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THE HEART OF FIJI'S LAND TENURE CONFLICT: THE LAW OF TRADITION AND *VAKAVANUA*, THE CUSTOMARY "WAY OF THE LAND"

John Crosetto[†]

Abstract: In an effort to ease racial tension and the resulting political unrest, recent law reform in Fiji has focused on land tenure. Political coups in the wake of expiring agricultural leases demonstrate that the current tenure system fails to provide the security and predictability demanded by both Fijian owners and Indian tenants. Current law reform theory advocates adapting the rule of law to the local context to promote human rights and self-determination. A problem lies, however, in identifying the institutions and interests that define Fiji's local context. In addition to the country's divided ethnic population, Fiji's "tradition" is largely defined by the former colonial institutions, while custom continues to define daily life. The current constitution, which provides for the "paramouncy" of Fijian interests, supports land management policies that preserve traditional communal tenure. The practice of customary tenure by farmers, however, continues to diverge from the "law" as defined by tradition. Adapting the laws governing the Native Land Trust Board to better reflect customary practice may successfully address the land tenure conflict. To this end, the Native Land Trust Board should reevaluate the *mataqali* system and legitimate *vakavanua* leasing arrangements, which manifest a grass-roots transformation from subsistence to market economy. Those arrangements may better preserve what the constitutional provisions for paramouncy were intended to protect, namely, Fijian cultural identity expressed in *vakavanua*, the transformation between the past and present in the way of the land.

For the Fijian community, their land is an extension of themselves. It is part of the Fijian soul, and the concept of the "vanua"—the land and the people—lies at the heart of Fijian identity. Land represents life and sustenance, race and culture, and Fijians cling fiercely to their ownership of it.¹

~ Ratu Mosese Volavola

I. INTRODUCTION: THE HEART OF FIJI'S LAND TENURE CONFLICT— DIVERSITY AND CULTURAL IDENTITY

On May 19, 2000, seven armed men stormed into Fiji's Parliament building, taking Prime Minister Mahendra Chaudhry and thirty members of Parliament hostage. Rumors suggested coup leader George Speight was

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¹ Ratu Mosese Volavola, *The Native Land Trust Board of Fiji*, in *CUSTOMARY LAND TENURE AND SUSTAINABLE DEVELOPMENT* 47, 49 (Ron Crocombe ed., 1995).

motivated by personal financial gain,² but popular support for the insurgence was based on protecting indigenous Fijian land interests.³ The Western international community condemned the coup⁴ and praised the Fijian Appeals Court decision upholding the validity of the 1997 constitution and the rule of law.⁵ And yet, it is the same ethnically-based colonial land management policy embedded in the constitution that has institutionalized racial divisions in Fiji. Accordingly, achieving peace and stability through the reform of current institutions will require reevaluating what lies at the heart of Fiji's land tenure conflict. Specifically, recognizing the ways in which *vanua* develops over time can ease racial tension and move the political debate away from entrenched ideologies and traditional cultural identity. Lawmakers should focus on adapting to current land tenure practices that already show a willingness to accommodate mutual interests.

The coup of 2000, like those of 1990 and 1997, demonstrates that Fiji's land tenure system, an unwieldy combination of colonial

² JOHN D. KELLY & MARTHA KAPLAN, REPRESENTED COMMUNITIES: FIJI AND WORLD DECOLONIZATION 180 (2001).

³ When Indo-Fijian Chaudhry won the election in 1999, the most contentious issue was the renewal of Indo-Fijian farmers' leases on agricultural land. Stephanie Lawson, *Fiji: Divided and Weak*, in STATE FAILURE AND STATE WEAKNESS IN A TIME OF TERROR 265, 278 (Robert Rother ed., 2003) [hereinafter Lawson, *Divided and Weak*]. Speight said a month before the coup that the land lease issue would make or break the Chaudhry government. *The Region*, PACIFIC MAGAZINE, Apr. 2000, at 27, cited in Lawson, *Divided and Weak*, supra, at 278. The grievances of "many indigenous Fijians" included the payment of US\$ 28,000 to displaced Indo-Fijian cane farmers by the Chaudhry government, which was viewed as a "gross abuse of public funds and serves to further entrench in the minds of Indians in Fiji their misplaced notions of rights to land." *A May Newsletter of Indigenous Fijian Concerns*, TE KARERE IPURANGI MAORI NEWS ONLINE, June 21, 2000, available at <http://maorinews.com/karere/fiji/fiji035.htm> (last visited Jan. 14, 2005) [hereinafter *Indigenous Fijian Concerns*]. Notably, US\$ 28,000 is more than the average total rents received by Fijian landowners over the past 30 to 50 years. Spike Boydell, *Land Tenure and Land Conflict in the South Pacific: Consultancy Report for the Food & Agriculture Organization (FAO) of the United Nations* 23 (Sept. 2001), available at <http://www.usp.ac.fj/landmgmt/pdf/faoreport.pdf> (last visited Jan. 14, 2005) [hereinafter Boydell, *Consultancy Report*].

⁴ The European Union ("EU"), for example, suspended aid following the coup. Council Meeting on General Affairs, Brussels, Belgium, Nov. 17, 2003, pt. VIII, available at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/gena/77929.pdf (last visited Jan. 14, 2005). EU Commissioner Nielson visited Fiji in February 2004 "in the wake of recent positive developments in the region, in particular in Fiji," to discuss Economic Community aid and cooperation. Press Release, EU, Commissioner Nielson to visit the Pacific (Jan. 28, 2004), available at http://europa-eu-un.org/articles/de/article_3187_de.htm (last visited Jan. 14, 2005); Lawson, *Divided and Weak*, supra note 3, at 266.

⁵ See Republic of Fiji Islands v. Prasad [2001] FJCA 2 (Fiji); Press Release, Richard Boucher, U.S. Department of State, Fiji—Appeals Court Decision (Mar. 1, 2001), available at <http://www.state.gov/r/pa/prs/ps/2001/1009.htm> (last visited Jan. 14, 2005). See also Press Release, U.S. Department of State, Fiji—Reappointment of Laisenia Qarase as Prime Minister (Mar. 16, 2001), available at <http://www.state.gov/r/pa/prs/ps/2001/1323.htm> (last visited Jan. 14, 2005) [hereinafter Reappointment] (reiterating that "Fiji's crisis can only be resolved through respect for the rule of law"). See also Press Release, Richard Boucher, U.S. Department of State, Fiji—Trial of Speight and Accomplices Will Proceed (Mar. 29, 2001), available at <http://www.state.gov/r/pa/prs/ps/2001/1789.htm> (last visited Jan. 14, 2005) (stating the U.S. commitment to democracy and the rule of law).

administration and customary law,⁶ has made the country vulnerable to radical politics. Fiji's domestication⁷ under the hybrid system of land management underlies any discussion of "indigenous" land rights. While the "paramountcy" of Fijian interests incorporated into the original land grant was meant to protect the indigenes from predatory colonial and commercial forces,⁸ it has become a rallying cry for nationalists defending cultural identity.

The politics of Fijian cultural identity are inextricably linked to indigenous and colonial institutions that defend property interests. The Fijian concept of *vanua* that united the land and the people carried with it an ecological imperative and deep-rooted sense of stewardship that protected the rights of future generations.⁹ As the context shifts, however, from a native subsistence economy, which the colonial administration sought to preserve,¹⁰ to a modern market economy, the land becomes a commodity—a tool of economic and political power. Thus, *vanua*, understood as a realization of Fijian identity, transformed from a union of land and people into the people's power over land.¹¹ The conflation of cultural identity with economic and political power has allowed radical nationalists to easily heighten tension on the issue of land tenure.¹²

On a policy level, the land tenure dispute centers on the relative advantages of a formal system based on statutes and common law in contrast to an informal customary tenure system, and whether the two can coexist.¹³

⁶ See *infra* Part III.

⁷ Donald Horowitz describes "domestication" as the result of "crises of legitimacy" and in doing so outlines Fiji's likely future socio-political landscape. The "globalization of constitutional ideas" will not reduce the world's societies to a few institutional forms, but will instead produce a variety of hybrid institutions "wrapped in an indigenous contrivance." Donald L. Horowitz, *Domesticating Foreign Ideas in the Adoption of New Institutions: Evidence from Fiji and Indonesia*, in SOVEREIGNTY UNDER CHALLENGE: HOW GOVERNMENTS RESPOND 197, 219 (2002).

⁸ PETER FRANCE, THE CHARTER OF THE LAND: CUSTOM AND COLONIZATION IN FIJI, 162-63 (1969) [hereinafter FRANCE, CHARTER].

⁹ G. Small, *A Cross Cultural Economic Analysis of Customary and Western Land Tenure*, THE VALUER, Aug. 1997, cited in Boydell, *Consultancy Report, supra* note 3, at 8.

¹⁰ John Overton, *Land Tenure and Cash Cropping in Fiji*, in LAND ISSUES IN THE PACIFIC 117, 118 (Ron Crocombe & Malama Meleisea eds., 1994).

¹¹ "The inalienable control of land has become an icon of ethnic distinctiveness. It is what Fijians have and other ethnic groups do not." R. Gerard Ward, *Land, Law and Custom: Diverging Realities in Fiji*, in LAND, CUSTOM AND PRACTICE IN THE SOUTH PACIFIC 198, 248 (R. Gerard Ward & E. Kingdon eds., 1995) [hereinafter Ward, *Diverging Realities*].

¹² "The Commander [and Head of the Interim Military Government] suggested that 'the 1997 Constitution was widely regarded as inadequately protecting indigenous rights, insufficiently protecting Fijian land and endorsing an electoral system having bizarre and unexpected results.' He pointed out that the exploitation of those perceptions allowed such men as Speight to inflame their fears." Republic of Fiji v. Prasad [2001] FJCA 2, 6 (Fiji).

¹³ Boydell, *Consultancy Report, supra* note 3, at 6-7.

At stake in this debate are Fijian cultural identity and the necessary element of self-determination, meaning the ability “to influence meaningfully the framing of [the Fijians’] destiny.”¹⁴ The 1997 constitution abrogated formal recognition of customary law,¹⁵ and some legal scholars assert that there is in fact no custom.¹⁶ The widely recognized shift from a subsistence to a market economy,¹⁷ the presence of generations of Indo-Fijian citizens, and Fiji’s colonial experience certainly make defining “indigenous” problematic.¹⁸ The complexity of Fijian cultural identity demands continued reevaluation of the proper interests Fijian land tenure laws ought to protect. Land tenure has been described as “an ongoing process of negotiation between different interests, a way of seizing or missing different opportunities.”¹⁹ Many Pacific Island nations, including Fiji, have revised their constitutions to better accommodate customary property rights,²⁰ but Fiji remains weak²¹ because the proper interests to be protected remain ill-defined. To seize the opportunity for peace and stability, the institutions of land management must further adapt to the contemporary context and expand the understanding of what “lies at the heart of Fijian identity.”

This Comment maintains that Fijian identity, like the nation’s institutions of land tenure and the economy, continues to develop. The Native Land Trust Board (“NLTB”), as an instrumental organization of those institutions, must accommodate such ongoing development to fulfill its mandate to protect Fijian interests.²² Part II describes why the challenges

¹⁴ Hon. Major-General Sitiveni L. Rabuka, Prime Minister of the Republic of Fiji, Address at the Opening of the Workshop on the U.N. Draft Declaration on the Rights of Indigenous Peoples in Suva, Fiji (Sept. 2 1996) [hereinafter Rabuka, Address].

¹⁵ Jennifer Corrin Care, *The Status of Customary Law in Fiji Islands after the Constitution Amendment Act 1997*, 4 JOURNAL OF SOUTH PACIFIC LAW 1 (2000).

¹⁶ See, e.g., Kenneth Brown, *Customary Law in the Pacific: An Endangered Species?* 3 JOURNAL OF SOUTH PACIFIC LAW 2 (1995) (examining the survival of customary law as a viable legal source).

¹⁷ LAND, CUSTOM AND PRACTICE IN THE SOUTH PACIFIC, *supra* note 11, at 1.

¹⁸ While defending the right of self-determination for indigenous peoples, Prime Minister Sitiveni Rabuka acknowledged that Fiji’s colonial experience, which included the incorporation of Indian citizens, makes defining “indigenous” problematic: “We must share our heritage with others. In fact, part of our heritage, often taken away from us against our will, is no longer ours, it belongs to others. . . . We cannot and must not expel others from our midst, that would be contrary to civilized principles, even though the methods used to deprive us of what was wholly ours, were less than civilized.” Rabuka, Address, *supra* note 14.

¹⁹ Margaret Rodman, *Breathing Spaces: Customary Land Tenure in Vanuatu*, in LAND, CUSTOM AND PRACTICE IN THE SOUTH PACIFIC, *supra* note 11, at 65, 108.

²⁰ Kenneth Brown, *The Language of the Land: Look Before You Leap*, 4 JOURNAL OF SOUTH PACIFIC LAW 2 (2000).

²¹ Lawson defines a “weak” state as one nearly unable to maintain a stable political, economic, and social environment for the people within its borders. Lawson, *Divided and Weak*, *supra* note 3, at 265.

²² The colonial government enacted the Native Land Trust Act of 1940 (NLTA) and gave the NLTB the power to regulate leases both to ensure commercial use rights (e.g. for the Commonwealth Sugar Refining Company) and protect native owners from leasing away the land on which they subsisted.

faced by Fiji with regard to land tenure are unique. Part III provides the historical basis for the assertion that the institutions that protect indigenous Fijian interests are distinctly non-native. This section also outlines how the racial divisions inherited from Fiji's colonial administration were built into the modern legal framework and explains how that legal framework perpetuates racial and economic tension. Finally, Part IV considers the forces of change to customary tenure and proposes two ways to promote political and economic stability while recognizing and maintaining custom: (1) changing the basic land owning unit and (2) legally recognizing *vakavanua* leases.²³

II. LAND TENURE REFORM CANNOT BALANCE STAKEHOLDER INTERESTS WITHOUT ACCEPTING A DYNAMIC VIEW OF FIJI'S CULTURAL IDENTITY

Fiji's land tenure problem is unique and requires a unique solution. Land reform typically seeks to redistribute property rights for the benefit of landless tenants and farm laborers.²⁴ In the South Pacific, however, land reform must take a different approach because subsequent to post-colonial independence, customary owners have retained eighty to ninety-five percent of the land.²⁵ In Fiji, eighty-three percent of the total 18,270 square kilometers is owned by indigenous Fijians.²⁶ The NLTB, however, controls and administers all native land.²⁷ Native land cannot be sold or leased without NLTB approval,²⁸ the NLTB, in fact, has the authority to lease native land without the consent of landowners.²⁹ Because "ownership" for native Fijians does not extend beyond permission to use land allocated by

Josefata Kamikamica & Tim Davey, *Trust on Trial: The Development of the Customary Land Trust Concept in Fiji*, in LAW, POLITICS AND GOVERNMENT IN THE PACIFIC ISLAND STATES 284, 287 (Yash Ghai ed., 1988) [hereinafter Kamikamica & Davey, *Trust on Trial*]. Today, the NLTB describes its "corporate objective" as developing land for the benefit of present and future landowners. See Native Land Trust Board, *Role, Vision, and Corporate Objectives*, http://www.nltb.com.fj/corp_obj.html (last visited Jan. 14, 2005).

²³ *Vakavanua* leases grant rights to Fijian or non-Fijian "strangers"—people outside the native community. Overton, *Land Tenure and Cash Cropping in Fiji*, *supra* note 10, at 121.

²⁴ Martin Adams, *Land Reform: New Seeds on Old Ground?*, NATURAL RESOURCE PERSPECTIVES (Oct. 1995), available at <http://www.odi.org.uk/nrp/nrp6.html> (last visited Jan. 14, 2005).

²⁵ See generally U.S. DEPARTMENT OF STATE, BUREAU OF EAST ASIAN AND PACIFIC AFFAIRS, BACKGROUND NOTE: FIJI (Dec. 2003), <http://www.state.gov/t/pa/ei/bgn/1834.htm> (last visited Jan. 14, 2005).

²⁶ *Id.*

²⁷ Native Land Trust Act, ch. 134, § 4(1) (1985) (Fiji).

²⁸ *Id.* §§ 5(1), (9).

²⁹ Pdama Lal & Mahendra Reddy, *Old Wine in New Bottle? Proposed Sugar Industry Restructure and Land Conflict*, 4 FAO/SP/RICS Foundation South Pacific Land Tenure Conflict Symposium (Apr. 2002), available at <http://www.usp.ac.fj/landmgmt/pdf/webpapers/paper64lal.pdf> (last visited Jan. 14, 2005).

the NLTB and the right to receive NLTB-assessed rents, it has been suggested that the NLTB alone owns land.³⁰ For the purposes of land reform, or for example, bank loans that require a land right secured by the NLTB, a native Fijian landowner might, therefore, still be considered “landless.”

Fiji’s tenure system is further complicated by the country’s polarized ethnic population, raising questions about the basis for land rights.³¹ Fiji has the lowest indigenous ethnicity in the South Pacific. Of Fiji’s 870,000 citizens, forty-four percent are Indian and fifty-one percent Fijian,³² most other South Pacific island populations are at least ninety percent indigenous.³³ This diversity arose when the sugar industry began importing Indian labor in 1879. The population remained ethnically polarized because loyalty to the Fijian Chiefs and the first colonial administration’s opposition to indenturing the indigenous population largely kept Fijians out of the labor force.³⁴ Today, Indians produce seventy-five percent of Fiji’s sugar crop, which requires most to secure leases from ethnic Fijian owners.³⁵ The significance of the sugar industry to Fiji’s economy³⁶ demands that land reform for the landless consider ethnic divisions in the country. For example, customary law emphasizes “use” as a basis for land rights,³⁷ but Fiji’s Indian farmers, upon whom the economy depends for so much, cannot own native land.³⁸ While land reform has become a nationalist political

³⁰ Ward, *Diverging Realities*, *supra* note 11, at 242.

³¹ The country is politically and socially segregated. The constitution provides for representation based on ethnicity. See generally ELECTORAL SYSTEMS IN DIVIDED SOCIETIES: THE FIJI CONSTITUTION REVIEW (Brij V. Lal & Peter Larmour eds., 1997). Most voluntary social and economic organizations are monoethnic, inter-racial marriage is virtually non-existent, and until recently, pre-university schools remained segregated. See Ralph Premdas, *Fiji: Peacemaking in a Multiethnic State*, in FROM PROMISE TO PRACTICE 133, 134-35 (Chandra L. Sriram & Karin Wermester eds., 2003) [hereinafter Premdas, *Peacemaking*].

³² CIA, THE WORLD FACTBOOK, available at <http://www.cia.gov/cia/publications/factbook/print/fj.html> (last visited Jan. 14, 2005).

³³ Boydell, *Consultancy Report*, *supra* note 3.

³⁴ DAVID LEA, MELANESIAN LAND TENURE IN A CONTEMPORARY AND PHILOSOPHICAL CONTEXT 53 (1997). See also Native Labour Ordinance No. X (1877) (Fiji) (establishing the obligation of Fijians to the chiefs, but which was amended in 1878 “to enable planters, under certain circumstances, to acquire the enforced services of Fijian villagers” (CO 83/34 of 1884), cited in Shanta S.K. Davie, *Citizens or Subjects?: Accounting’s Uses in Subjectification*, 9th World Congress of Accounting Historians, Melbourne, Australia (July 30-Aug. 2, 2002), at 10 [hereinafter *Citizens or Subjects*]].

³⁵ U.S. DEPARTMENT OF STATE, *supra* note 25.

³⁶ The sugar industry accounts for 40% of Fiji’s export revenue and 11% of its gross national product. Aya Kasasa, *Fiji: Gateway to the Pacific* 60, 64, available at http://www.europa.eu.int/comm/development/body/publications/courier/courier179/en/en_059_ni.pdf (last visited Jan. 14, 2005).

³⁷ See *infra* Part IV.A on the shift in practice from present need to future interests and for a description of land rights defined by use.

³⁸ Native Land Trust Act, ch. 134, § 5(1) (1985) (Fiji).

platform³⁹ encouraging Fijians to assert superior property rights to the Indo-Fijian "immigrant race,"⁴⁰ customary law and the colonial history of the islands question the fundamental principle of an inalienable indigenous Fijian property right.

Misunderstandings about "tradition" make it difficult to identify the interests served by the system of traditional land tenure.⁴¹ Some reformers propose correcting misunderstandings about tradition as a way to return to the customary sense of *vanua* as cooperation:⁴² "Co-operation, not competition, is the very basis of life systems and of future survival."⁴³ Advocates of this model promote permanent subsistence agriculture rather than profit-driven development.⁴⁴ In contrast, other reformers suggest a system of "stakeholder capitalism," in which "a change in culture" transforms the way people think about "their respective interests and their joint interests."⁴⁵ As a result, this model establishes an economy in which cultural resources are exchanged for political stability and economic gain. Politically, however, Fijians appear only to accept a vision of development that distinguishes and protects indigenous rights and interests.⁴⁶ Achieving the goals of political stability and economic security⁴⁷ will therefore require a developmental concept of custom that balances the interests of tradition and cultural transformation.⁴⁸

³⁹ Ward, *Diverging Realities*, *supra* note 11, at 198; LEA, *supra* note 34, at 64.

⁴⁰ Lawson, *Divided and Weak*, *supra* note 3, at 266.

⁴¹ See *infra* Part III.

⁴² Cooperation in customary law may be understood simply as serving community rather than self-interest under principles of reciprocity and respect. See Josevata N. Kamikamica, *Fiji: Making Native Land Productive*, in *LAND TENURE IN THE PACIFIC* 226, 231 (Ron Crocombe ed., 3d ed. 1987).

⁴³ Spike Boydell & Garrick Small, *Evolving a Pacific Property Theory*, Cutting Edge 2001, The Real Estate Research Conference of the RICS Research Foundation (Sept. 2001), at 7.

⁴⁴ *Id.*

⁴⁵ Lal & Reddy, *supra* note 29, at 15.

⁴⁶ An odd mix of tolerance and steadfast paramountcy is typical of government policy statements from elected officials: "VISION: 'A multi-ethnic and multi-cultural society where the special place of indigenous Fijians and Rotumans as the host communities are recognized and accepted, and where their rights and interests are fully safeguarded and protected, alongside those of other communities, in the overall national development and in the interests of maintaining peace, stability, unity and progress in Fiji.'" Parliament of Fiji, Ministry of Finance and National Planning, 20 Year Development Plan (2001-2020) for the Enhancement of Participation of Indigenous Fijians and Rotumans in the Socio-Economic Development of Fiji, Parliamentary Paper No. 73 of 2002.

⁴⁷ Conventional wisdom that a country must have a "settled, well-functioning rule of law to attract investment" has been challenged, albeit with the example of China with a labor force so large it hardly bears comparison with Fiji's. For Fiji, there remains something of a Catch-22 in the conclusion that the causal relationship is reversed: "[t]he presence of at least certain types of foreign investors may contribute to the development of the rule of law through their demands for legal reforms." Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge*, Carnegie Endowment for International Peace, No. 34 (Jan. 2003).

⁴⁸ In this context, Ward and Kingdon offer a useful distinction between tradition and custom: the former describes static forms of culture ("the authority of the 'eternal yesterday'") and the latter reflects

III. THE COLONIAL GOVERNMENT TRANSFORMED PRE-COLONIAL CUSTOM INTO WHAT IS NOW ACCEPTED AS THE "TRADITIONAL" LAW OF THE LAND

The colonial government transformed Fiji's tenure system from an informal system of custom and direct conflict resolution to a more formal system of rules and judicial process. This change in the relation between the people and the land remains at the heart of Fiji's land tenure conflict. The colonial mechanisms created legally defensible indigenous "ownership" interests to protect the natives from foreign interests and thereby institutionalized a tradition of Fijian paramountcy. As foreign labor was imported to serve foreign commercial interests, the colonial mechanisms protected Fijian property interests and provided a legal arena in which to resolve the ensuing conflict.

While the roots of Fiji's land tenure conflict are easily traced to the country's colonial experience, a solution to Fiji's land tenure conflict requires not just understanding the past, but recognizing that tradition serves interests in the present. The paramountcy of Fijian interests is a product of the colonial administration and remains the most ethnically and politically divisive issue in Fiji.⁴⁹ Numerous historians and cultural anthropologists have observed that the orthodoxy established by the colonial government, rather than Fijian tradition, justifies both nationalist claims and the current constitution's provisions for the paramountcy of indigenous Fijian interests.⁵⁰ While undermining the institutional foundations of racial tension may promote constructive dialog, such dialog must progress beyond obvious ironies and recognize that change also lies at the heart of Fijian identity.⁵¹ If

development as a culture adapts to its changing context over time (actual practice "within a band of acceptable divergence from the community's norms"). R. Gerard Ward & Elizabeth Kingdon, *Land Use and Tenure: Some Comparisons*, in LAND, CUSTOM AND PRACTICE IN THE SOUTH PACIFIC, *supra* note 11, at 6, 13-15.

⁴⁹ Premdas, *Peacemaking*, *supra* note 31, at 136; Joseph E. Bush, *Defining Group Rights and Delineating Sovereignty: A Case from the Republic of Fiji*, 14 AM. U. INT'L L. REV. 735, 736 (1999).

⁵⁰ Peter France's seminal history of Fijian land tenure, THE CHARTER OF THE LAND, *supra* note 8, describes how the colonial administration embedded the paramountcy of indigenous Fijian interests into the fundamental institutions governing land. His book remains the historical foundation for much research and analysis of Fiji's land tenure conflict. See STEPHANIE LAWSON, THE FAILURE OF DEMOCRATIC POLITICS IN FIJI (1991); KELLY & KAPLAN, *supra* note 2; Kamikamica & Davey, *Trust on Trial*, *supra* note 22, at 287. On the paramountcy of Fijian interests see *infra* Part III.B.2.

⁵¹ With regard to obvious ironies, any discussion of cultural identity as an institution is subject to the deconstructive criticism that it homogenizes its subject. Despite the monolithic use of the term "cultural identity," this Comment ultimately resists essentializing the identity of Fiji's inherently diverse indigenous population. For example, the claim that colonial legal provisions have "allowed the indigenous people and culture of Fiji to survive the colonial clash of cultures" defines self-determination as the resistance to

a stable political and economic environment is a current interest of native Fijians, reformers must leave tradition to the preservation of cultural institutions and allow custom to develop. To be effective, reform must take into account how the colonial experience changed the object of land disputes (property rights) and established non-native mechanisms for resolving land issues.

A. *The Concept of a Right to Property Introduced By Western Missionaries Sowed the Seeds of the Current Land Tenure Conflict Based on a Rule of Law*

. . .with the savage everything is regulated by custom, and custom is law.⁵²

~ Lorimer Fison

The question whether the colonial system ultimately produced a more or less stable society is moot. Scholars of South Pacific land tenure point to Fiji's colonial experience as the source of current conflict,⁵³ but land tenure under the Chiefs did not exactly promote a secure or stable political environment, let alone a means of adapting to economies of accumulation. Neither inter- nor intra-tribal social structures were stable in a modern sense: "[Fiji] was thickly settled and its inhabitants were continually at war with each other."⁵⁴ As of 2001, meetings of the Great Council of Chiefs ("GCC") continue to display "backstabbing, *vanua* jealousy, and traditional power struggle."⁵⁵ As a creation of the colonial administration designed to preserve native tradition, the GCC does not exactly represent governance according to pre-contact customary law. As part of the colonial administration, the objects of dispute and channels of resolution for the GCC have changed, and

assimilation. See Bush, *supra* note 49, at 758-59. In contrast, this Comment frames cultural self-determination as the ability of a community to direct the pursuit of its interests (or as Rabuka said, its "destiny") regardless of whether or not those interests are defined by colonial or indigenous institutions.

⁵² LORIMER FISON, *LAND TENURE IN FIJI*, cited in FRANCE, CHARTER, *supra* note 8, at 34 n.68. Fison's comment reflects the contrast between the ideas of law rooted in reason serving justice and the law rooted in custom serving power; the distinction provides a framework for understanding how land tenure has been transformed by Fiji's colonial experience.

⁵³ See Lal & Reddy, *supra* note 29, at 3; Ron Crocombe, *Land Tenure and Agricultural Development in the Pacific Islands* (1983) (cited in Boydell, *Consultancy Report*, *supra* note 3); Lawson, *Divided and Weak*, *supra* note 3, at 268, 270.

⁵⁴ WILLIAM CARY, *WRECKED ON THE FEEJEES* 40, cited in FRANCE, CHARTER, *supra* note 8, at 22.

⁵⁵ Chief Ratu Ilisoni Qio Ravoka, quoted in FIJI TIMES, Mar. 9, 2001, cited in Jon Fraenkel, *Disunity Through Diversity? The Contours of Fiji's Post-Putsch Elections*, PAC. ECON. BULL., No. 1, 150, 153 (2001).

despite claims of preserving tradition, Fijian custom has changed accordingly under its governance.⁵⁶

Fiji's pre-contact customary governance was certainly closer to a rule of man than a rule of law. Historically, the Chief's tribal authority rested upon sheer political power rather than on legal right; many 19th-century tribal narratives tell of Chiefs being removed at will by the community.⁵⁷ As eager as the first colonial governor was to accommodate custom,⁵⁸ his goal of efficient administration relied on preconceptions entirely at odds with native Fijian culture; a Fijian Chief, "when asked to explain the custom of his tribe in the matter of chiefly succession, replied that the custom was to fight about it."⁵⁹ Though the bureaucracy imposed by the colonial administration revolutionized the native form of dispute resolution, Fijian customary governance certainly allowed for radical political change. Even today, customary land law itself is alternately criticized for failing to provide security of tenure and praised for possessing the advantage of flexibility.⁶⁰

Just as pre-contact land tenure under customary law did not lend itself to colonial organizational principles,⁶¹ the Fijian rights to land themselves were fundamentally distinct from Western property rights. Customary Fijian land tenure cannot be properly called a "property right," because it never associated acts with a separate legal regime, and any privilege of use was wholly revocable.⁶² Although Fijian land rights prior to European contact lacked systematic rules or universal principles,⁶³ some generalizations can be made. First, "rights" were established by gift, use (cultivation), or for service rendered to the community.⁶⁴ Second, though the nature of the right varied from absolute to something akin to a life estate, it was not

⁵⁶ Shanta S.K. Davie notes, "Customary powers of the chiefs were thus incorporated into the executive council. . . This marked the beginning of a style of rule that has remained unchanged in Fiji into the 21st Century. The British created social structure continues to be the foundation of political, economic and social discourse in Fiji today." The comment illustrates the transformation of custom, as practice which adapts over time, into tradition, as cultural institution that becomes rooted in social or political organizations. See *Citizens or Subjects*, *supra* note 34, at 9 n.5.

⁵⁷ Tribal narratives were recorded by the Native Lands Commission as part of the effort to systemize land tenure according to custom and tradition. FRANCE, CHARTER, *supra* note 8, at 17.

⁵⁸ *Id.* at 104.

⁵⁹ *Id.* at xiii.

⁶⁰ Kamikamica, *Fiji: Making Native Land Productive*, *supra* note 42, at 231-32.

⁶¹ See *infra* Part III.B.1. for a description of how custom was appropriated by the colonial administration.

⁶² FRANCE, CHARTER, *supra* note 8, at 15-16, 18.

⁶³ *Id.* at 11, 14.

⁶⁴ W.C. Clarke, *Traditional Land Use and Agriculture in the Pacific Islands*, in 2 LAND USE AND AGRICULTURE, SCIENCE OF PACIFIC ISLAND PEOPLES 14, 22-23 (John Morrison et al. eds., 1994); FRANCE, CHARTER, *supra* note 8, at 15, 17.

irrevocable.⁶⁵ Third, the defensibility of a right was a fact of life, not of law. Just as the granting of a right by gift, use, or services rendered was not considered automatic, neither was the failure to pay annual tribute (*sevu*) for the use of land a “breach” constituting a “grounds” for eviction; if eviction occurred, it was a simple expression of political power, not justice.⁶⁶ Underlying these aspects of Fijian custom is the fundamental principle that rights to land are inalienable; that is, held through customary practice rather than acquired as an alienable right.⁶⁷

Pre-contact land tenure in Fiji was a matter of customary practice, not organized administration, and current ideas of “ownership” are based on foreign principles of land tenure. Most Fijians today consider the right to own land to be a fundamental freedom.⁶⁸ That fundamental freedom, however, was not derived strictly from tradition or custom, as Fijian tribes were historically highly migratory.⁶⁹

The missionaries who arrived prior to the British colonial government introduced a new concept of “ownership” based on defending a tract of land by right. Decades before the first colonial administration, Methodist missionaries imposed civil codes based on Christian principles; moral principles of “right” began to replace the “law of the gods.”⁷⁰ These new doctrines challenged the mythological framework for identifying ties of kinship and chiefly power, the traditional structures that shaped land use practice.⁷¹ The missionaries thus introduced an abstract basis new to Fijian culture for justifying occupation of the land.

The resulting land use practices of the missionaries also contrasted with the indigenous culture and modeled a novel idea of property. By custom, strangers lived in the tribal village.⁷² Missionaries, however, feared

⁶⁵ A gift of land could be taken back with the ceremonial presentation of whales’ teeth (*tabua*) known as *vakalutu*. The occupants could respond with a presentation to negate the taking, but this was rarely done. Members of a community who failed to render adequate service could be dispossessed of their right. FRANCE, CHARTER, *supra* note 8, at 15-16, 18.

⁶⁶ *Id.* at 15, 17.

⁶⁷ Lorimer Fison interpreted the inability to alienate land under customary law as an “inalienable” property right, transforming customary practice into a first principle of “traditional” law. *Id.* at 117.

⁶⁸ S. Dean, *Fiji: Protecting Property Rights*, in LAND, PEOPLE, AND GOVERNMENT 19, 19 (Peter Larmour et al. eds., 1981).

⁶⁹ The most common feature of the tribal narratives (*tukutuku raraba*) told to the Native Lands Commission is an account of constant migration; only twenty-one of more than six hundred *tukutuku raraba* tell of a tribe that continued to occupy the land it originally settled. FRANCE, CHARTER, *supra* note 8, at 13.

⁷⁰ *Id.* at 32.

⁷¹ Fijian tribes and the communities defined by the land they occupied were agnatic. As the leader of a tribe, the Chief sanctioned the use of land by members of the community. *Id.* at 14-15.

⁷² The first beachcombers and traders often lived in the villages and assimilated to the native culture. *Id.* at 34-35.

moral corruption of the children they brought with them and sought land outside the villages; the Chiefs obliged by granting land for their use.⁷³ A missionary's account of 1835 marks the introduction of a defensible property right: "The ground about our houses was an uncultivated wilderness—we had to get it cleared, put up fences, and make roads, as well as to keep a constant and strict watch on the natives to prevent their pilfering."⁷⁴ Furthermore, missionaries claimed large areas of land they did not use.⁷⁵ Fencing and accumulating property contrasted sharply with the highly migratory, subsistence agriculture practiced by Fijians, demonstrating the difference between customary practices that describe the fact of land use and the abstract or "legal" principles established to justify land occupation. Broadly defining "occupied land" in the original Deed of Cession later became crucial for rooting the "tradition" of an inalienable native right to land against all others.⁷⁶ Therein lie the traditional roots of today's land tenure conflict.

B. Colonial Land Administration Seeded the Current Land Tenure Conflict By Embedding the Paramountcy of Fijian Interests in the Heart of "Native" Institutions

Gordon thought himself completely in sympathy with the minds of the indigenes. On his departure he spoke feelingly of the impending separation: 'All this pains me deeply, for my heart is the heart of a Fijian.'⁷⁷

~ Peter France, quoting Sir Arthur Gordon

1. It is Not Clear What Constitutes Fiji's "Native" Institutions

For the purpose of preserving tradition, it is no longer clear what constitutes Fiji's native institutions of land management. Sir Arthur Gordon, Fiji's first colonial governor, formed the Native Lands Commission in 1880 to establish boundaries, keep records, and settle disputes between native communities.⁷⁸ These records are still used today to determine interests in

⁷³ *Id.*

⁷⁴ Letter from David Cargill to General Secretaries of Wesleyan Missionary Society (Oct. 18, 1835), quoted in FRANCE, CHARTER, *supra* note 8, at 34-35.

⁷⁵ FRANCE, CHARTER, *supra* note 8, at 36.

⁷⁶ R. GERARD WARD, LAND USE AND POPULATION IN FIJI: A GEOGRAPHICAL STUDY at 115, n.1 (1965) [hereinafter Ward, GEOGRAPHICAL STUDY]. See *infra* Part III.B.2.

⁷⁷ FRANCE, CHARTER, *supra* note 8, at 104.

⁷⁸ Kamikamica, *supra* note 42, at 226-27.

land, who receives rents, and who must be consulted before native land may be leased.⁷⁹ While Gordon explicitly sought to preserve the “spirit in which native institutions have been framed” as a way to foster Fijian independence, Fijians considered the Commission an imported institution controlled by a foreign colonial power.⁸⁰ When Gordon convened the Council of Chiefs in 1876 to expound the “immemorial origins” of the native tenure system, the group could not agree and instead proposed dividing the land among the occupants and establishing a system of individual rights.⁸¹ Gordon tabled the idea and years later a communal system was recorded.⁸² Many critics take the historical view that the Native Lands Commission initially failed because it sought to preserve an official version of the past rather than protect the future interests of Fijians.⁸³

Though contemporary colonial theorists criticize Gordon's paternalism,⁸⁴ the land-management legal framework he established was actually the product of collusion between indigenous and foreign interests. The Chiefs, colonial government, and foreign investment all embraced systematic development of the land tenure system to augment their respective power.⁸⁵ The Chiefs favored reserving eighty-three percent of the land for Fijians.⁸⁶ This arrangement also served the interest of the Colonial Sugar Refining Company (“CSR”), the largest foreign investor, by preventing competitors from accessing large tracts of land.⁸⁷ Putting land in the hands of Fijians, a form of indirect rule, also allowed Gordon to stretch his limited administrative budget.⁸⁸

Fijian custom quickly adapted to the new system of land tenure, leaving tradition behind. Under Gordon's tenure system, the limited amount

⁷⁹ *Id.* at 227.

⁸⁰ FRANCE, CHARTER, *supra* note 8, at 107 n.26, 108.

⁸¹ *Id.* at 110-111.

⁸² *Id.* at 111.

⁸³ Ron Crocombe, *Land Tenure and Agricultural Development in the Pacific Islands* (1983) (cited in Boydell, *Consultancy Report*, *supra* note 3); Lawson, *supra* note 3, at 268, 270; FRANCE, CHARTER, *supra* note 8, at 147-148.

⁸⁴ KELLY & KAPLAN, *supra* note 2, at 85.

⁸⁵ In this sense, colonial claims of increased efficiency through indirect rule are thinly veiled expressions of power: “Institutions are not necessarily or even usually created to be socially efficient; rather they, or at least the formal rules, are created to serve the interests of those with the bargaining power to create new rules.” Douglas C. North, *The New Institutional Economics and Development* 3, available at <http://econwpa.wustl.edu:8089/eps/ch/papers/9309/9309002.pdf> (last visited Jan. 14, 2005). The difference is significant when cultural identity and self-determination are defined, as Fiji's Prime Minister Rabuka did, as the ability to frame one's own destiny. See Rabuka, Address, *supra* note 14 and accompanying text.

⁸⁶ KELLY & KAPLAN, *supra* note 2, at 85.

⁸⁷ *Id.*

⁸⁸ FRANCE, CHARTER, *supra* note 8, at xiii.

of land for sale to non-Fijians increased prices for various land contracts.⁸⁹ As a result, Fijians endorsed the European legal framework over their own custom, because it offered more secure and thus more lucrative transactions—a policy which endures today.⁹⁰ In contrast, European entrepreneurs and Indo-Fijian settlers preferred the old customary ways, finding it more expedient to secure property rights by gaining the favor of the Chiefs.⁹¹ The irony is apparent: Fijian interests, represented by the GCC and Gordon, embraced development under a new system of land tenure, while the typical forces of change, new foreign investment and immigrants, sought to perpetuate Fijian tradition.

2. *Colonial Efforts to Preserve Fijian Cultural Identity By Codifying the Paramountcy of Fijian Interests Have Ultimately Facilitated the Nationalist Agenda*

The Native Lands Commission institutionalized a principle of communal “ownership,” seeding ideas of exclusivity, inalienability, and the paramountcy of Fijian interests; together these ideas create political tension by supporting modern-day Fijian nationalism.⁹² Pre-colonial Fijian tribes comprised patrilineal families joined by marriage or a need for common defense.⁹³ To effectively manage the land, the Commission, in contrast, viewed the structure of the tribe in terms of social units with different rights to use the land.⁹⁴ The *matagali*, which constituted the social unit under the colonial system of land tenure, refers to a localized subset of a tribe; in the colonial legal framework it is a social unit defined in terms of its occupation of land.⁹⁵ Thus, in the pre-contact Fijian context, the occupation and defense of land by the *matagali* may be understood as a simple necessity of life, but

⁸⁹ *Id.* See also Boydell, *Consultancy Report*, *supra* note 3, at 12, 17 (discussing the growth of the sugar industry after independence in 1970 and the call for a secure, national, legal framework to promote foreign investment).

⁹⁰ FRANCE, CHARTER, *supra* note 8, at 51.

⁹¹ KELLY & KAPLAN, *supra* note 2, at 85; FRANCE, CHARTER, *supra* note 8, at 51.

⁹² Lawson, *Divided and Weak*, *supra* note 3, at 270.

⁹³ Commentators generally agree on the basic facts given by Peter France to describe pre-colonial Fijian society. See LAWSON, THE FAILURE OF DEMOCRATIC POLITICS IN FIJI, *supra* note 50; KELLY & KAPLAN, *supra* note 2; Ward, GEOGRAPHICAL STUDY, *supra* note 76; Kamikamica & Davey, *Trust on Trial*, *supra* note 22, at 284. For a balanced bibliography on Fiji's history, see Joseph H. Carens, *Democracy and Respect for Difference: The Case of Fiji*, 25 U. MICH. J.L. REFORM 547, 554 n.10 (1992). The brief description in this section therefore relies on the facts provided in FRANCE, CHARTER, *supra* note 8, at 1-18.

⁹⁴ FRANCE, CHARTER, *supra* note 8, at 1-18.

⁹⁵ *Id.*

within the colonial legal framework it comes to represent a right of exclusivity within a society.

Ideas of inalienability and the paramountcy of Fijian interests were incorporated into the "native" institutions because they served the Commission's purpose of balancing European claims with the need to accommodate native use and development. While an occupant could do what he wished with his land, there is no record of rules governing alienation in the modern sense.⁹⁶ But the Commission translated the custom into a Fijian law against alienation to give claimants to Fijian land the impression they had done something illegal.⁹⁷ Gordon's resistance to individual ownership suggested by the GCC and his endorsement of communal ownership embedded inalienability as the most important feature of Fijian land tenure.⁹⁸

Finally, by formally acknowledging the paramountcy of Fijian interests,⁹⁹ the Deed of Cession of 1874 enshrined the "tradition" that supports the modern nationalist platform¹⁰⁰ and perpetuates racial tension in modern Fijian society. In fact, today the Deed of Cession remains in Fiji's contentious politics the most talked about land agreement of the colonial period.¹⁰¹ Under the doctrine of paramountcy, Fijian rights and interests in land and customary use are inalienable.¹⁰² Gordon's interpretation of Article 4 of the Deed of Cession, putting eighty-three percent of the land under customary tenure,¹⁰³ continues to justify indigenous paramountcy under the 1997 constitution.¹⁰⁴ The resulting system of land tenure prevents a Fijian from selling land to a non-Fijian,¹⁰⁵ making land the most divisive issue between Fijian landowners and Indo-Fijian tenants today.¹⁰⁶

⁹⁶ *Id.* at 18.

⁹⁷ *Id.* at 123. The Commission's decision reflects 19th-century Western legal doctrine, which considered territories occupied by indigenous, "uncivilized" peoples to be *terra nullius*. The famous case of George Rodney Burt whose pre-cession claim was denied by the Crown but affirmed by the British-American Claims Tribunal, shows how the Commission under Gordon attempted to keep land in the hands of the Fijians. See L. Benjamin Ederington, *Property as a Natural Institution: The Separation of Property from Sovereignty in International Law*, 13 AM. U. INT'L L. REV. 263, 292-93 (1997).

⁹⁸ FRANCE, CHARTER, *supra* note 8, at 125.

⁹⁹ DEED OF CESSION (1874) § 7 (Fiji); See Premdas, *supra* note 31, at 136; KELLY & KAPLAN, *supra* note 2, at 161.

¹⁰⁰ Lawson, *supra* note 3, at 270.

¹⁰¹ KELLY & KAPLAN, *supra* note 2, at 160.

¹⁰² Lawson, *supra* note 3, at 270; Bush, *supra* note 49, at 740-43.

¹⁰³ Ward, *Geographical Study*, *supra* note 76, at 115 n.1.

¹⁰⁴ FIJI CONST. ch. 2, § 6(j).

¹⁰⁵ Native Land Trust Act, ch. 134 § 5(1) (1985) (Fiji).

¹⁰⁶ Premdas, *Peacemaking*, *supra* note 31, at 136.

3. *The Colonial Legacy: The Laws of Modern Land Management and Dispossessed Indo-Fijian Farmers*

The concept of Fijian paramountcy set down in the Deed of Cession shaped the modern rules of land management and preserves an ethnic class of landless Indian farmers. The modern system, based on the Native Lands Act ("NLA") of 1905 and the Native Land Trust Act ("NLTA") of 1940, explicitly incorporates "native" custom and tradition. For example, the NLA states that "native lands shall be held by native Fijians according to native customs as evidenced by usage and tradition."¹⁰⁷ It also establishes the duty of the Native Lands Commissioner to determine which lands are "the rightful and hereditary property of native owners."¹⁰⁸ The NLTB is responsible for administering all native land for the benefit of native owners, which includes granting leases.¹⁰⁹ The NLTB also has the authority to create a "native reserve," which may not be sold or leased to non-Fijians.¹¹⁰

The rules of land management, such as those governing leases, have progressively removed decision-making power from the actual stakeholders. Until 1940, when the NLTA was enacted, the *mataqali* made a variety of leases to non-indigenous peoples for the use of the land.¹¹¹ Under the previous system, leases of native land were granted only when requested and approved by the native owners concerned.¹¹² Individuals and groups, however, would sometimes accept "gifts" from more than one party for the use of the same piece of land.¹¹³ The colonial administration viewed the inability to identify the "legitimate" native owners as a fatal flaw and therefore gave that power to the Commission.¹¹⁴ Today, all lease transactions are to be approved by the NLTB.¹¹⁵

Despite the country's dependence on Indo-Fijian cane farmers,¹¹⁶ the colonial experience has pushed them to the margins of the land tenure institutions. Because their ancestors came to Fiji as tenant farmers for the

¹⁰⁷ Native Lands Trust Act, ch. 133, § 3; Volavola, *supra* note 1, at 48.

¹⁰⁸ Native Lands Trust Act, ch. 133, § 4; Kamikamica & Davey, *Trust on Trial*, *supra* note 22, at 285.

¹⁰⁹ Native Land Trust Act, ch. 134, §§ 4, 8, 9, 16.

¹¹⁰ *Id.* § 16(3)(a). For the process of making native reserve claims see Edward V. Palad, *Reserve Claims in Fiji*, in LAND, PEOPLE AND GOVERNMENT: PUBLIC LANDS POLICY IN THE SOUTH PACIFIC 161, 161-63 (Peter Larmour et al. eds., 1981).

¹¹¹ Ward, *Diverging Realities*, *supra* note 11, at 240.

¹¹² Kamikamica & Davey, *supra* note 22, at 287.

¹¹³ Andrew Crosby, *Fijian Cosmology, Vanua, Development and Ecology*, in 4 EDUCATION, LANGUAGE, PATTERNS AND POLICY: SCIENCE OF PACIFIC ISLAND PEOPLES 55, 59 (John Morrison et al. eds., 1994).

¹¹⁴ FRANCE, CHARTER, *supra* note 8, at 45.

¹¹⁵ Native Land Trust Act, ch. 134 § 9 (1985) (Fiji).

¹¹⁶ See Kasasa, *supra* note 36 and accompanying text.

sugar industry, Indo-Fijians presently lack the legal status to sustain rights of ownership in land. In accordance with Gordon's vision of communal tenure, the Deed of Cession establishes an inalienable right in the *mataqali*.¹¹⁷ An individual Fijian therefore has legal status through his immediate community and his interests are at least nominally represented politically by the GCC. In contrast, Indo-Fijian rights were based on the *girit*, a five-year contract after which the laborer could retire.¹¹⁸ Indo-Fijian land rights were individual not communal; thus upon expiration of the *girit*, an Indo-Fijian tenant was without a cognizable property interest.¹¹⁹

Indo-Fijian cane farmers have found their marginal property rights untenable. Over the past decade, Fiji's sugar industry has lost US\$ 100 million due to strikes, and today the industry is on the verge of collapse.¹²⁰ On April 28, 2004, the Fijian Parliament passed a motion to form a committee to look into the land issue and rehabilitate the sugar industry.¹²¹ Though the committee will consider a report of the Indian Government Technical and Finance Mission, Prime Minister Laisenia Qarase reiterated that the NLTA is legislation "that will protect the landowners."¹²²

In keeping with colonial history, the modern system of tenure was the product of colonial, commercial, and "native" interests voiced through the GCC. In the 1930s, the colonial government, which had always supported the absolute right of Fijians to native land, began to reconsider the tenure system to encourage economic development.¹²³ CSR, fearing a strike by Indian cane farmers, threatened to refuse cane grown on land by "unjustifiably dispossessed" Indian farmers.¹²⁴ Ratu Sukuna pitched the idea of the Native Land Trust to the Chiefs who then adopted a resolution for development "in the best interests of the native race."¹²⁵ To gain Fijian support, the ultimate draft of the legislation (the NLTA) proposed to protect

¹¹⁷ The NLTA defines "native owners" as the *mataqali* or other subdivision having the customary right to occupy and use native land. Section 9 of the NLTA adopts the language of the Deed of Cession to make land inalienable subject to NLTB approval. Native Land Trust Act, ch. 134 § 9.

¹¹⁸ KELLY & KAPLAN, *supra* note 2, at 85.

¹¹⁹ Indo-Fijians cite the Salisbury Despatch of 1875 as a constitutional basis for their rights as British subjects. But the Despatch remains just that, lacking the legal status of the Fijian charter, the Deed of Cession. See KELLY & KAPLAN, *supra* note 2, at 85, 161.

¹²⁰ Akuila Yabaki et al., *Land, Conflict & Ethnic Relations in Fiji: a Civic Perspective* 16, (2002), available at <http://www.usp.ac.fj/landmgmt/pdf/webpapers/paper23ccf.pdf> (last visited Jan. 14, 2005) [hereinafter Yabaki, *Civic Perspective*].

¹²¹ *Fiji: Parliament Passes Landmark Decision*, PACIFIC ISLANDS, Apr. 28, 2004, available at <http://www.pacificmagazine.net/pina/pinadefault.php?urlpinaid=11367> (last visited Jan. 14, 2005).

¹²² *Id.*

¹²³ Kamikamica, *supra* note 42, at 228-29.

¹²⁴ *Id.*

¹²⁵ *Id.* at 230.

native owners from leasing themselves out of a means of support by restricting leases to land not “beneficially occupied” by the Fijian owners and not likely to be needed during the term of the lease for their “use, maintenance, or support.”¹²⁶ “At the heart of the [NLTA] was the creation of the [NLTB].”¹²⁷ The new institution of land tenure thus promises to secure Fijian interests into the future.¹²⁸

Institutionalized racial tension and economic pressures continue to destabilize the current tenure system. Only three years before Fiji achieved independence in 1970, the government enacted the Agricultural Landlord and Tenant Act (“ALTA”) to regulate agricultural leases.¹²⁹ ALTA authorized leases for a minimum term of thirty years and capped rents at six percent of the unimproved value of the property.¹³⁰ Today, sixty-two percent of Indo-Fijians are tenants dependent on ALTA leases, with eighty percent of sugar farmers being Indian.¹³¹ In 1997, the first ALTA leases began expiring and by 2006 it is expected that eighty-eight percent of the cane leases will expire.¹³² The thirty-year minimum term and rent caps have discouraged most landowners from renewing leases.¹³³ Fijian nationalists cited Chaudhry’s continuing attempt to retain ALTA against the wishes of the GCC and the NLTB as justification for the coup of May 19, 2000.¹³⁴ At the same time, dispossessed Indian tenant farmers tore down the houses their families occupied for up to seventy years and illegally burned their crops to avoid seeing them harvested for the benefit of Fijian landowners.¹³⁵

¹²⁶ Native Land Trust Act, ch. 134 § 9 (1985) (Fiji).

¹²⁷ Kamikamica, *supra* note 42, at 230.

¹²⁸ Under the NLTA land is leased only if it “is not likely during the currency of such lease or licence to be required by the Fijian owners for their use, maintenance or support.” Native Land Trust Act, ch. 134, § 9. The NLTB’s mission is to “ensure that any development over native land will bring the best economical return to the present and future landowner.” Native Land Trust Board, *Role, Vision, and Corporate Objectives*, available at http://www.nltb.com.fj/corp_obj.html (last visited Jan. 14, 2005).

¹²⁹ Agricultural Landlord and Tenant Act, ch. 270 (1985) (Fiji).

¹³⁰ *Id.*

¹³¹ See Premdas, *Peacemaking*, *supra* note 31, at 136.

¹³² Lal & Reddy, *supra* note 29, at 5; Ratu Timoci W. Vesikula, *Regional Representatives Report: Fiji 2*, FAO/SP/RICS Foundation South Pacific Land Tenure Conflict Symposium (Apr. 2002), available at <http://www.usp.ac.fj/landmgmt/pdf/webpapers/fijipaper.pdf> (last visited Jan. 14, 2005).

¹³³ Yabaki, *Civic Perspective*, *supra* note 120, at 5.

¹³⁴ *Indigenous Fijian Concerns*, *supra* note 3.

¹³⁵ Robert Keith-Reid, *Fiji’s Worst Political Dilemma: How to Solve the Expiring Land Lease Issue?*, PACIFIC ISLANDS, Mar. 2001, available at <http://www.pacificmagazine.net/pm32001/pmdefault.php?urlarticleid=0029> (last visited Jan. 14, 2005).

IV. TO PROMOTE STABLE DEVELOPMENT, THE NLTB SHOULD ADAPT TO CUSTOM RATHER THAN ADAPTING CUSTOM TO THE NLTB

[T]he strength of tradition depends less on its historical accuracy than on its social significance. . . . That tradition has withstood the protestations and denigrations of a generation of economic advisers, and will, no doubt, survive the demythologizing labours of historians.¹³⁶

~ Peter France

The fact that his book has become the seminal history of land tenure in Fiji does not contradict France's comment on the reception of his work. In other words, a critical historical analysis aimed only at undermining the current understanding of "tradition" misses the mark—deliberations on Fiji's land tenure conflict must shift focus from historical accuracy to the current social significance of tradition. While pragmatic reformers advocate rejecting both custom and tradition and relying instead on purely empirical analysis to evaluate the land tenure system,¹³⁷ solutions lie instead in gradually dovetailing current needs and practice with tradition. The inherent flexibility in Fijian custom thus provides opportunities currently precluded by the highly centralized formal system of land management.

Because the NLTB exercises absolute discretion over land sales and leasing, it cannot provide opportunities for self-determination, a crucial element for political stability,¹³⁸ without being responsive to changes in customary practice. For that reason, the NLTB must adapt to current customary practices in order to legitimately serve the present and future interests of Fijians. Establishing the family as the primary land-owning unit and legitimating *vakavanua* leases are two ways to preserve the cultural resource of custom while maintaining the regulatory control necessary to provide stability and conserve natural resources.

¹³⁶ FRANCE, CHARTER, *supra* note 8, at 174-175.

¹³⁷ Kamikamica & Davey, *Trust on Trial*, *supra* note 22, at 285.

¹³⁸ See Rabuka, Address, *supra* note 14 and accompanying text on the importance of the right of self-determination to Fijians. While democratic institutions cannot simply be foisted upon cultures, Fijians do look for social and political security in self-determination. See Steven Ratuva, *The Paradox of Multi-Culturalism: Managing Differences in Fiji's Syncretic State* 10, Conference on Pluricultural States and Rights to Differences (July 2002).

A. *Current Efforts to Centralize Land Tenure in the NLTB Mirror the Colonial Efforts to Adapt Customary Practice to a More Administratively Efficient "Tradition"*

Gordon's heart was in the right place when he centralized land tenure to protect Fijians, but his efforts to preserve tradition have created a system for securing future interests that does not provide for current needs. Historically, systematic regulation of land tenure in Fiji has shifted the aim of customary practice from present to future interests and thus increased tension between adverse parties. Assuming that providing for current needs requires a sustainable approach, the NLTB could serve a valuable regulatory function by helping to preserve the natural and cultural resources that constitute *vanua*, the core of Fijian national identity.

Centralized regulation of land tenure fundamentally changed the historical relationship between the people and the land by encouraging "owners" to secure property interests extending into the future rather than sustain current needs. Registration of land rights by the Native Lands Commission in the 1890s encouraged families and their communities to legitimize land claims and thus reserve future interests. The NLTA of 1940 further cultivated a centrally administered economy in which "owners" needed to secure their interests against others to provide for future use.

Registration of traditional rights resulted in manipulation of the new administrative framework and increased tension between competing interests. When the Native Lands Commission began registering rights, land held by the tribe as a whole was rapidly developed to establish a stronger familial right over a more clearly defined piece of land.¹³⁹ Under traditional tenure such behavior occurred rarely, if at all, because it could easily prompt violent conflict.¹⁴⁰ The legal framework erected by the Native Lands Commission may have reduced physical violence, but it increased people's willingness to assert adverse claims.

The difference between land rights that follow customary use and land rights as described in the NLTA illustrates how centralization of tenure in the NLTB has created adverse interests, pitting future use by landowning Fijians against present use under lease by Indian farmers. Speaking to the GCC to win Fijian support for the proposed NLTA, Ratu Sukuna, a Fijian

¹³⁹ *Id.* at 209.

¹⁴⁰ *Id.*

Chief instrumental in establishing the country's modern tenure system,¹⁴¹ advocated a customary land right based on utilization.¹⁴² The original NLA of 1905 still reads: "Native lands shall be held by native Fijians according to native custom as evidenced by usage and tradition."¹⁴³ Under the NLTA, the NLTB may lease land not "beneficially occupied" by Fijians.¹⁴⁴ The term, adopted from the Deed of Cession,¹⁴⁵ illustrates the effect of institutionalizing custom: a right of customary use to serve present needs becomes a defensible property right of occupation to protect future interest. Still today, the Native Land Trust Act subjects the right granted by lease to possible future use by Fijian owners.¹⁴⁶

The shift in focus from present interests under customary tenure to future interests under systematic land tenure reflects an assumption by the Western colonial administration, which persists today, that development occurs only where there is a market in which values may increase.¹⁴⁷ Customary "development," however, may be distinguished from a Western accumulative approach to development. A typical conclusion is that a Western idea of development continues to erode the traditional sense of community.¹⁴⁸ Accelerated cultivation in response to the registration of land, for example, supports the notion that there has always been a conflict between the traditional Fijian concept of land as a "sacred community trust" and "the Western concept of land as a resource for development."¹⁴⁹ The

¹⁴¹ Ratu Sukuna is considered "the father of Fiji's solution to its land management question." Volavola, *The Native Land Trust Board*, *supra* note 1, at 49; Native Land Trust Board, *Ratu Sukuna*, available at http://www.nltb.com.fj/ratu_sukuna.html (last visited Jan. 14, 2005).

¹⁴² Kamikamica, *supra* note 42, at 229.

¹⁴³ Native Lands Trust Act, ch. 133 § 3 (1905) (Fiji).

¹⁴⁴ *Id.*, ch. 134 § 9.

¹⁴⁵ See *supra* Part III.A.

¹⁴⁶ Native Land Trust Act, ch. 134 § 9 (1985) (Fiji).

¹⁴⁷ In this sense modernization theory is nothing new: "Modernisation theory defines development as a process of convergence on the institutions of developed Western societies. On this view underdevelopment is both caused by and reflected in traditional as opposed to modern institutions. [A] definitive modern institution [is the] free market[]." Kevin E. Davis & Michael J. Trebilcock, *Legal Reforms and Development*, 22 *THIRD WORLD QUARTERLY* 1, 21-22 (2001) [hereinafter Davis & Trebilcock, *Legal Reforms*].

¹⁴⁸ See Patrick Ellum, *A Legal Perspective*, in *CUSTOMARY LAND TENURE AND SUSTAINABLE DEVELOPMENT* 27, 33 (Ron Crocombe ed., 1995) on the incompatibility between development and customary land tenure. Ward describes a "transformation" from traditional subsistence to market economy. But notably, Ward also points out that an "ideology of socialist collectivism" as well as individual, alienable, exclusive rights to land were absent from the traditional tenure arrangements in the Pacific Islands. See *LAND, CUSTOM AND PRACTICE IN THE SOUTH PACIFIC*, *supra* note 11, at 3. But see Crosby, *Fijian Cosmology, Vanua, Development and Ecology*, *supra* note 113, at 61 on cannibalism as traditional "development."

¹⁴⁹ Kamikamica, *Fiji: Making Native Land Productive*, *supra* note 42, at 227.

conflict encompasses economic¹⁵⁰ as well as cultural dimensions.¹⁵¹ If there is no real concept of development in the traditional system of land tenure (*vanua*),¹⁵² tradition and custom are compromised as a result of "progress."¹⁵³ The tension created by the current ethnically based land tenure system, however, calls for reevaluation of how a customary tenure system could promote development and provide stability while serving Fijian interests in preserving tradition.

Customary agriculture accommodates capitalistic enterprise. Fijian farming can be broadly divided into two methods of land use: (1) *galala*, practiced by the modern, individualistic farmer who works outside the village and participates in a cash profit economy; and (2) *vanua*, exemplified by the farmer who works his land for communal benefit.¹⁵⁴ The two methods are not entirely distinct, as *galala* farmers contribute to community projects and conversely *vanua* farmers sometimes enter an economy outside the restrictions of kinship and communal obligations.¹⁵⁵ The "Fijian Regulations," for example, which were designed to protect traditional village life, were abolished to allow farmers to participate more freely in the national economy.¹⁵⁶

Still, a familiar complaint with customary land tenure is that it restricts development, suggesting that not enough people want to remain in a system of subsistence agriculture.¹⁵⁷ Historically, Fijians welcomed the opportunity presented by European planters to "[reap] the fruits of their labour, which they rarely [could] under the Chiefs."¹⁵⁸ Today, as subsistence gives way to market economies, cooperative communal agricultural practices based on reciprocal obligations are replaced by wage labor and money.¹⁵⁹ In the past, communalism and reciprocity served Fijians' technological, economic, environmental, and social needs. When climate or harvest, for example, made demands beyond a family's abilities and labor could not be purchased, the community resource was available.¹⁶⁰

¹⁵⁰ "Land has become a commodity rather than simply a stage on which activities take place." LAND, CUSTOM AND PRACTICE IN THE SOUTH PACIFIC, *supra* note 11, at 2.

¹⁵¹ Kamikamica, *Fiji: Making Native Land Productive*, *supra* note 42, at 227.

¹⁵² Crosby, *Fijian Cosmology, Vanua, Development and Ecology*, *supra* note 113, at 58.

¹⁵³ *Id.* at 55-56.

¹⁵⁴ *Id.* at 58.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Ellum, *A Legal Perspective*, *supra* note 148, at 33-34.

¹⁵⁸ William Arthur, *What is Fiji, the Sovereignty of which is Offered to Her Majesty?* 4 (1859), quoted in FRANCE, CHARTER, *supra* note 8, at 38-39.

¹⁵⁹ LAND, CUSTOM AND PRACTICE IN THE SOUTH PACIFIC, *supra* note 11, at 1.

¹⁶⁰ R. Gerard Ward & Elizabeth Kingdon, *Land Tenure in the Pacific Islands*, in LAND, CUSTOM AND PRACTICE IN THE SOUTH PACIFIC, *supra* note 11, at 36, 45.

In today's market economy, however, community obligations represent an added risk for entrepreneurs. A farmer, for example, may be called upon to provide produce or services to the community at a time when his expanded investment in his farm requires his attention; alternatively, non-compliance with community service puts his land right at risk.¹⁶¹ Under traditional *vanua* development, an individual may accrue social wealth with gifts and labor contributed to the community.¹⁶² As the idea of "Western" development commingles with the traditional idea, the contributions to the community are considered "opportunity costs" against personal income.¹⁶³

Fiji is shifting from a subsistence to a market economy, but the NLTB's *mataqali*-based system removes individual incentives to economic growth by promoting only a collective interest in "maintenance and support."¹⁶⁴ Entrusted to "ensure that any development over native land will bring the best economical return to the present and future landowner,"¹⁶⁵ the NLTB regulates the transformation to a market economy by legitimating all native land transactions.¹⁶⁶ The NLTA, however, adopts the language of the Deed of Cession to acknowledge that the foreseeable need for Fijian owners' "maintenance and support" is paramount.¹⁶⁷ A fundamental tension within the NLTB policy directives therefore exists between market and traditional communal values.

The Vanua Development Corporation ("VDC"), endorsed by the government in April 2004, represents increased centralization of land management and another step toward changing the relationship between the land and the people from subsistence, where the land itself serves present needs, to accumulation, where the land is conceived as means to generate income in a growing economy. The VDC will invest funds from the NLTB

¹⁶¹ Ward, *Diverging Realities*, *supra* note 11, at 223-24. Notably, researchers have begun to dismiss the "traditional" excuse that Fijian communal obligations are an impediment to sugar production. See AGRI. LANDLORD AND TENANT ACT (ALTA) TASK FORCE, NATIVE LAND TRUST BOARD, 1 FINAL REPORT 76 (1997), cited in Yabaki, *Civic Perspective*, *supra* note 120, at 10.

¹⁶² Crosby, *Fijian Cosmology, Vanua, Development and Ecology*, *supra* note 113, at 60.

¹⁶³ *Id.*

¹⁶⁴ Native Land Trust Act, ch. 133, § 9 (1985); Deed of Cession, Oct. 10, 1874, Fiji-Great Britain, para. 4.

¹⁶⁵ Native Land Trust Board, *Role, Vision, and Corporate Objectives*, available at http://www.nltb.com.fj/corp_obj.html (last visited Jan. 14, 2005).

¹⁶⁶ Legitimizing land transactions essentially means establishing which land owner should receive rents according to the colonial records and customary law. Native Lands Act, ch. 133 §§ 8-10 (1985) (Fiji). See also Kamikamica, *Fiji: Making Native Land Productive*, *supra* note 42, at 227.

¹⁶⁷ Native Land Trust Act, ch. 133, § 9 (1985); Deed of Cession, Oct. 10, 1874, Fiji-Great Britain, para. 4.

to generate additional revenue for NLTB initiatives,¹⁶⁸ increase indigenous Fijian participation in the economy,¹⁶⁹ and convert the “fixed asset” of land into cash.¹⁷⁰ As a result, the NLTB will presumably enjoy greater autonomy.¹⁷¹

B. “Customizing” Reform of the Current Land Tenure System Will Balance the Forces of Development

It is not enough simply to point out the irony that the centralizing forces that sought to preserve traditional communal tenures also contributed to creating a modern economy with its concomitant market forces. Whether or not market and communal interests can be labeled exclusively “Western-colonial” or “customary,” any reform of the tenure system must reconcile those forces.

1. Changing the Fundamental Landowning Unit from the Mataqali to the Family Will Better Adapt the Land Tenure Institution to Custom

Both history and current practice support reforming the *mataqali*-based land tenure system to better conform to tradition and custom. The colonial history reveals that while the GCC initially proposed individual ownership, Gordon pushed for communal, inalienable rights because contemporary 19th-century social theory located Fiji at a stage of social development that coincided with such rights.¹⁷² Still, Native Lands Ordinance 21 (1880) declared native land inalienable to non-Fijians “until the native race be ripe for a division of such community rights among individuals.”¹⁷³ Though individual rights are considered the “Western view”

¹⁶⁸ FIJI GOVERNMENT ONLINE PORTAL, NATIVE LAND TRUST BOARD VANUA DEVELOPMENT CORPORATION LTD., Apr. 21, 2004, available at http://www.fiji.gov.fj/publish/page_2311.shtml (last visited Jan. 14, 2005).

¹⁶⁹ Press Release, Native Land Trust Board, NLTB Announces I.T. Contract (Apr. 2003), available at http://www.nltb.com.fj/press_release/2003/april/press_14.html (last visited Jan. 14, 2005).

¹⁷⁰ Press Release, K. Bakani, Native Land Trust Board, NLTB’s IT Upgrade (Apr., 2003), available at http://www.nltb.com.fj/press_release/2003/april/press_16.html (last visited Jan. 14, 2005).

¹⁷¹ *FIJI: Cabinet Endorses Vanua Development Corporation*, PACIFIC MAGAZINE AND ISLANDS BUSINESS, Apr. 26, 2004, available at <http://www.pacificmagazine.net/pina/pinadefault.php?urlpinaid=11352> (last visited Jan. 14, 2005).

¹⁷² For a discussion of Gordon’s reliance on Lorimer Fison and Lewis H. Morgan’s theories of social evolution, see FRANCE, CHARTER, *supra* note 8, at 117-123; Ward, *Diverging Realities*, *supra* note 11, at 207.

¹⁷³ Native Lands Act, Ordinance No. 21, § 3(iii) (1880) (Fiji); Ward, *Diverging Realities*, *supra* note 11, at 207.

of property,¹⁷⁴ it cannot be said that Fijians ever recognized land rights strictly along *mataqali* lines.¹⁷⁵ Even today, Fijians may identify themselves with one *mataqali* for purposes of official land registrations, but belong to another for social and ceremonial purposes.¹⁷⁶

As a practical matter, land use follows the family, not the larger *mataqali* clan. As recently as 1983, between thirty-seven and eighty-eight percent of gardens surveyed lay outside the planter's land.¹⁷⁷ Rural development projects based on the idea that production is highest on farms owned and operated by a single family¹⁷⁸ have worked in the past (in the long-lived sugar industry) and in the present (Fiji's cattle farms), while producing tenures across *mataqali* boundaries.¹⁷⁹

By assigning land rights to the *mataqali* the modern tenure system triggered efforts to secure rights either by manipulating or circumventing the NLTB process.¹⁸⁰ The result has been economic inequalities that increase social tension and fragment the community.¹⁸¹ Fencing and self-leasing represent two such effects of the modern tenure system. By custom, an individual whose *mataqali* could not supply his need for land could plant outside his *mataqali*, but the availability of leasing and commercial planting gives the *mataqali* an economic incentive to fence out these "freeloaders."¹⁸² As *mataqali* increase or decrease in population, the inflexibility in the modern tenure system allows some to grow cash crops while others cannot meet subsistence needs.¹⁸³ Entrepreneurial farmers must lease land through the NLTB from their own *mataqali* to secure a right upon which loans to buy machinery can be made. A shared interest in economic development between the NLTB and the farmer often results in the best agricultural land going to the farmer, leaving others with less productive poorer soils or slopes.¹⁸⁴ Recognizing the family as the landowning unit will remove the

¹⁷⁴ Kamikamica, *Fiji: Making Native Land Productive*, *supra* note 42, at 228.

¹⁷⁵ Ward, *Diverging Realities*, *supra* note 11, at 202-03. Native Lands Ordinance 21 (1880) acknowledged that "lands of the native Fijians are for the most part held by *mataqali* or family communities as the proprietary unit according to ancient customs." Native Lands Act, Ordinance No. 21, pmb. (1880). Kamikamica, *Fiji: Making Native Land Productive*, *supra* note 42, at 227-28. The NLTB recognizes the family, *tokatoka*, but the *mataqali* remains the primary landowning unit. *See id.* at 227.

¹⁷⁶ Ward, *Diverging Realities*, *supra* note 11, at 202-03.

¹⁷⁷ *Id.* at 227.

¹⁷⁸ Roy L. Prosterman & Tim Hanstad, *Land Reform in the 21st Century: New Challenges, New Responses*, RDI Report on Foreign Aid and Development No. 117, at 4 (Mar. 2003).

¹⁷⁹ Ward & Kingdon, *Land Tenure in the Pacific Islands*, *supra* note 160, at 59.

¹⁸⁰ *See supra* Part IV.A.

¹⁸¹ R. Gerard Ward, *Fijian Villages: A Questionable Future?*, in *LAND ISSUES IN THE PACIFIC* 133, 133-134, 139, 143 (Ron Crocombe & Malama Meleisea eds., 1994).

¹⁸² Ward, *Diverging Realities*, *supra* note 11, at 233.

¹⁸³ *Id.*

¹⁸⁴ Overton, *Land Tenure and Cash Cropping in Fiji*, *supra* note 10, at 122-23.

economic incentive to hoard *mataqali* land. Entrepreneurial farming could still exist as a joint venture between families coordinated through the NLTB with revenues indexed to efficient use of resources.

Though shifting land rights to the family may yield a more equitable distribution of wealth, it also threatens to expand current land use practices that are changing the physical and cultural landscape. Land reform therefore requires a regulatory framework, which could be provided by the NLTB, to protect environmental and cultural resources that define Fijian identity. In addition to creating internal economic inequalities, self-leasing has fragmented the Fijian landscape by changing it from a village surrounded by garden plots to scattered homesteads typical of “Indian-settled rural areas.”¹⁸⁵ The new pattern of development also accelerates deforestation and soil erosion,¹⁸⁶ two of Fiji’s greatest environmental threats.¹⁸⁷ Though pre-colonial customary practice was not necessarily environmentally sound,¹⁸⁸ codifying family-based land rights in today’s modern economy could further speed fragmentation and degradation. In promoting sustainable *vanua* practices, ecological stewardship could not be more in keeping with the NLTB’s mandate to preserve communal tradition and protect future interests—*vanua* means, after all, the land and the people.¹⁸⁹

2. *Acknowledging Vakavanua Leases Will Promote Development in Keeping with Custom*

To facilitate growth, acknowledge custom, and ease tensions resulting from bureaucratic inefficiency, the NLTB should acknowledge and legitimate *vakavanua* leases. In policy terms, such reform would foster stability and support the rule of law. *Vakavanua* leases grant rights to Fijian or non-Fijian “strangers,” people outside the *vanua*.¹⁹⁰ The very existence of *vakavanua* leases suggests that the Fijian interests the NLTB was established to serve lie outside the current communal tenure system. *Vakavanua* leases are frequently used to circumvent the NLTB leasing system, which has been

¹⁸⁵ Ward, *Diverging Realities*, *supra* note 11, at 237.

¹⁸⁶ W.C. Clarke, *Traditional Land Use and Agriculture in the Pacific Islands*, *supra* note 64, at 24.

¹⁸⁷ Boydell, *Consultancy Report*, *supra* note 3.

¹⁸⁸ W.C. Clarke, *Traditional Land Use and Agriculture in the Pacific Islands*, *supra* note 64, at 16.

¹⁸⁹ Numerous studies and articles point to a causal relationship between environmental quality and social and political well-being. See Davis & Trebilcock, *Legal Reforms*, *supra* note 147, at 25. Studies also show a positive connection between sound environmental policy and political stability. See also James Kraska, *Sustainable Development is Security: The Role of Transboundary River Agreements as a Confidence Building Measure (CBM) in South Asia*, 28 YALE J. OF INT’L L. 465, 466 (2003).

¹⁹⁰ Overton, *Land Tenure and Cash Cropping in Fiji*, *supra* note 10, at 121.

considered "burdensome"¹⁹¹ and monopolistic.¹⁹² *Vakavanua* leases to non-Fijians are illegal, but so common that nothing is done to stop the practice.¹⁹³ This fact alone undermines the legitimacy of the NLTB and therefore inhibits its ability to rein in the abuse of *vakavanua* leases.¹⁹⁴

The economic benefits of *vakavanua* leases would allow for a more equitable distribution of rents than through the NLTB. With up to twenty-five percent of rents going to the NLTB and over twenty-two percent going to the Chiefs, often without redistribution, individual *mataqali* members do not realize significant income from NLTB leases.¹⁹⁵ Because *vakavanua* leases allow direct negotiation, owners receive up to ten times the NLTB payments with more flexible short-term leases, while tenants receive access to better land.¹⁹⁶ Though tenants lose a measure of tenure security guaranteed by the NLTB, this may be offset by the interest of the owner in retaining a rent that more accurately reflects the market value.

The constitutional provisions for paramountcy¹⁹⁷ and land administration according to custom¹⁹⁸ support *vakavanua* leasing. *Vakavanua* leasing represents Fijian custom adapting to new ideas of development and property. While this may be viewed as the appropriation of traditional *vakavanua* gifting of land to relatives by the Western-style market economy,¹⁹⁹ formal recognition of the process incorporates custom into the current legal framework in a way that empowers rather than marginalizes stakeholders. For example, the NLTB does not currently need to consult *mataqali* members to lease non-reserve land.²⁰⁰ As a result no individual in the *mataqali* has standing to challenge NLTB decisions, thus creating a source of anxiety for native owners.²⁰¹ The original GCC

¹⁹¹ Crosby, *Fijian Cosmology, Vanua, Development and Ecology*, *supra* note 113, at 59.

¹⁹² B.C. Prasad, *Property Rights, Economic Performance and the Environment in Fiji: A Study Focusing on Sugar, Tourism and Forestry* (1998) (unpublished Ph.D. dissertation, University of Queensland, St. Lucia), cited in Boydell, *Consultancy Report*, *supra* note 3, at 23.

¹⁹³ Overton, *Land Tenure and Cash Cropping in Fiji*, *supra* note 10, at 121.

¹⁹⁴ Unregulated *vakavanua* leasing in and around cities is viewed as a problem because it has produced large squatter settlements. Kamikamica, *Fiji: Making Native Land Productive*, *supra* note 42, at 232.

¹⁹⁵ Ward, *Diverging Realities*, *supra* note 11, at 221-22.

¹⁹⁶ Overton, *Land Tenure and Cash Cropping in Fiji*, *supra* note 10, at 129; Ward, *Diverging Realities*, *supra* note 11, at 240.

¹⁹⁷ Constitution Amendment Act of 1997, no. 13, ch. 2, § 6 (j) (Fiji).

¹⁹⁸ Native Lands Act, ch. 133, § 3 (1985) (Fiji); Constitution Amendment Act of 1997, ch. 2, §6(b) (Fiji).

¹⁹⁹ H.J. Rutz, *Capitalizing on Culture: Moral Ironies in Urban Fiji*, *COMPARATIVE STUDIES IN SOCIETY AND HISTORY* 29, 533-57 (1987).

²⁰⁰ Native Land Trust Act, ch. 134, §§ 4(1), 7-9. Kamikamica, *Fiji: Making Native Land Productive*, *supra* note 42, at 230.

²⁰¹ Ward, *Diverging Realities*, *supra* note 11, at 244.

recommended a system of property rights that empowered the individual with land divided so “each individual would have his own allotment.”²⁰² Though legitimating *vakavanua* leasing may reduce the power of the Chiefs, codifying the current practice would yield something closer to what the Chiefs first recommended in 1876. *Vakavanua* leasing, as a customary practice, thus represents the crucial element of self-determination at its most fundamental level, while upholding the rule of law preserved by the constitution.

3. *Reform of Fiji’s Cultural Institutions Should Be Localized*

Along with these three kinds of law [political, civil, criminal], goes a fourth, most important of all, which is not graven on tablets of marble or brass, but on the hearts of the citizens. This forms the real constitution of the State.²⁰³

~ Jean Jacques Rousseau

Despite the irony in citing the Western canon to propose localized reform, Rousseau’s words appropriately distinguish the law as a product of custom from the law as a product of institutions (imported or otherwise). Accordingly, a solution to Fiji’s land tenure conflict requires localized institutional reform, not simply economic or legal reform. Economic theory typically holds that development and land tenure work together successfully when both the user and owner have a secure, alienable right.²⁰⁴ The claim that a legal framework securing individual, alienable property rights promotes development does not, however, have sound empirical support.²⁰⁵ On the other hand, evidence does support reforming the organizations that administer and enforce property laws as a way to promote development.²⁰⁶ Reforming the NLTB to better reflect *vakavanua*, the transformation between the past and present in the way of the land,²⁰⁷ offers an opportunity for Fiji to successfully address the land tenure conflict.

²⁰² *Id.* at 249.

²⁰³ Jean-Jacques Rousseau, *THE SOCIAL CONTRACT*, bk. II, ch. 12 (1762).

²⁰⁴ Jean Bijon, *Economic Considerations*, in *CUSTOMARY LAND TENURE AND SUSTAINABLE DEVELOPMENT* 37, 40 (Ron Crocombe ed., 1995).

²⁰⁵ Davis & Trebilcock, *Legal Reforms*, *supra* note 147, at 27.

²⁰⁶ *Id.* at 21.

²⁰⁷ *Vakavanua* may be translated as “the way of the land,” in which the idea of continuity between past and present is inherent. Margaret Jolly, *Custom and the Way of the Land: Past and Present in Vanuatu and Fiji*, 62 *OCEANIA* 330, *quoted in* Margaret Rodman, *Breathing Spaces: Customary Land Tenure in Vanuatu*, *supra* note 19, at 66.

Institutions, such as land tenure or cultural identity, have been viewed as evidence of an imperfect market economy;²⁰⁸ they exist only to reduce uncertainty in human exchange.²⁰⁹ As Fiji's colonial history shows, the NLTB, an organization that represents the institution of land tenure, exists because stakeholders sought to reduce the uncertainty of property transactions. Though considering Fiji's land tenure conflict in the context of a perfect market economy may be inimical to preserving cultural identity,²¹⁰ the inflexibility of the tenure system under the NLTB weakens the very institution that organization is charged to protect: *vanua*, the land and people at the heart of Fijian identity. *Vakavanua* leases, for example, represent the community's adaptation to its local economic circumstances to make transactions more efficient. As they become more prevalent, the NLTB must incorporate the function they serve in order to make the transactions more secure and legitimate itself as a cultural institution.²¹¹ If "the heart of development policy must be the creation of polities that will create and enforce efficient property rights,"²¹² then the NLTB must secure what the heart of the community, both Indian and Fijian, seeks—an efficient market for property rights. Ideally, an efficient market produces the equitable balance of property interests that measures the success of democracy.²¹³

²⁰⁸ "In a world of instrumental rationality institutions are unnecessary; ideas and ideologies don't matter; and efficient markets—both economic and political—characterize economies. . . . In such a world ideas and ideologies play a major role in choices, and transaction costs result in imperfect markets." North, *The New Institutional Economics and Development*, *supra* note 85, at 1.

²⁰⁹ *Id.* at 2.

²¹⁰ At the World Bank conference on land policy, Spike Boydell, Head of the Department of Land Management and Development for the University of the South Pacific in Fiji responded to Tim Hanstad of the University of Washington's Rural Development Institute by noting that the South Pacific did not garner much mention. Boydell advocates developing a conceptual framework distinct from the "Western" capitalist models to provide "locationally specific" solutions to conflict. Posting of Dr. Spike Boydell, spike.boydell@usp.ac.fj., to Development Forum (Mar. 7, 2001), at <http://www2.worldbank.org/hm/hmlandpolicy/0010.html> (last visited Jan. 14, 2005). He frequently quotes Aikman: "[T]he problems of a particular country are the problems of that country alone. . . suited to its own physical environment, culture and economy." C.C. Aikman, Welcome Address at the Symposium on Land Tenure in Relation to Economic Development (Sept. 1, 1969), *quoted in* Boydell, *Evolving a Pacific Property Theory*, *supra* note 43, at 2, and *Consultancy Report*, *supra* note 3, at 21.

²¹¹ This is not to say that the NLTB need embrace every type of "illegitimate" transaction. "Good will" payments, for example, are made outside the NLTB process to secure land rights, but rather than providing security, they often resemble a form of extortion leading to violence. See *FIJI: Villagers Demand Money from Hotel*, PACIFIC MAGAZINE AND ISLANDS BUSINESS, Mar. 22, 2004, available at <http://www.pacificmagazine.net/pina/pinadefault.php?urlpinaid=11022> (last visited Jan. 14, 2005); see also Editorial, *Fiji Must Stand Firm Against Greedy Landowners*, FIJI SUN: PACIFIC ISLANDS REPORT, Apr. 1, 2004, available at <http://archives.pireport.org/archive/2004/april/04%2D01%2Ded2.htm> (last visited Jan. 14, 2005).

²¹² North, *The New Institutional Economics and Development*, *supra* note 85, at 7.

²¹³ See Robert F. Kennedy, Jr., *Crimes Against Nature*, ALTERNET, Nov. 24, 2003, available at <http://www.alternet.org/story/17252/> (last visited Jan. 14, 2005). Successful development in this context means working toward conflict resolution through an equitable distribution of property or use rights.

Certainly, it would be too much to expect that economic or legal reform of the land tenure system under the NLTB would entirely resolve the broader conflict embedded in Fiji's political institutions. The past experiences of law and development refute the claim that economic solutions will spill over to democracy and human rights.²¹⁴ Though the 1997 constitutional reforms recognize human rights as an independent goal,²¹⁵ the current constitution still relies on the colonial past to link ethnicity to property rights.²¹⁶ Contrary to the purpose of the modern rule of law,²¹⁷ Western support for "the rule of law" therefore perpetuates tension built into the constitutionally sanctioned land tenure institutions as long as those institutions resist grass-roots reform.²¹⁸ The current thinking is that decentralizing economic development and providing a legal framework to support local efforts to establish a market will promote development.²¹⁹ That said, the NLTB represents a legal institution through which the socio-political community can carry on non-violent negotiation, thereby establishing human rights and principles of equality as fundamental interests

²¹⁴ On law and development in the 1970s, see David M. Trubek, *The "Rule of Law" in Development Assistance: Past, Present, and Future* 5-6 (June 2003), available at <http://www.law.harvard.edu/programs/elrc/events/2002-2003/papers/dtrubek.doc> (last visited Jan. 14, 2005). Fiji's Minister of Foreign Affairs noted that the form of government natural to capitalism is oligarchy, government by the rich, not democracy, adding that the Pacific's "hierarchical traditional structure" does not "reconcile itself to the democratic principles of equality and liberty." Kaliopate Tavola, *The Challenges of Democracy in the Pacific, Remarks at the 33rd Pacific Islands Forum* (Aug. 15, 2002), available at <http://www.pacificforum.fiji.gov.fj/speeches/02.html> (last visited Jan. 14, 2005). One has to wonder to which "traditional" hierarchy he refers.

²¹⁵ See Constitution Amendment Act of 1997, ch. 1, § 3(b)(i) and (ii).

²¹⁶ See Constitution Amendment Act of 1997, pmbl, para. (a) (Fiji) (recognizing the Deed of Cession of 1874); see also Constitution Amendment Act of 1997, no. 13, ch. 2 § 6(b) and (j) (Fiji) (establishing the "paramountcy of Fijian interests as a protective principle").

²¹⁷ The modern rule of law may be defined as laws that are public knowledge and equally applied to everyone. The modern market economy, based on property rights and contracts, depends on the rule of law. Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFFAIRS 2, 1-2 (1998), available at <http://www.ceip.org/files/Publications/rulelaw.asp?from=pubauthor%20> (last visited Jan. 14, 2005).

²¹⁸ The United States, for example, challenged the appointment of Laisenia Qarase as Fiji's Prime Minister on the basis of the 1997 constitution upheld by Fiji's Court of Appeal. The United States called for "respect for the rule of law" and return to "democratic government." *Reappointment*, *supra* note 5. Democratically elected Prime Minister Mahendra Chaudhry, however, inflamed Fijian nationalist fears and tension increased. See *Indigenous Fijian Concerns*, *supra* note 3. Furthermore, Fiji's Minister for Foreign Affairs cites the "imposition" of democracy as a source of political tension. Tavola, *The Challenges of Democracy*, *supra* note 214. Meanwhile, Qarase claims that Fiji has adopted the "European culture" of "parliamentary democracy, the rule of law and constitutions organized for orderly management of our affairs." Prime Minister Laisenia Qarase, Opening Address at the 33rd Pacific Islands Forum (Aug. 15, 2002), available at <http://www.pacificforum.fiji.gov.fj/speeches/03.html> (last visited Jan. 14, 2005).

²¹⁹ The World Bank supports removing the state from initiating and promoting economic development; instead, law can facilitate market transactions by defining property rights and enforcing contracts. WORLD BANK GROUP, *RULE OF LAW AND DEVELOPMENT MOVEMENT* (2001), <http://www1.worldbank.org/publicsector/legal/ruleoflawanddevelopment.htm> (last visited Jan. 14, 2005).

of the indigenous culture. Understood as an arena for bloodless struggle,²²⁰ legal institutions such as the NLTB present an opportunity for the rule of law to become a localized tool to mitigate political tension and promote development according to traditional ways.

V. CONCLUSION

Distinguishing between "customary" and "traditional" institutions is not a science, but the exercise sets the land tenure conflict in a context that facilitates peaceable solutions. Recent political unrest in Fiji may be traced to the country's colonial history. The paramountcy of Fijian interests established by Gordon's interpretation of the Deed of Cession currently represents the fundamental "tradition" of ownership by indigenous Fijians. The NLTB charter mandates protecting that "tradition."²²¹ The custom of pre-colonial dispute resolution, however, was arguably more dynamic, less, centralized, and hence more adaptive. Though it cannot be said that custom rendered pre-colonial Fijian society more peaceful, by better reflecting customary land tenure as it is practiced today, the rule of law can provide a bloodless arena for free negotiation between interested parties.

Legitimizing *vakavanua* leases and shifting focus to families as a smaller landowning unit would incorporate custom into the current tenure system while promoting the political and economic interests of the multi-ethnic community as a whole. While Prime Minister Sitiveni Rabuka is correct in saying that part of Fiji's heritage has been taken away, he is also correct in warning against embedding ethnic tension in Fiji's political institutions.²²² So long as tradition based on Fiji's colonial experience is conflated with custom expressed as the way of the people past and present, the struggle to protect cultural identity will remain misplaced. Fiji's constitution provides for "the ownership of Fijian land according to Fijian custom."²²³ Embracing a developmental view of custom will facilitate economic and political stability and thus better preserve the broader cultural identity, the heart of Fiji, the constitutional provisions are intended to protect.

²²⁰ See Trubek, *The "Rule of Law" in Development Assistance: Past, Present, and Future*, *supra* note 214, at 19.

²²¹ Native Land Trust Act, ch. 134, § 4(1) (1985) (Fiji).

²²² See *supra* note 18.

²²³ Constitution Amendment Act 1997, no. 13, ch. 2, § 6(b) (Fiji).

