Agricultural Landlord & Tenant Act (ALTA),[64] which have been allowed to survive thus far in the three Fijian Constitutions of 1970, 1990 and 1997 despite 3 Military Coups.

Agricultural land was administered under the provisions of ALTA. This was held on a 30-year lease with rental set at 6% of unimproved capital value (UCV) - a figure that is impossible to quantify in today's largely improved market. Some 13,140 ALTA leases will expire between 1997 and 2028 with the most (3,549) by Indian sugarcane farmers expired in 1999-2000.

Under the 1999 Coalition Government, headed by Mahendra Chaudhry, the first Indo-Fijian Prime Minister, the issue became very political as some indigenous owners sought to regain and retain their land. Compensation for lease expiry (a controversial and unprecedented action) at $28,000 per agricultural lease was proffered to tenants who did not want to be resettled (as the government had seen resettlement of these tenants as their responsibility).

This windfall compensation was significantly more in dollar terms than the accumulated total income earned by the tenants over the last 30 or 50 years of the lease. The Fijian landowner on the other hand whose consent was not required and who did not have anything to do with the leasing out of their land; who received a minimum rent and could not touch his land during the 30 to 50 year term of the lease, received nothing from the Chaudhry government, on the expiry of leases.

Brookfield[65] has left open the possibility that wrongs done before the British Crown formally assumes power over a territory may be the subject of a Commission of Inquiry. Referring to the New Zealand

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[64] (1976) Laws of Fiji Cap. 270 (1978 edition included in 1985 edition)

[65] Brookfield, F.M.; Waitangi and Indigenous Rights - Revolution, Law & Legitimation, at p.11

position, he says that the wrongs into which the Waitangi Tribunal inquires relate specifically to the Treaty of Waitangi entered into in 1840; but they may be classed generally with wrongs done whenever one people seizes power over the territory of another. It is arguable that, the Fiji Land Claims Tribunal may examine allegations of wrongs done to indigenous Fijians by early settlers and traders who arrived into Fiji well before the signing of Cession in 1874.

In looking at Historical Claims, the Fiji Land Claims Tribunal would naturally have to start from the terms of the Deed of Cession,[66] which was signed by the Crown, and the Chiefs who ceded Fiji in 1874, to see if there was a breach of the spirit of the Deed. While the first European sighting of Fiji was by Able Tasman in 1643, regular European contact did not occur until the early 20th century.

The first European settlements were located in Levuka, site of the signing of the Treaty of Cession and the first Fijian Capital, in the 1920s. However, whalers, runaway convicts and traders in sandalwood (which was used for perfumes) and bech de mer (a Chinese delicacy); frequented Fiji long before Cession. The London Missionary Society Missionaries were in Fiji by 1930 and some French Catholic priests had arrived before them. It is interesting to note that some of the most fertile and commercially valuable property in Fiji today belongs to the Methodist, Catholic and Anglican Churches.

The Constitution of Fiji Amendment Act 1997 has provisions that the government can use to establish a Land Claims Tribunal. I refer in particular to paragraphs (h), (i), (j) and (k) of Section 2, which states that:

[66] Supra at n.6

h) in the formation of a government, and in that government's conduct of the affairs of the nation **through the promotion of legislation or the implementation** of administrative policies, full account is taken of the interests of all communities;
(i) to the extent that the interests of different communities are seen to conflict, all the interested parties negotiate in good faith in an endeavour to reach agreement;
(j) in those negotiations, the paramountcy of Fijian interests as a protective principle continues to apply, so as **to ensure that the interests of the Fijian community** are not subordinated to the interests of other communities;
(k) affirmative action and social justice programs to secure effective equality of access to opportunities, amenities or services for the Fijian and Rotuman people, as well as for other communities, for women as well as men, and for all disadvantaged citizens or groups, are based on an allocation of resources broadly acceptable to all communities;

(Authors emphasis)

Chapter 2 of the Constitution which sets out the principles of a Social Compact also says that the application of the principles are non-justiciable, except to the extent that they are made subject of other provisions of this Constitution or of a law made under the Constitution.

The Government of the day must have the political will, to put through the Parliament of Fiji, legislation establishing a Treaty of Cession Act. The purpose of this Act should be to provide for the observation and confirmation of the principles of the Treaty of Cession 1874, and to determine certain claims which are inconsistent with those principles. While the Treaty can be regarded as the possession by the whole nation of an instrument of mutuality that has endured since 1874, to the Fijian people it is a charter that should protect their rights. A right which was given away, without consultation, by Cakobau and his band of chiefs.

Aside from an economy's human, natural and capital resources, among the most basic requirements for sustained economic growth is an institutional structure, a property rights regime that reduces the uncertainty that hinders investment. It is submitted that to the NLTB's role of controlling and managing land, should be added the

responsibility of building skilled human capital and capacity at the **mataqali** level.

As outlined earlier, Section 3 of the Native Lands Trust Act (Cap. 134, Volume VIII, 1985 Edition) states that native lands shall be held by native Fijians according to native custom as evidenced by usage and tradition. It is argued that this section is confusing and frustrated by Section 19 of the Native Lands Act (Cap. 133, Vol. VIII 1985 Edition),[67] which describes the Crown (State) as ultimus haeres of extinct mataqalis.

The English sense of the term "ultimus haeres" means that the land of an extinct mataqali belongs to the Crown absolutely as the ultimate heir. The Roman sense means that the Crown takes the land of an extinct mataqali as ultimate trustee to discharge debts and distributes to beneficiaries. The words *"to be allotted to the qali of which it was a part"* in the section, supports this meaning.

It is submitted that the English sense of the term does not apply to Fiji because the Crown did not grant the land to the mataqali, in the first place to be entitled to the reversion when the mataqali becomes extinct, as would be the case in England on the principle of bona *vacantia.* The issue has been further complicated by the Native Land Trust Act Decree No. 14 of 2000 which has a new Section 19A.

This section states that:

> 4. The principal Act is amended by inserting after section 19 the following new section-
>
> *"Allotment of extinct mataqali lands*
>
> 19A. (1) An order by the Board under section l9(1) allotting or otherwise dealing with land vested in the

[67] See p. 49

Board under that section must be transmitted to the Native Lands Commission which must register the allotment or dealing in the Register of Native Lands.
(2) Until an allotment of or other dealing with vacant land is made under section 19(1), all income arising from the control and administration of the land, Less 15%, must be paid to the Central Fijian Treasury and used exclusively for the benefit of Fijians in a manner and for purposes approved by the Minister on the advice of the Great Council of Chiefs.
(3) In exercising its powers under this section or section 19(1) the Board must comply with any procedures prescribed in the Native Land (Native Reserves} Regulations.".

This section is a perfect example of the powers given to the NLTB and the Native Lands Commission[68], two institutions set up by the Colonial Government, which has the effect of alienating native lands from mataqali landowning units.

[68] Section 4 of the Native Lands Act states :
"The Minister shall appoint a Native Lands Commission consisting of one or more commissioners, each of whom shall have the powers of the Commission, who shall be charged with the duty of ascertaining what lands in each province of Fiji are the rightful and hereditary property of native owners, whether of mataqali or in whatever manner or way or whatever divisions or subdivision of the people the same may be held."

5. Fijian Land Legislation

5.1 Agricultural Landlord and Tenant Act (ALTA) (formerly Ordinance) Cap. 270 Laws of Fiji

Whereas the Native Land Trust Act (supposedly) protects the Native Landowners, the Agricultural Landlord and Tenant Act offers a measure of security and protection to lessees of agricultural land. The vast majority of tenants are Indians who have been the mainstay of the agricultural sector for the last 125 years.[69]

The Burns Commission[70] which was appointed to look into agricultural tenant problems observed as follows:

> "We consider that the existing landlord tenant position is unsatisfactory and we recommend that legislation should be enacted which would establish a fair and proper relationship between landlord and tenant. In particular we consider that the legislation should provide for greater security of tenure. We understand that in many cases farmers are merely annual tenants with no leases and we consider that this position should be rectified.'

The specific recommendations made by the Burns Commission led to the formation of a broadly based bipartisan Committee, which was set up to examine the problem and make recommendations on the

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[69] See article on http://www.abc.net.au/ra/pacbeat/st
FIJI: Girmit descendents reflect after 125 years Last week, Fiji celebrated the 125th anniversary of the arrival of the first Indian indentured labourers in the then British colony. Indo-Fijians make up about 44 percent of Fiji's population, most of them descendents of the indentured, or 'girmitiya's' as they call themselves. This year's anniversary has given many of them a chance to learn about their history and reflect on their identity. The country's indigenous Great Council of Chiefs has also taken the opportunity to apologise for any grievances caused during the Sitiveni Rabuka and George Speight inspired coups. **Presenter/Interviewer:** Sophie Dutertre
Speakers: Parul Deoki, Member, Fiji Media Council; Deep Singh, Secretary, Fiji Gurmit Council; Dr Dinesh Chand, Politician, Fiji Labor Party, 20/05/2004

[70] Burns Commission (1960) *Report on the Natural Resources and Population Trends of the Colony of Fiji*, Legislative Council Paper No. 1 of 1960, Fiji

creation of laws which would ensure a fair and proper relationship between landlord and tenants.

This Committee was specifically concerned with safeguarding tenants against exorbitant rents, while ensuring adequate security to encourage tenants to expend money in developing and improving the land to realise maximum yields, building proper houses, installing other agricultural fixtures, and not "mining the land". This was considered essential for the well-being of the sugar industry, and the entire colonial economy.

The status that ALTA has in Fiji's history and , its implicit necessity for the economic development of the country, as tenants would argue, may be seen in its constitutional treatment over the decades, since its inception. ALTA was entrenched under the 1970 Constitution.[71] Even after the Military Coups of 1987, the ALTA provision was entrenched under the "Pro-Indigenous Fijian" Constitution of 1990 and again under the 1997 Amended Constitution. ALTA thus enjoys a special status alongside Acts protecting special interests of the indigenous people.

ALTA also provides security of tenure. It provides for a minimum term of 30 years for all agricultural leases (Section 6 and 13) and no landlord can create an agricultural lease for a shorter term. When a landlord agrees to renew or extend a lease at the end of a current term, the extension must be for thirty (30) years. Any purported extension for a lesser period will nonetheless be deemed to be a thirty (30) year lease.

There is no doubt that this long-term security of tenure has helped the sugar industry in Fiji. By the nature of sugar cane farming, the benefits of investing either in new plantings of cane or major capital

[71] See discussion of the entrenchment provisions of certain laws supra at p. 35

improvements of drainage or purchase of cane transport trucks or tractors have inevitably been long-lasting. Farmers have been able to borrow (and financial institutions to lend) with full confidence that their investment into agricultural enterprises will return to them the appropriate benefits over the long term, commensurate with their financial and labour sacrifice.

The most important benefit to tenants under ALTA arises from the mechanism for the determination of rent, which is one of the largest components of farming costs, other than labour. Under ALTA all agricultural lands are valued every five years by a Committee of Valuers appointed by the Minister responsible for land matters. As discussed earlier, landlord is entitled to recover up to six (6) percent of the Unimproved Capital Value (UCV) of the land as rental.

"Unimproved Capital Value" is defined in Section 22(3) of ALTA as follows:

> "For the purposes of subsection (2), "unimproved capital value" means the capital sum which the land the subject of the agricultural holding, if it were held for an estate in fee simple unencumbered by any mortgage or charge thereon, might be expected to realise at the time the maximum rent was assessed, fixed and certified if offered for sale with vacant possession on such reasonable terms and conditions as a bona fide seller might be expected to require and assuming that any improvements thereon or appertaining thereto made by the tenant or acquired by the tenant had not been made;
>
> Provided that such capital sum shall only take into account the purpose for which the land is leased and not the actual use of the land or any purpose for which the land could be used".

Either party to an ALTA tenancy agreement may give three months notice prior to the expiry of the current five (5) year period of the lease either to increase or to decrease the rent. If the landlord wishes to increase the rent it must give notice of its intention to do so under Section 9 (1)(g). And if the tenant does not agree to the rental

demanded (which is most of the time), then the onus falls back on the landlord to apply to the Agricultural Tribunal to determine the rent. The tenant has an important protection in that he has two opportunities to challenge the basis of the reassessment of rent.

Firstly, when the Committee of Valuers come out with the values, a disaffected tenant may appeal to the Central Agricultural Tribunal against the values under Sections 21(2) and 49. Secondly, when the landlord demands the revised rental, the tenant has the right to dispute the same and to seek a reassessment by the Agricultural Tribunal under Section 22(1)(a). However, his rights for review are more limited and generally confined to the issue of classification.

The ALTA rental mechanism thus has four main components:

(1) An independent Valuers estimate of the unimproved capital value,
(2) A regulation that limits the level of rent to 6 percent of the unimproved capital value,
(3) The NLTB which sets the level of rent within these limits – usually in negotiation with the tenants and,
(4) An Agricultural Tribunal to whom the NLTB and the tenant can appeal if they are dissatisfied with the terms of the contract.

This formula suggests that if rent is based on unimproved capital value it is likely that rental for any sugarcane farm is grossly below market rent because unimproved capital value is only part of the "surplus" when a factor is put into production.

Mataqali landowners are disadvantaged because firstly rent is based on unimproved capital value and secondly, rent is controlled by ALTA at 6% of unimproved capital value. Thirdly, NLTB sets the level of rent within the ALTA limits and negotiates with the tenant. Finally, the Agricultural Tribunal is the final abiter in the event of dis-satisfaction with the amount of rent.

They are further disadvantaged by the fact that sugarcane tenant farmers have the choice of being represented by two powerful Cane Farmers Union namely, the National Farmers Union which forms the support base of the Fiji Labour Party, and; the Federation of Canegrowers which supports the National Federation Party. The mataqali landowners are legally bound under ALTA to be represented by the NLTB.

This policy of rent control, which was introduced by the Colonial Government and approved by the Mara Government, benefits the tenants to the detriment of the mataqali landowners. As a consequence, many mataqalis are reluctant to renew expiring ALTA leases preferring instead to cultivate their own land because the rent prescribed is extremely low. In 1995, ALTA rents averaged $36 per hectare, a figure far below any other country in the world.

5.2 Native Land Trust Act (NLTA) Cap. 134 Laws of Fiji

Although Mr Justice Cullinan's judgment[72] says in effect that the Courts must recognise the existence of Fijian Customary Rights, the Courts have also outlined the difficulty in drawing the conclusion that mataqali are indeed the owners of Fijian native land, preferring instead to recognise the legality of the existence of the NLTB as a statutory trust.

The relevant provision of indefeasibility under the Native Land Trust Act Cap 134 (NLTA) is outlined under Section 10 which provides that:

[72] Supra at p.26

> 10(1) All leases of native land shall be on such form and subject to such conditions and covenants as may be prescribed, and such leases shall be recorded in a register to be kept by the Registrar of Titles entitled "Registrar of Native Leases" and it shall be lawful for the Board to change and collect in respect of the preparation of any lease or for any matter in connection therewith such fees as may be prescribed.
> (2) When a lease made under the provisions of the Act has been registered it shall be subject to the provisions of the Land Transfer Act, so far as the same are not consistent with the Act, in the same manner as if such lease has been made under that Act, and shall be dealt with in a like manner as a lease so made.
> (3) It shall be lawful for the Registrar of Titles to charge and collect in respect of any lease registered under the provisions of the Act, or in respect of any dealing with such lease, the fees prescribed under the Land Transfer Act in the same manner as if such lease was a lease under that Act.

Hence, all surveyed native leases with exception of those given under Agricultural Landlord and Tenant Act (ALTA), are presumed to have had the certainty and protection provided for under the indefeasibility provisions of Section 37 to Section 42 of the LTA. It is further presumed, once registered under those provisions, that a native lease is deemed to be indefeasible and has absolute certainty unless it falls within the fraud exception under Section 40 of LTA.

The following sections of the Act spell out the powers of the NLTB and its Board to alienate native land. The interpretation section of section 2 while it describes "native owners" to mean the mataqali or other division or subdivision of the natives having the customary right to occupy and use any native land, "native land" is defined as land which is neither Crown Land nor the subject of a Crown or Native Grant but includes lands granted to a mataqali under Section 18, which deals with the power of the President (formerly Governor General). The section states:

> 18(1) If the Governor-General is satisfied that the land belonging to any mataqali is insufficient for the use, maintenance or support of its members, it shall be lawful for the Governor-General by proclamation

to set aside such Crown land or land acquired for or on behalf of Fijians by purchase, as in his opinion may be required for the use, maintenance or support of such mataqali. Any area so set aside shall be deemed to be a native reserve.

(2) Any land set aside under the provision of subsection (1) shall be fully described in the proclamation by stating the boundaries and area thereof and the name of the mataqali or other division or subdivision of the natives for whose use, maintenance or support such land is set aside, and such proclamation shall be published in the Gazette and in a newspaper published in the Fijian language and circulating in Fiji.

6.0 Constitutional Attempts to address Indigenous Fijian fears

The 1970 Constitution provided merely that Parliament could enact legislation for the recognition of custom, leading the courts to conclude that, under the 1970 Constitution and in the absence of specific legislation, custom had no legal status[73]. The recognition of custom in Section 100 of the 1990 Constitution explicitly reverses this decision.[74]

Section 100 of the 1990 Constitution of Fiji establishes Fijian custom as a primary source of law. Under that section Fijian customary law shall have effect as part of the laws of Fiji unless:

(1) an act of Parliament provides otherwise or
(2) the particular custom, tradition, usage or values is inconsistent with a statute or with the Constitution or is "repugnant to the general principles of humanity".

Section 100 mandates in subsection (2) that, in enacting legislation, Parliament "shall have particular regard to the customs, traditions, usages, values and aspirations of the Fijian people". Section 100(4) also provides that decisions of the Native Lands Commission shall be final and conclusive and shall not be challenged in a court of law on any of the following:

(1) matters relating to and concerning Fijian customs, traditions, usages or existence, extent, or application of customary laws; and
(2) disputes as to the headship of any division or sub-division of the Fijian people having the customary right to occupy and use any native lands

[73] See discussions of the following cases at note 51 on *Timoci Bavadra v. Native Land Trust Board.* See also note 4 on *Naimisio Dikau No. 1 and Others v. Native Land Trust Board,* Supreme Court, Civil Action No. 801 of 1984 (individual members of a *mataqal,i* the Fijian landowning group, do not have standing to sue to enforce customary land rights).

[74] See Ntumy, M.A.; South Pacific Legal Systems, University of Hawaii Press. 1993, at p. 33

These constitutional provisions represent a return to the pre-independence place of custom as a source of law. As discussed earlier[75], a system of native Fijian courts had been established as early as 1876, staffed by Fijian magistrates and dealing with a wide range of matters at village level. The recognition of custom in Section 100 of the 1990 Constitution explicitly reverses this decision.

Compared to the 1990 Constitution, the 1997 Constitution addressed the position of disadvantaged peoples including Fijians in broad terms. It provided in Section 2 a Social Compact that Parliament make provisions for programmes designed to achieve for all groups or categories of persons who are disadvantaged, effective access to: education and training; land and housing; and participation in commerce and in all levels and branches and services of the state.[76]

It went further to create provisions for an Act that specified: the goals of the programme and the persons or groups intended to benefit; the means by which those persons or groups are to be assisted to achieve the goals; the performance indicators for judging the efficacy of the programme in achieving the goals; and if the programme is for the benefit of a group, the criteria for selection of the members of the group entitled to participate in the programme.

In the context of the 1997 Constitution, the disadvantaged situation of the indigenous Fijians in the socio-economic sphere, therefore deserves particular consideration. This is especially so when this has been the source of deep ethnic grievances and acts of political destabilisation.

Using these particular provisions of the 1990 and 1997 Constitution to justify its actions, the present government led by Laisenia Qarase has initiated

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[75] Supra at p. 12 to 14
[76] See Paragraph 2.6.6 and 2.6.7 of the Fijian Blueprint Document in Appendix G

policies, including the development of indigenous Fijians in a rather novel way. It has introduced a Blueprint for Affirmative Action for Indigenous Fijians.[77] It has now become apparent that this Blueprint Document and the idea of a Land Claims Tribunal has appeared from the ashes of Speight's failed Coup attempt and appears to address the very issues that Speight and his group claimed were the reasons behind their storming of the Fiji Parliament on 19 May, 2000.

The Blueprint document has proposed a Land Claims Tribunal[78] for Fiji. It is suggested that, this document is politically motivated to allay the fears of indigenous Fijians; perceived or otherwise, that there are threats to the control of their land and natural resources; but more importantly to gain and build support from the indigenous Fijians and the Great Council of Chiefs.

In hindsight, the present Prime Minister has already begun to cultivate a political ambition, in proposing that implementation of the proposals in the document will take 2 to 10 years. As events have unfolded, Qarase's Interim Government, that was appointed immediately after Speight's attempted takeover, set aside $34 million to fund the Blueprint programme, which was distributed to Indigenous Fijians and Rotuman voters just prior to the Fiji Elections in August 2001. Incidentally, Mr Qarase's SDL (Soqosoqo Duavata ni Lewenivanua) Party won the elections and is currently running the government of Fiji in Coalition with the Conservative Alliance Matanitu Vanua and the New Labour Unity Parties.

Despite the setting of clear human rights standards at the international and state levels, there continues to be widespread prohibition of, and/or denial of

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[77] See Appendix E

[78] Part (V) Land Claims Tribunal to settle Land Claims:

The establishment of a Land Claims Tribunal to deal with land compensation claims for land acquired for public purposes, e.g. Monasavu Hydro site, Suva City Domain Residential site, etc. This is the best way to deal with long-standing historical land claims, away from the political arena, and in a tribunal that will comprise eminent people well qualified to consider these claims on their merit. (The legislation is also to establish a special fund to give effect to settlements decided by the Tribunal)

respect for, Indigenous Peoples' esoteric traditional knowledge and cultural rights, and the language that are intrinsic to their cultures.[79] State and global governance urgently needs reform that enhances the life chances and choices of Indigenous Peoples, through creating a balance of power enabling them to participate in governance processes and to define outcomes as individuals and as peoples.[80]

While introducing the Blueprint Document[81] to the Council of Chiefs,[82] as Interim Prime Minister on 13 July, 2000; Mr Qarase stated that the proposals set out in it are provided for in the Constitution of Fiji[83] and cover issues which have been of great concern to Fijians regarding the security of their rights and interests as the indigenous communities in Fiji, and also the advancement and acceleration of their development, so that they can participate on an equitable basis in the progress of their country.

It has been argued that the purpose of the Blueprint is to bring together all the proposals to address these concerns. Mr Qarase noted that follow-up action to be taken comprised the enactment of necessary legislation, the issuance of appropriate Government directives and the provision of budgetary allocations.

Given the above, anything that affects them must affect the nation. Ensuring the paramountcy of their interests and their equitable participation in all

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[79] Havemann (2002), p. 9

[80] ibid

[81] Supra at n. 32

[82] Chapter 8 of the Constitution of Fiji 1997 deals with the Bose Levu Vakaturaga (Great Council of Chiefs)

> **116.** - (1) The Bose Levu Vakaturaga established under the Fijian Affairs Act continues in existence and its membership, functions, operations and procedures are as prescribed from time to time by or under that Act.
>
> (2) The Bose Levu Vakaturaga has, in addition to the functions set out in the Fijian Affairs Act, the functions conferred on it under this Constitution.

[83] Section 6 of the Constitution of Fiji Amendment Act 1997 states that the people of the Fiji Islands recognise that within the framework of this Constitution and other laws of the State, the conduct of government is based on the following principles....

> *(k) "Affirmative action and social justice programs to ensure effective equality access to opportunities, amenities or services to the Fijian and Rotuman people, as well as for other communities, for women as well as men and for other disadvantaged groups, are based on an allocation of resources broadly acceptable to all communities"*

aspects of life in Fiji is thus a pre-condition for the achievement of long term peace, stability and sustainable development in the country. What is needed they argue is an enabling environment to facilitate the achievement of these objectives. It is to enable indigenous Fijians and Rotumans to fully exercise their rights of self-determination within the unitary State of the Republic of the Fiji Islands. It is to safeguard the paramountcy of their interests in Fiji's multi-ethnic and multi-cultural society. It is also to improve and enhance opportunities, amenities and services for Fijians and Rotumans in their development and participation.

The writer suggests that the Qarase Government's Blueprint document should be subjected to the "good governance" test as set down by the UN Human Rights Commission (Resolution 2000/64). This requires the conduct of public affairs by public institutions for the management of public resources and the guarantee of corrupt-free, Rule of Law-based delivery of civil, cultural, economic, political and social rights.

The key question is whether the institutions of governance in Fiji are effectively guaranteeing the right health, adequate housing, sufficient food, quality of education, fair justice and personal security[84] of the indigenous Fijian Mataqali landowners? After analysing the laws that affect mataqali landowners and the NLTB the writer doubts whether the Blueprint document will benefit either the mataqali landowners or Fijians in general, save a select few.

[84] Kofi Annan, *We the Peoples: The role of the United Nations in the 21st Century* (New York: United Nations, 2000) 13

7.0 Conclusion

While the Deed of Cession Treaty can be regarded as the possession by the whole nation of Fiji of an instrument of mutuality that has endured since 1874, to the Fijian people and especially the mataqali landowning units, it is a charter that should protect their rights.

Central to my legal critique is the criticism that the Native Land Trust Board did not and has not, to this day worked as a trustee should, i.e. *uberrimae fidei* – in the context of a fiduciary relationship. I have attempted to show that the introduction of this concept into indigenous state jurisprudence around treaties, is applicable to the functions and duties of the NLTB and how it operates in Fiji.

Aside from an economy's human, natural and capital resources, among the most basic requirements for sustained economic growth is an institutional structure, a property rights regime that reduces the uncertainty that hinders investment. It is arguable that the Native Land Trust Board creates a market-like environment that promotes certainty and predictability for investment and economic growth predominantly for the national economy. This has been advantageous for tenants of mataqali owned native land, foreign investors and the government.

Thus the legal effect of laws like the Native Lands Act, the Native Lands Trust Act and its recent amendments, the Agricultural Landlord and Tenant Act, and the governance structures of colonial institutions such as the Native Land Trust Board, the Great Council of Chiefs and the Fijian Administration have not worked for the majority mataqali landowners of Fiji but only for a select group of Fijians. It is submitted that the land laws should be reformed and policies adopted that would create a win-win situation for all stakeholders particularly the mataqali landowner, the tenant or foreign investors, and the government.

The current laws have restricted the ability of mataqali landowning units, who are in fact the indigenous native owners of Fijian land, to realise the potential that is in their land resources for themselves and their children.

Although Fiji became independent from the British Crown in 1970 the Colonial laws and institutions that were made by them still exist in Fiji. This is despite the Fijian dominated governments of Ratu Mara, Rabuka and now Qarase.[85] Especially, Rabuka who had earlier carried out two coups claiming the need to safeguard indigenous Fijian land and rights. Perhaps maintaining the status quo was more practical in maintaining power and therefore controlling the Fijians and mataqali owned land effectively for these governments.

It is submitted that to the NLTB's role of controlling and managing land, should be added the responsibility of building skilled human capital and capacity at the **mataqali** level.

It is absolutely imperative that Fijians re-examine the Deed of Cession Treaty and its text to interpret their past, in the light of new scholarship concerning such treaties. That will spell out British obligations to Fijians and whether these were fulfilled or not.[86] It was a consequence of the British reading of the Deed of Cession for example that non-Fijians became permanent settlers in Fiji.[87] The Deed of Cession in Fiji needs to be accorded a similar status to the Treaty of

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[85] It has been said by some Fijians that the government of Mahendra Chaudary, did more for Fijians in its 12 months in power than any of the other Fijian dominated governments

[86] It might be noted however, that Ocean Islanders, also known as Banabans were unsuccessful in their claims for breach of fiduciary relationship and damages for specific performance for breach of contract in *Tito v.Waddell (No. 2)* [1977] 3 All ER 129

[87] It is also extremely ironic that leaders of the Indian Community also perceive a breach of faith on the part of the British Government for bringing them to Fiji for plantation work, but allegedly not guaranteeing their citizenship rights. See Shaista Shameem, *Sugar and Spice: Wealth Accumulation and the labour of Indian Women in Fiji, 1879-1930,* D.Phil. Sociology Thesis, University of Waikato, 1990.

Waitangi in New Zealand and other similar treaty/contractual agreements.

To conclude, any Fijian Government must have the political will to put through the Parliament of Fiji, legislation that reforms Fijian land laws. They could begin, by establishing a Treaty of Cession Act. The purpose of this Act is to provide for the observation and confirmation of the principles of the Treaty of Cession 1874, and to establish a Levuka[88] Claims Tribunal to determine certain claims which are inconsistent with those principles.

[88] Levuka was where the Deed of Cession was signed and also the first Capital of Fiji

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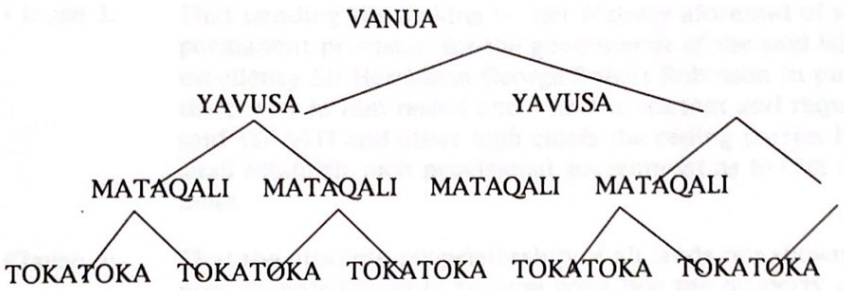
Appendix A

Members of the **yavusa** are by official definition agnatically related to a common authority or tutelar head chief. The **yavusa** is the sub-unit of the **vanua** (land) which is described by Ravuvu as "groups of people who could trace their dependents agnatically to a common ancestor or ancestral god"

The **mataqali** the land holding unit "normally consists of members of patrilineally related kinsmen whose founder was a descendent of the founder of the **yavusa**, but it may also include other persons who have no such links and may have been incorporated either socially or legally into the **mataqali** ... members of the mataqali have proprietary rights to the area of land of which the title is held by the **mataqali** as a whole"

The **tokatoka** is not a term universally used in Fiji, though where the term is recognised, the **tokatoka** is used to identify a sub-unit of the **mataqali**



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Appendix B

THE TREATY OF CESSION 1874

Clause 1: That the possession of and full sovereignty and dominion of the whole of the group of islands in the South Pacific known as Fiji ... are hereby ceded to and accepted on behalf of Her Said Majesty the Queen of Britain and Ireland, her heir and successors, to the intent that from this time forth, the said islands and the waters and reefs and other places as aforesaid lying within or adjacent thereto may be annexed to and be a possession and dependency of the British Crown.

Clause 2: That the form of or constitution of government, the means of the maintenance thereof and the laws and regulations to be administered within the said islands shall be such as Her Majesty shall decide and determine.

Clause 3: That pending the making by Her Majesty aforesaid of same permanent provision for the government of the said islands. His excellency Sir Herculean George Robert Robinson in pursuance of the power in him rested and with the consent and request of the said TUI VITI and other high chiefs the ceding parties hereto, shall establish such provisional government as to him may seem meet.

Clause 4: That the absolute proprietorship of all lands not shown to be now alienated so as to become bona fide the property of Europeans or other foreigners or not now in the actual use or occupation of some chief or tribe, or not actually required for the probably future support and maintenance of some chief or tribe shall be and is hereby declared to be vested in Her Said Majesty her heirs and successors.

Clause 5: That Her Said Majesty shall have power, whenever it shall be deemed necessary for public purposes, to take any land upon payment of the proprietor of a reasonable sum by way of compensation for the deprivation thereof.

Clause 6: That all now existing public buildings, houses and offices, all enclosures and other pieces or parcel of land now set apart or being used for public purposes are hereby assigned, transferred and made over to Her Said Majesty.

Clause 7: That on behalf of Her Said Majesty His Excellency Sir Hercules George Robert Robinson promises

(1) that the rights and interests of the said TUI VITI and other high chiefs the ceding party hereto shall be

recognised so far as is and shall be consistent with British sovereignty and colonial form of government,

(2) that all questions of financial liabilities and engagements shall be carefully scrutinised and dealt with upon principles of justice and sound public policy,

(3) that all claims to title to land by whomsoever preferred and all claims to pensions or allowances whether on the part of the said TUI VITI and other high chiefs or of persons now holding office under them or any of them shall in due course be fully investigated and equitably adjusted.

Appendix C

Census of Population 1881 -1996 | Population by Sex and Age 1996 | Key Demographic indicators
Gross Domestic Product of Fiji: Current Prices | Gross Domestic Product of Fiji: Constant Prices
Balance of Payments: Gross Flows ($F Million) | Balance of Trade | Consumer Price Index
Paid Employment: Wage and Salary Earners | Numbers in Wage Employment
Visitor Arrivals: Number by Country of Residence | Visitors: Average Length of Stay

CENSUS OF POPULATION

1881 -1996

		CENSUS DATES											
Ethnic Group	**Sex**	1881 4-Apr	1891 5-Apr	1901 31-Mar	1911 2-Apr	1921 24-Apr	1936 26-Apr	1946 2-Oct	1956 26-Sep	1966 12-Sep	1976 13-Sep	1986 31-Aug	1996 25-Aug
Total	Total	127,486	121,180	120,124	139,541	157,266	198,379	259,638	345,737	476,727	588,068	715,375	775,077
	Male	70,401	66,367	66,874	80,008	88,464	107,194	136,731	178,475	242,747	296,950	362,568	393,931
	Female	57,085	54,813	53,250	59,533	68,802	91,185	122,907	167,262	233,980	291,118	352,807	381,146
Chinese	Total	+	+	+	305	910	1,751	2,874	4,155	5,149	4,652	4,784	4,939
	Male	+	+	+	276	845	1,476	2,105	2,624	2,910	2,503	2,546	2,573
	Female	+	+	+	29	65	275	769	1,531	2,239	2,149	2,238	2,366
European	Total	2,671	2,036	2,459	3,707	3,878	4,028	4,594	6,402	6,590	4,929	4,196	3,103
	Male	1,879	1,273	1,531	2,403	2,297	2,263	2,467	3,374	3,427	2,605	2,240	1,713
	Female	792	763	928	1,304	1,581	1,765	2,127	3,028	3,163	2,324	1,956	1,390
Fijian	Total	114,748	105,800	94,397	87,096	84,475	97,651	118,070	148,134	202,176	259,932	329,305	393,575
	Male	60,899	56,445	50,357	46,110	44,022	49,869	59,862	74,989	102,479	131,413	167,256	199,895
	Female	53,849	49,355	44,040	40,986	40,453	47,782	58,208	73,145	99,697	128,519	162,049	193,680
Indian	Total	588	7,468	17,105	40,286	60,634	85,002	120,414	169,403	240,960	292,896	348,704	338,818
	Male	388	4,998	11,353	26,073	37,015	48,246	64,988	88,359	122,632	147,194	175,829	171,796
	Female	200	2,470	5,752	14,213	23,619	36,756	55,426	81,044	118,328	145,702	172,875	167,022
Part European	Total	771	1,076	1,516	2,401	2,781	4,574	6,142	7,810	9,687	10,276	10,297	11,685
	Male	387	529	759	1,217	1,454	2,325	3,195	4,008	4,951	5,358	5,396	6,052
	Female	384	547	757	1,184	1,327	2,249	2,947	3,802	4,736	4,918	4,901	5,633
Rotuman	Total	2,452	2,219	2,230	2,176	2,235	2,816	3,313	4,422	5,797	7,291	8,652	9,727
	Male	1,126	1,056	1,036	1,043	1,129	1,413	1,696	2,232	2,939	3,666	4,387	5,008
	Female	1,326	1,163	1,194	1,133	1,106	1,403	1,617	2,190	2,858	3,625	4,265	4,719
Other Pacific Islanders	Total	6,100	2,267	1,950	2,758	1,564	2,353	3,717	5,320	6,095	6,822	8,627	10,463
	Male	5,629	1,923	1,584	2,429	1,271	1,470	2,145	2,839	3,207	3,474	4,499	5,414
	Female	471	344	366	329	293	883	1,572	2,481	2,888	3,348	4,128	5,049
All Others	Total	156	314	467	812	789	204	514	91	273	1,270	810	2,767
	Male	93	143	254	457	431	132	273	50	202	737	415	1,480
	Female	63	171	213	355	358	72	241	41	71	533	395	1,287
Growth Rate		-	-0.5	-0.1	1.5	1.2	1.6	2.7	2.9	3.3	2.1	2.0	0.8

Appendix D

Section 185 and 186 of the Constitutional Amendment Act 1997

GROUP RIGHTS

Alteration of certain Acts

185.-(1) A Bill that alters any of the following Acts, namely:
(a) Fijian Affairs Act;
(b) Fijian Development Fund Act;
(c) Native Lands Act;
(d) Native Land Trust Act;
(e) Rotuma Act;
(f) Rotuman Lands Act;
(g) Banaban Lands Act;or
(h) Banaban Settlement Act; including a Bill prepared in consequence of the enactment of this Constitution:
(i) must be expressed as a Bill for an Act to alter the Act concerned:
(j) must not be presented for the President's assent unless it has been read 3 times in each House and motions for the second and third readings are carried in each House; and
(k) is deemed not to have been passed by the Senate unless at its third reading in that House it is supported by the votes of at least 9 of the 14 members of the Senate appointed the Council of Chiefs.
(2) A Bill that alters the Agricultural Landlord and Tenant Act:
(a) must be expressed as a Bill for an Act to alter that Act; and
(b) must not be presented for the President's assent unless:
(i) it has been read 3 times in each House and motions for the second and third readings are carried in each House; and
(ii) at its third reading it is supported by the votes of at least two-thirds of the members of each House and, in the case of the Senate, by the votes of at least 9 of the 14 members of the Senate appointed by the Council of Chiefs.
(3) The President must not assent to a Bill referred to in this section unless it is accompanied by a certificate of the Secretary-General to Parliament certifying that, in relation to the particular House, the approval required by this section has been given.

Customary laws and customary rights

186.-(1) The Parliament must make provision for the application of customary laws and for dispute resolution in accordance with traditional Fijian processes.
(2) In doing so, the Parliament must have regard to the customs, traditions, usages, values and aspirations of the Fijian and Rotuman people.
(3) The Parliament must make provision granting to the owners of land or of registered customary fishing rights an equitable share of royalties or other moneys paid to the State in respect of the grant by the State of rights to extract minerals from the land or the seabed.
(4) A law fixing amounts under subsection (3) must require that account be taken of:
(a) any benefits that the owners are likely to receive as a result of the mineral exploitation;
(b) the risk of environmental damage;
(c) any legal obligation of the State to contribute to a fund to meet the cost of preventing, repairing or compensating for any environmental damage;
(d) the cost to the State of administering exploitation rights; and
(e) the appropriate contribution to the general revenue of the State to be made by the person granted exploitation rights.

Appendix E

NLTB STATISTICS

Province	Freehold Land	State Administrated Land	Native Land	Native Land Leased	% of Nat Land Lea
Ba	10,323	34,525	203,505	77,706	38%
Bua	17,725	286	117,086	33,144	28%
Cakaudrove	50,512	4,483	216,454	22,711	10%
Kadavu	1,717	51.05	45,328	2,188	5%
Lau	4,490	315.65	44,933	1,133	3%
Lomaiviti	5,583	678	29,903	2,551	9%
Macuata	12,595	4,054	178,230	67,475	38%
Nadroga/Navosa	6,205	3,752	206,578	45,236	22%
Naitisiri	7,343	4,290	144,414	21,000	15%
Namosi	386	11,241	52,894	3,945	7%
Ra	5,815	2,145	98,682	29,289	30%
Rewa	2,661	344	21,380	1,483	7%
Serua	12,297	98.62	45,303	28,553	63%
Tailevu	4,437	1,364	86,434	23,059	27%
TOTAL	**142,089**	**67,628**	**1,491,125**	**359,473**	

Note: Native Land leased does not include Timber Concession's which makes up an aprox. area of 270,759 hectares.

Difference in area; shown for State lands and Native land with those complied by other sources may occur due to the following:

- Proclamations of the State lands to native land happening from time to time, where some have been registered to native owners on the Register of native lands (RNL) because their boundaries have been surveyed. In others which are not surveyed, the RNL's cannot be prepared and therefore not registered to their owners.
- State (Crown) lands originally acquired by Government are somtimes reverted to native owners when such lands cease to be used for the purposes they were acquired for as in the case Queens and Kings Road, water catchment etc. In many cases the task of completing the procedures involved, to revert the land owners have not been completed.

The following statistics come from NLTB's Native Land Management System on 05/02/2004

Lease Statistics by Lease Type

Lease Type	No. Leases	Area (Hec)	A
Agricultural	14,675	445,377	$
Commercial	1,522	132,756	$
Industrial	419	1,123	$
Other	1,667	44,651	$
Residential	13,599	6,327	$
Totals	**31,882**	**630,233**	**$**

Lease Statistics by Region

Region	Count	Area (Hec)	A
Central & Eastern	8,219	118,736	$
North Western	8,286	97,533	$
Northern	9,670	325,170	$
South Western	5707	88,794	$
Totals	**31,882**	**630,233**	**$**

Land Owning Unit Statistics

Province
Ba
Bua
Cakaudrove
Kadavu
Lau
Lomaiviti
Macuata
Nadroga & Nav
Naitasiri
Namosi
Ra
Rewa
Serua
Tailevu
Total

Appendix F

NATIVE LANDS ACT (Cap. 133) Ed.1978 LAWS OF FIJI

Crown ultimus haeres of extinct mataqali

19. (1) If any mataqali shall cease to exist by the extinction of its members its land shall fall to the Crown as *ultimus haeres* to be allotted to the qali of which it was a part or other division of the people which may apply for the same or to be retained by the Crown or dealt with otherwise upon such terms as the Board may deem expedient.

(2) A report to the Board under the hand of the Chairman of the Native Lands Commission appointed under the Native Lands Act or of the Commissioner that a mataqali has ceased to exist by the extinction of its members and describing the lands which in consequence of such extinction fall to the Crown under subsection (1) shall be evidence that the mataqali is extinct.

(3) At any time after the report referred to in subsection (2) has been received the Board shall direct a notice in the form prescribed to be published in the Gazette and in a newspaper published in the Fijian language and circulating in Fiji, and a copy of such notice shall be sent as soon as possible by the Board through the Commissioner to the Roko Tui of the province in which any part of the land is situated.

(4) If any person desires to show that the mataqali has not ceased to exist by reason of the extinction of its members, he may, within three months of the date of publication of the notice in the Gazette and in a newspaper published in the Fijian language and circulating in Fiji, give notice of objection in writing to the Board setting out particulars of any members alleged to be still surviving. Upon receipt of such notice of objection, the Board shall cause such investigation to be made as it considers necessary.

(5) If the Board after such investigation is of the opinion that the objection to declaring the mataqali extinct is not well founded, the Board shall cause the Commissioner to send notice by post to the person who has given notice of objection in writing and also to the Roko Tui of the province in which any part of the land is situated informing them that the objection is disallowed.

(6) If no notice of objection as provided for in subsection (4) is received by the Board, or if such objection having been duly made is disallowed, the Board may make an order in the form prescribed and such order shall upon presentation to the Registrar of Titles be filed by him and the land shall be deemed to be Crown land for all purposes.

Appendix G

BLUEPRINT FOR THE PROTECTION OF FIJIAN & ROTUMAN RIGHTS AND INTERESTS, AND THE ADVANCEMENT OF THEIR DEVELOPMENT

{Presentation to the Great Council of Chiefs by the Interim Prime Minister, Mr Laisenia Qarase, 13 July, 2000}

Introduction The proposals set out below cover issues which have been of great concern to Fijians and Rotumans regarding the security of their rights and interests as the indigenous communities in Fiji, and also the advancement and acceleration of their development, so that they can participate on an equitable basis in the progress of our country.

The purpose of the Blueprint is to bring together all the proposals to address these concerns. It will be noted that follow-up action to be taken comprises the enactment of necessary legislation, the issuance of appropriate Government directives and the provision of budgetary allocations. The Blueprint will, of course, require preparation in detail with full background and supporting information. It will also be necessary for individual Government Ministries to submit papers to Cabinet on specific measures to be taken. Much of the measures proposed in the Blueprint can be implemented in the next two years. However, it is also proposed that a TEN-YEAR plan for Fijian and Rotuman development be prepared.

This will incorporate the measures set out in the attached summary Blueprint together with the development proposals in other areas. Education, for example, is a very important area where we need to pay greater attention in order to improve the performance of Fijian and Rotuman children. A good and successful education is the most effective pathway to a successful future for each individual. The ten-year plan can also set out the broad vision for all indigenous Fijian and Rotuman and for our country as a whole. The plan can thus play an important role in our current endeavour to bring greater unity to Fijians and Rotumans.

For it is in our unity that we can best protect our future. The specific proposals summarised below, together with others, will be part of this ten year plan. It is proposed that a meeting representative of all Fijian and Rotuman interests is to be convened by Government early in the year 2001 to discuss and to map out what should be in this ten year plan. This is to ensure that it is a plan for Fijians by Fijians for their future.

Background

Indigenous Fijians and Rotumans make up more than 51% of the total population of the Fiji Islands, and their numbers, according to the 1996 Census, are continuing to grow at 1.8% per annum compared to the national population growth rate of 0.8%. They also comprise the majority landowning communities in Fiji, with customary proprietary rights to more than 83% of all land in the country, together with associated traditional fishing rights, or qoliqoli. Given the above, anything that affects them must affect the nation. Ensuring the paramountcy of their interests and their equitable participation in all aspects of life in Fiji is thus a pre-condition for the achievement of long term peace, stability and sustainable development in the country. What is needed is an enabling environment to facilitate the achievement of these objectives. This is what this Blueprint seeks to provide. It is to enable indigenous Fijians and Rotumans to fully exercise their rights of self-determination within the unitary State of the Republic of the Fiji Islands. It is to safeguard the paramountcy of their interests in our multi-ethnic and multi-cultural society. And it is to improve and enhance opportunities, amenities and services for Fijians and Rotumans in their development and participation.

1. Legislative Action {by Decree}

{i} New Constitution Preparation of a new Constitution to be promulgated on 24 July, 2001 {Constitution Day} to give effect to the collective desire of Fijians that the national leadership positions of Head of State and Head of Government should always be held by them. The new Constitution is also to address other issues of importance to Fijians and Rotumans in line with the Terms of Reference, as approved by the Great Council of Chiefs. The point is stressed that it will be a new Constitution.

{ii} Schedule A & B Lands The transfer of administration of State Schedule A and B lands by Government to the Native Land Trust Board, as requested by the GCC and the NLTB.

{iii} Agricultural Leases on Native Land Moved to NLTA The removal of native land from the ambit of ALTA and placing it under the NLTA, as requested by the GCC and the NLTB. {Appropriate amendments to be considered for NLTA to protect the interests of tenants. First step is further discussions with NLTB.}

{iv} Ownership Rights to Customary Qoliqoli The conferment of ownership rights, similar to customary ownership of land, on all traditional qoliqoli, as requested by the GCC and the NLTB. {This will take some time as survey and demarcation of boundaries by the Native Lands and Fisheries Commission need to be completed. Appropriate safeguards will be included in the legislation on the right of public access and the protection of the interests of investors.}

{v} Lands Claims Tribunal to Settle Land Claims The establishment of a Land Claims Tribunal to deal with land

compensation claims for land acquired for public purposes, e.g. Monasavu, Suva {Domain}, etc. This is the best way to deal with long-standing historical land claims, away from the political arena, and in a tribunal which will comprise eminent people well qualified to consider these claims on their merit. {The legislation is also to establish a special fund to give effect to settlements decided by the Tribunal.}

{vi} Strengthening of the Great Council of Chiefs Review of the Fijian Affairs Act and the Great Council of Chiefs Regulations to determine the need for separate stand-alone Legislation for the GCC, given its enhanced authority under the Constitution.

{vii} Fijian and Rotuman Development Trust Fund The establishment of a Fijian {including Rotumans} Development Trust Fund {similar to the Banaban Trust Fund and the Tuvalu Trust Fund}. This is a capital endowment to be invested to earn interest income to support Fijian {and Rotuman} development. Specifically, it is to be used for the following purposes:

{1} to fund the Fijian Foundation - to undertake and sponsor programmes, including research, etc. on Fijian language, culture, and ethno-geography and ethno-history studies, etc. {this is to accompany the introduction of these as a compulsory subject in all schools};

{2} leadership and other training programmes at Nadave; and

{3} any other purposes approved by the GCC {including the financing of its own operation, so that it is financially independent of the elected political government of the day}.

{viii} Compulsory National Savings Scheme The establishment of a national savings scheme for Fijians and Rotumans. A paper on this is to be presented to the GCC for its approval. The Fund is to finance increased Fijian and Rotuman equity and other forms of participation in business, and also investment in education. The concept has been discussed before and agreed to in principle in both the FAB and GCC.

{ix} Law on Affirmative Action Enabling legislation on affirmative action for Fijians and Rotumans to accompany the relevant provisions of the new Constitution.

{x} Royalty for Underground Water Review the law on mining, so that there is also royalty payment for commercial use of artesian or underground water. This is also to ensure that landowners receive a fair share of the royalties, as in the regime for mining of minerals. Other interests of landowners, i.e. environmental protection, to be also taken into account in the review.

{xi} Tax Exemption for Fijian Companies Enabling legislation, i.e. amendment to the Company Tax Act, for exemption of Fijian-owned companies from company tax for a specified

period. This is to assist with cash flow in the formative stage of Fijian company operations. This scheme would be consistent with the grant by Government of tax concessions to companies {e.g. 13 year company tax holiday} in the tourism, mining and garment industry sectors in order to stimulate increased investment and employment creation. Fijian-owned companies or joint venture companies with Fijian controlling interest have not really benefited from the grant of these concessions.

{xii} Review of Legislation to Improve Service A review needs to be undertaken of both the Native Land Trust Act and the Native Lands Act to ensure that their provisions are conducive to the effective delivery of services to Fijians and others by the NLTB and the Native Lands and Fisheries Commission. 2. Policy Direction {by Cabinet together with Budget provision, where needed}

{i} Fijian Administration Revamping the Fijian Administration under the Fijian Affairs Act, so that in its operation, it is fully autonomous of the Central Government. This will include a review of the legislative framework for the Great Council of Chiefs, reflecting its enhanced constitutional and other responsibilities.

{ii} Government to Fund Fijian Administration Government subvention to fund the entire operation of the Fijian Administration {i.e. the GCC, FAB and Provincial Councils}. Meanwhile, there is to be no cuts in Budget allocations to the Ministry of Fijian Affairs in the Mini-Budget from August to December, 2000. It will be up to each Province to decide whether to continue or discontinue the collection of provincial levy or rates. However, since the full running costs of the Fijian Administration are to be covered by the Government grant, fundraising by the Provinces either by way of a provincial levy or by other means is to enable the Provinces to apply more funds to community development projects, the improvement of schools and education, and increased investment in business ventures through their provincial-owned companies.

{iii} Government to Restart Financial Assistance to NLTB Government annual grant support to the NLTB to assist it -

{1} in further reducing its poundage levy on lease rent, thus increasing nett rent income to the landowners;

{2} in its development activities to assist landowners in the commercial development of their land; and

{3} in the restitution of rent income foregone during the grace period {12 months} for expiring ALTA leases.

{iv} Government to Pay Arrears in Rent Budget provision for $1.5 million to cover the payment to the NLTB of arrears in rent for leases on State Schedule A land. These are arrears in rent since 1994 which Government has not paid to the NLTB.

{v} Government to Help Establish the FDTB Government to provide a grant to endow the proposed Fijian Development Trust Fund {FDTB}.

{vi} Fijian Education Fund Government to provide a Fijian Education Fund to cover scholarships {currently $4.7 million}, supplementary assistance {additional to the Ministry of Education's} to Fijian schools, and research into Fijian education issues.

{vii} Government Assistance to FHL Government to convert the $20 million interest-free loans to the Fijians Affairs Board {shares in Fijian Holdings Limited} to a Government grant on the following conditions:

* Transfer $1 million "B" shares held by FAB in Fijian Holdings Limited to each of the 14 Provinces {for their provincial companies}.
* Balance of $6 million to remain with FAB {as equity in FHL}.

{viii} Government Assistance to YHL Government to provide an interest-free loan to FAB for purchase of shares in Yasana Holdings {YHL}. YHL to acquire shares in other companies similar to the operation of FHL.

{ix} Government Shares for Fijians Reserve 50% of Government shares in companies for Fijians as they become available for sale to the public. {This is through competitive bids. Preference is to be given to provincial-owned companies. Joint ventures with majority control by Fijians are also to be allowed as this will have the added benefit of attracting business experience and expertise into the venture, as well as promoting inter-racial and inter-community co-operation.

{x} Licences for Fijians Reserve 50% of major licences for Fijians {e.g. import licences, taxi permits, etc.}.

{xi} Government Contracts for Fijians Reserve 50% of Government contracts for Fijians {as in {ix} above}.

{xii} FDB Loan Scheme Continuation of the FDB Loan Scheme for Fijians and Rotumans but to exclude other communities who are to be covered by a separate scheme at the FDB.

{xiii} Assistance in Purchase of Shares Establish a Small Business Equity Scheme at the FDB with annual allocation of $5 million from Government {for all citizens}.

{xiv} Small Business Agency Establish a National Small Business Agency under the umbrella of the Fiji National Training Council to provide training, advisory services, business information, etc {for all citizens}. This will be the central agency, co-ordinating with other schemes that are providing similar assistance.

{xv} Dealings on Mahogany on Hold Any dealings on "Mahogany" to await the report of GCC Committee on this industry. The report could also have implications on other industries like the pine industry.

{xvi} Discontinue Land Use Commission Discontinue the Land Use Commission as proposed by the last Government. Government is to be involved in land development programmes under the Ministry of Agriculture, Fisheries and Forests and the Land Development Authority, as well as land development for the resettlement of evicted tenants, and for low cost housing through the Housing Authority, and the resettlement of squatters. Government is also to assist the commercial development of native land through the NLTB.

{xvii} Assistance with Buy Back of Freehold Land Re-instate Government Budget provision of $500,000 to assist Fijians through interest-free loans in buying back ancestral land alienated as freehold land. These are freehold land available on sale by their owners.

{xviii}Assistance for Provincial Business Participation Government to re-instate the annual allocation of $1.5 million to Provincial Councils, via the FAB, for their participation in business. This allocation will henceforth be a grant and not an interest-free loan.

{xix} Assistance to Landowners Taking Up Cane Farming Establishment assistance to be given {through FDB and FSC} to Fijian landowners, taking up cane farming on their reverted land.

{xx} Mining Royalties Percentage of mining royalties to be paid by Government to landowners to be determined by Cabinet, and not by Parliament as provided in the 1997 Constitution.

{xxi} Royalty for Underground Water The royalty regime for minerals should also apply to artesian or ground water.

{xxii} Renting of Fijian-owned Commercial Office Buildings Government to resume renting, on a need basis, of commercial office buildings owned by Provinces and Tikina companies.

{xxiii} Tax Assistance to Fijian-owned Companies Tax exemption to be granted to Fijian-owned companies for specified periods similar to existing tax concession schemes for particular sectors.

11 July 2000.

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