An inquiry into the nature of land *ownership* in Fiji

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Abstract: Through a philosophical inquiry into the nature of communal land ownership, this paper questions the myth and embeddedness surrounding native title in Fiji. Can we identify an *owner* of native land? There are many who claim to be native landowners; indeed as members of the *Vanua,* they actually believe themselves to be landowners. There is sometimes a difference between belief and actuality.

The philosophical inquiry is grounded in legal precedent. Land tenure systems are manmade, but legal clarification is sometimes required to assist in determining rights. The three cases of ***Meli Kaliavu v NLTB***, ***Timoci Bavandra v NLTB***, and ***Naimisio Dikau v NLTB*** provide a valuable legal interpretation.

When the ordinary individual, who has been seduced by myth and the embeddedness of misunderstanding, comes to realise that they do not own anything other than a lifelong right of occupation and an obligation for prudent stewardship, there may be a revolution and a clarion call for modification of the land tenure system. This will only happen when the majority decide where they want to be placed between the extremes of traditional customary ways and Western materialism. This is both a societal and nation changing decision, and one that must not be taken lightly.

Something has been troubling the authors for some time. Perhaps it has become apparent with the strengthening of national resolve and self worth that has been more evident in the indigenous population since the attempted coup of May 2000. It concerns our inquiry into the nature of indigenous land 'ownership' in the Fiji Islands…

We have devoted considerable time to musing on this perplexing inquiry, yet as hard as we try we have yet to meet an *owner* of native land. We have met many who claim to be native *landowners*; indeed as members of the *Vanua,* they actually believe themselves to be landowners. However, there is sometimes a difference between belief and actuality; such is the embeddedness of property.[1]

There is an established rhetoric that land holds a special place in the Pacific, and nowhere more so than in Fiji. This assertion can be countered with the argument that land holds a special place in all societies as a basis of wealth and power. The Pacific difference lies in the 'special' fact that only a small percentage of land (by area, rather than value) was alienated as a result of colonisation – unlike Africa, and our Pacific neighbours in Australia and New Zealand. There is a burgeoning and plausible contention that a subtle form of alienation, a passing to state control, did actually occur – this argument will be developed after investigating the nature of ownership of land by the natives of Fiji.

What do we mean by ownership? Ownership seems to mean different things to different people. The dictionary definition is straightforward: if you own something, it is yours to do with as you please. You have absolute right over it, to preserve it and even to destroy it. It is yours. This is the western perspective of fee simple absolute in possession, or freehold ownership, albeit constrained by planning, taxation and other statutory requirements and obligations. It is an individualistic paradigm. This is not the essence of indigenous land ownership, which is philosophically vested in communalism.

To explore this communalism further we find it is about relationships: *NoqoKalou, NaqoVanua*. My God, My Land. If we acknowledge the concept of *NoqoKalou, NaqoVanua*, then we accept that there is no separation between God and the land. The land ultimately belongs to God. This links in with the basis of land as a gift, or indigenous right, for occupancy for the duration of life. We cannot take the land with us when we leave this earth, whatever our religious belief.

If land inherently belongs to God, and we accept that we are all God's creatures, the suggestion that indigenous Fijians 'own' the land is flawed, as we would be arguing that owning land means that we own God, or likewise that God (or a part thereof) belongs to us. Of course, we know that this cannot be so. Is this contextual, or applicable on a general basis?

Within *NoqoKalou, NaqoVanua*, we find an inseparable relationship between God, humankind, and the earth. Ultimately, we are all destined to become one with the earth, ashes to ashes, dust to dust, irrespective of our race or religion. The communalism within contemporary Fijian tradition can be interpreted as a form of land stewardship, or guardianship, associated with an enduring sense of place, or relationship to village. This enduring physical and spiritual relationship remains grounded in tradition and custom that is yet to be diluted by the ravages of globalisation.

[1] For a fuller discourse on the 'embeddedness' of property, see Hann (Hann, 1998)

We contend that the word 'ownership' has been wrongly adopted into everyday parlance in the Pacific, when used in the context of relationship to, or rights over, land. The individual Fijian has rights over customary land. That is not in question. However, the nature of those rights is open to debate. What is the place of the individual within the communal relationship to place or village?

If in isolation the individual had ownership, then that individual could pass on his or her right to you (or any third party) for money or an alternative form of consideration, and you could become the owner after exchange of a legally binding contract. Yet, we know that this cannot happen, because it is not the individuals to sell, however much they may want to liberate any financial wealth associated with a particular parcel of land. Such is the dilemma of communalism. Nonetheless, this non alienation of land seems to be the vision of Sir Arthur Gordon, rather than the practices of the people of Fiji, for about 10% of land in Fiji was alienated and is now freehold title or State land. It is intriguing to question how, if communal ownership did not have the power to alienate then these sales of freehold land would never have been considered as valid legal transfers. However, contemporary communalism, after the intervention by Sir Gordon, has taken away the rights of alienation from the native owner. A gift from God can become a curse if it is abused or mishandled.

We have tried to rationalise the nature of Fijian land rights within our experience from other societies around the globe. Take the Westminster legal framework for instance, which is widely accepted within post-colonial society. The nearest parallel to an individual Fijians right within the Westminster framework is the *tenancy for life*. Such tenure comes with a range of onerous restrictive covenants within the Fijian context of land. These include prohibitions on sale, exchange, assignment and, in many cases if reserve or village land, subletting. Strong land rights most definitely; but hardly land ownership.

This begs the question, *who does the land belong to*? At one level, we say the *vanua*. The land 'belongs' to the *vanua* within a philosophy of communal stewardship, rather than in individualistic ownership. This stewardship (or guardianship) is embraced in both the tenets of *NoqoKalou, NaqoVanua* and *tenancy for life*, with the responsibility to take care of land for the spirits of ones ancestors, use for ones life and protection, to ensure sustainability of the land for one's descendants who are yet to grace this earth. Is this not the most worthy of philosophies, a precursor of land care and permaculture, and a philosophy that strives for harmony in the relationship between God, humankind, and the earth? It is somehow at odds with the global individualistic aspirations of commercialism and the economic rationality of de Soto, yet so much in harmony with the notion of customary land tenure.

In explaining why capitalism works in the West and fails elsewhere, Hernando de Soto makes a case for individualising land ownership and land title in order that land title can be used as security against financial borrowing.[2] Such economic rationalism is at odds with the pervading sociology of Fijian society. Hitherto, there has not been a savings mentality in the Pacific. In part, this is attributable to the lack of climatic seasonality and, certainly in the case of Fiji, an abundance of subsistence food from the land and ocean. European and non-tropical counterparts have always had to hoard food and grain to let them survive the harshness of winter. It is also attributable to the existence of kinships as assets of the people in the Pacific, and in Fiji where the community views others within the community as theirs, rather than as

[2] (Soto, 2000)

separate individuals. It would be much easier for a native Fijian to borrow something from another within the community and the other would be willing to part with something of value to fulfil their customary obligation to his kinship. Living in harmony with the community with a large number of kin rather than individually is the major reason for lack of savings within this community. Interestingly, Asians and Indians with similar income have been able to make reasonable savings, by living in individualistic societies where materialism precedes kinship ties.

Pursuing de Soto's model would necessitate a complete rethinking of contemporary land stewardship in favour of the individual perception of ownership and acquiescence to the global, western influenced, ideal. Is it so ideal? Does individualism and commercialism ensure the optimal sustainability of either the land or society in the relationship that God intended? We think not. This is the dilemma confronting developing nations and their populace. Political rationality the world over is one of short-termism, paying but lip service to the underlying precarious sustainability of natural resources.

One of the critical strategies of the FAO/USP/RICS Foundation South Pacific Land Tenure Conflict Symposium in April 2002 was the need to 'explore and reach consensus on where people/citizens want to be located between the extremes of traditional customary ways and Western materialism'.[3] Inherent in this is that a society, or nation, cannot have both. There is a possibility that a nation can evolve a hybridization that hopefully incorporates the best of both paradigms, but such a societal evolution inevitably incurs significant growing pains. The authors' role in this capacity is not to provide the answer, but rather to ask the question. As Charles Darwin said in questioning evolution, what is important is to ask the question but there is no haste to provide the answer. In this case, the answers and the way forward will take time to manifest.

Earlier we introduced the suggestion that a subtle form of alienation, a passing to state control, did actually occur as part of Fiji's land tenure evolution. This argument is grounded on the changes that have transpired through colonisation and subsequent independence. Before 1874 and the Deed of Cession, tribal control of land was well established, and territorial control in Fiji was determined by the *Law of the Club*. Land was controlled by chiefs, who granted access to their obedient servants, whilst retaining the authority to gift access to others through marriage or favour. Whether such gifts were a grant of individual ownership or not is not clear. Such grants were certainly perceived as 'freehold' by many Europeans who came with the dogma of their own land tenure systems, clearly seeing them as much 'better' than the savage systems of the society they had come to plunder with a flag in their hand and an empire on their mind. It has to be borne in mind that the settlers had only seen freehold estates, but may not have fully appreciated, or understood that these estates were revertible to the Crown upon the non-existence of future heirs to the estates concerned. Similarly, when the native owner alienated land he only alienated the use of land, as the native owner was only familiar with a system where you alienate the use of the land until the occupant needs it. Pre-contact through to the Deed of Cession was a period in which land was in abundance, a never ending asset, which had little materialistic value, and required both toil and sweat to reap any benefits.

The above would suggest that, pre-colonisation, chiefs had ownership by virtue of control, albeit within a different perception of *Noqo Kalou, Noqo Vanua* than that which we

[3] (Boydell, Small, Holzknecht, & Naidu, 2002)

understand today, such was the unprecedented authority of the chief as God's representative on earth. Land Tenure patterns were fixed at the time of Cession in 1874. The British Empire exercised their right of land ownership almost instantly. One of the first acts of the Colonial Government was to issue a notice to the effect that "no sale, transfer or assignment of land" would be recognised by the government until a decision had been made on the settlement of existing titles (Gazette; No.2, 12.10.74).[4]

After the signing of Deed of Cession, rights of Fijians to the land were guaranteed. Likewise, rights of Europeans and other foreigners who had acquired land in a *bona fide* manner before Cession were also recognised. This provided security of tenure and legitimatised what we today know as the freehold lands in Fiji. In 1874, during the time of Cession, there were many foreign occupiers and claimants to large areas of Fijian land. These claims mostly originated through dealings with Chiefs, traders, and settlers. A commission under V.A. Williams was set up to investigate all claims during a time when about 400,000 acres of land was registered as Freehold land.[5]

The current land tenure patterns are based on the views of Sir Arthur Gordon, the first substantive Governor of Fiji. He set up a framework, establishing the Lands Claims Commission, under which the validity of European claims were determined and the protection of native forms of tenure systems were recognised. Among other issues, the *mataqali* was accepted as the main land-owning unit in Fijian Society. There were various Ordinances and legislation following the Gordon policies. These included the Native Land Ordinance of 1880 – under which alienation of all native land was prohibited, however under Sections XXII and XXIV provisions were made for *mataqali* land to be alienated to individual members of the clan if they desired to. Thus, after holding a 'Native Certificate Title' of the land for five years, the person is entitled to a Crown Grant of his land and after this it will cease to be native land and, in alienability ending, that land would than become freehold.[6] During the 1880's, due to an increase in land transactions, there was need for all recognised land owned by Fijians to be recorded and registered, together with settlement of issues such as boundary and ownership disputes. Thus under this governing Ordinance, the Native Lands Commission was established.

Native Lands Commission (1905 and 1907) allowed customary law to apply to Native land and ensured that Fijians could deal with native land in a customary manner. Tanner suggests that Im Thurm, who was Governor General from 1904 – 10, tried to dismantle the system of communal ownership.[7] de Soto would have been proud of Thurm's reasons, which were grounded on communalism holding back modernisation and the lack of title precluded villagers from obtaining credit by using the land as security. In 1916, the Native Lands Commission failed again. The need for greater control over the leasing of native land and the provisions of greater security increased in 1930's.

In 1940, the Native Land Trust Ordinance established a new system for the administration of native land known as the Native Land Trust Board. It was responsible for administering the unreserved native land on behalf of the owners, including the sub-division of land, issues of leases and collection and distribution of rent. The aims of Native Land Trust Ordinance of

[4] (Ward, 1965)
[5] (Boydell, 2001)
[6] The authors have no record of such transactions.
[7] (Tanner, 2003)

1940 were: (a) to ensure that sufficient land remained in Fijians hands for Fijian use; and, (b) to make surplus land available for leasing to non-Fijians.

The framework below outlines the social structural framework of Fijian landholding. This structure was given recognition and regarded as the foundation for land policy in Fiji, especially for native land. It was formulated as recently as the 1939 sitting of the Native Land Commission and has been used since then:

Vanua - headed by *Turaga-i-Taukei*

Yavusa (tribe) – headed by *Turaga-ni-qali*

Mataqali (Clan) – headed by *Turaga –ni- mataqali*

i Tokatoka (smaller clan)

This précis of the evolution of land tenure raises several pertinent questions. Senior chiefs who transferred a superior interest and lien to Queen Victoria were the signatories to the Deed of Cession. This suggests, and is commonly accepted, that the chiefs had the authority over and respect of their subjects to act on their behalf. However, let us cast our minds back to this period and ask whom the land belonged to at that time? One assumes that the chiefs were the landowners, not the individual Fijians. Yet, this was the period in history when the concept of indigenous landowners came into being.

The 1939 Land Commission framework of 'aristocracy' is confusing. If parallels were to be drawn with other aristocracies around the globe, the superior interest would seemingly be vested in the *Vanua*, a word that has an apparent complexity of meanings. Accepting that the *Vanua* is headed by the *Turaga-i-Taukei*, this would lead to the assertion that in 1939 the *Turaga-i-Taukei* was the superior landowner, leaving it unclear what ownership 'rights' the individual member of the *Mataqali* or *i-Tokatoka* actually held, both then and now. What is clear is that individual members of the *Vanua* certainly do not appear to be landowners, although collectively they could be taken to be part of a communal stewardship or co-guardianship.

At a time when the Native Land Trust Board (NLTB) is under the microscope and some critics argue that it may have outlived its usefulness, we need to reflect on the real impact of the Native Land Trust Ordinance 1940 under which it was established. The authority to act on behalf and in the best interest of the land 'owners' (yes, the statute uses language that perpetuates the myth) is an interesting veneer of the stewardship cycle. Who is the NLTB accountable to? The *Vanua*? The Government? The individual indigenous Fijian? Can they be accountable to the multiple aspirations of a multiplicity of masters? Perhaps it is even more complicated than that.

Did the Native Land Trust Ordinance of 1940 and the establishment of the NLTB effectively, and neatly, transfer the rights of the *Vanua* to the NLTB, whilst ensuring that any net proceeds are distributed back to the *Vanua* in accordance with a proportional formula based on the 1939 aristocratic hierarchy? Apparently, as the NLTO gives the NLTB the authority to make leasing decisions without recourse to the individual *Mataqali* as the NLTB has the statutory delegated authority of the *Vanua*. The place of NLTB employees in traditional society has in most cases resulted in the NLTB succumbing, albeit unnecessarily, to custom

through their tokenism of seeking approval for their actions from various levels of the aristocracy. Such custom and practice is certainly under question as the NLTB strives for greater efficiency and aspirations of commercialism with the re-establishment of the Native Land Development Corporation (in the guise of Vanua Land Development Corporation [VLDC] as the commercial arm of the NLTB).

It is important to reflect on some legal precedents that offer authority in determining the rights of those that claim to be landowners. In the case of ***Meli Kaliavu and others v NLTB*** (1956) 5 FLR 17, the plaintiffs were five members belonging to the *Matanivuga mataqali*. Their claim was for damages and an injunction to stop the NLTB from granting a lease of a portion of land owned by the *Matanivuga mataqali*. This action was commenced by the plaintiffs as members of their *mataqali* within their personal capacities. Hammett J determined that members of a *mataqali* could not sue on behalf of the *mataqali* in their own personal capacity to recover damages, which the *mataqali* may have suffered. Hammett J also commented that this did not mean that the *mataqali* could not recover the damages sustained, the liability for any damages sustained by the mataqali through the actions of the NLTB would make NLTB liable, and the *mataqali* could recover them. However, members in their personal capacity did not have the locus to represent the *mataqali*.[8] This case was well before independence in Fiji, and it saw the erosion of some rights of control of members of the *mataqali* when it came to deciding as to whether to lease a particular piece of land to someone or not. In addition, this case portrays the shift of decision-making power from the members of the *mataqali* in the communal way, to an individualistic decision of the NLTB.

Meanwhile, 1970 saw independence and political nationhood come into play in Fiji. Today it is hard to separate the role and place of the NLTB from the politics of Government, given the role of both the President and the Minister for Fijian Affairs, currently the Prime Minister, on the Native Land Trust Board. As supreme chief of the *Vanua*, the President has much to gain from the aristocratic hierarchy and proceeds generated by the NLTB. Likewise, the Prime Minister as Minister for Fijian Affairs is in a position to influence the role of the NLTB politically. Moreover, the involvement of the Head of State and Prime Minister interweaves national interests into the operation of the NLTB. As a tool of state, this would suggest that the NLTB's authority effectively vests land control, if not full conventional ownership, in the State. At this point in the dialogue, the social imperatives of communalism appear to move close to the socialist definition of communism – for as we have eluded, if there is no such thing as an individual owner of native land, does the legislation effectively mean that control, and real ownership, of land is really vested in the State? It is clearly not straightforward.

One can look at the post independence decision in the case of ***Timoci Bavadra v NLTB*** (Unreported) 11/07/1986, where Rooney J affirmed that not only could *mataqali* members not sue in their own personal capacities, but also that a *mataqali* in itself was not an entity which had legal personality. Thus, a *mataqali* could not even bring actions in court as a representative action by its members, for one cannot give what he or she does not have in the first place. Justice Rooney declared in his decision that as a *mataqali* did not have legal personality, it could not give others the right of representing it when it does not have such a right itself.

This decision was reinforced by ***Namisio Dikau v NLTB*** (1986) 32 FLR 179 where members of a *mataqali* brought an action both in their personal capacities as members, and in their

[8] Hammet, J. per page 20.

representative capacity as representatives of other members of the mataqali. They were once again clearly declared as not having locus to bring a case seeking damages, declarations, and costs.

The above case law highlights that those claiming to be landowners in Fiji, are not even allowed to bring actions in the courts in Fiji as communal owners. These actions are declined, both when brought forward as personal actions and when brought in as representative actions of the *mataqali* or the members. Whatever the myth surrounding land ownership may be, the legal scenario is clear in that communal *landowners* have no place in the courts of the Fiji Islands when it comes to exercising rights as landowners.

So, who can bring claims on behalf of those who proclaim to be landowners? The answer is clear - it is the landowner. This again raises the question as to who is the *landowner*. Despite how agitated native owners (or rather 'guardians') may feel with this question, the legal precedents determine that all native land is legally owned by the Native Land Trust Board as the legal owner and the rightful litigant for all claims regarding native land. The feared warriors who controlled the land and claimed *ownership* until Cession are apparently nothing more than toothless tigers, who claim to have ownership, albeit that they have neither control nor legal redress.

We could question if this is the reality that was actually intended, but history and legal precedent has brought us to the current scenario. In the case of ***Waisake Ratu & Others v NLTB*** (Civil Action) No. 580 of 1984 Cullinan J stated that he would not be willing to interpret that the Parliament of Fiji intended that native owners comprising of more than half the population and *owning* more than 85% of the lands were to be excluded from the courts. Due to their population size and their landholdings they had to have representation. Yet, when Rooney J gave decision in ***Namisio Dikau v NLTB*** he clearly stated that because 85% of the landholdings were controlled by Fijians who were more than half the population, they had to be excluded from the courts as not doing so would cause chaos. The answer thus lies in the fact that land tenure systems are manmade and they evolve to serve the needs of the people. Whilst they are manmade, those who have most to gain from their operation make the rules. The system is made to accommodate the particular way of life of the people, laws and most importantly the physical environment. They are subject to change and should be transmitted from generation to generation with efficient modification. When the ordinary individual, who has been seduced by myth and the embeddedness of misunderstanding comes to realise that they don't actually own anything other than a lifelong right of occupation, there may be a revolution and a clarion call for modification… but this will only happen when the majority decide where they want to be placed between the extremes of traditional customary ways and Western materialism. That is both a society and nation changing decision, and one that should not be taken lightly. What is important is that the questions are asked and that people are aware of their rights and obligations under the status quo and any subsequent modification.

In closing, it is appropriate to return to the concept of *Noqo Kalou, Noqo Vanua.* Earlier we suggested that God does not belong to the people, but people (would like to) believe that they belong to God. It follows that the land apparently does not belong to the indigenous Fijian people, rather that the people belong to the land.[9]

[9] Blake notes that a similar conclusion was reached in Australian case law over thirty years ago (Blake, 2003). In *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 270 Blackburn J described the Aboriginal relationship with the land as the Aboriginal clan belongs to the land rather than land belonging to the clan.

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