

Breathing Spaces at the Sea: The Ambiguity of Fijian Inshore Territorial Ownership

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Abstract

The question of ownership of the inshore territory in Fiji has been a debated issue for over a century. Alienated to the British colonial government in 1874, the inshore fishing grounds were expected to be returned to their customary owners, just as what has been done to the customary lands. Instead, the ownership is still vested in the hands of the government, even after the Independence in 1970. The coastal customary owners have the usufructuary fishing rights in marked inshore territories and are usually the primary managers of these areas. This system of duality has created many confusing issues regarding coastal development, business, and fisheries. Based on interviews with government officials, NGO workers and an ethnographic study at a Fijian coastal village, this article argues that this ambiguity is intentionally maintained to balance development and indigenous identity. On the one hand, it allows business opportunities monitored by the government and NGOs to slip in; on the other hand, it relies heavily on local/regional Fijian leadership to negotiate and control. It is far from a perfect system but it will not be changed in the foreseeable future.

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Introduction

In August, 2006, the then Prime Minister of the Fiji Islands, Laisenia Qarase and his SDL government attempted to pass a “Qoliqoli Bill” that would return the proprietary rights of all internal waters, archipelagic waters, and internal seas from the state back to the indigenous communities who hold usufructuary rights in their customary fishing grounds (*i-qoliqoli*¹) spread out in these marine territories. By this process, all *qoliqoli* would be deemed as “native reserves”². This proposal was vehemently opposed by Fiji’s tourism industry whose establishments were mostly situated along the beaches and reefs. Should the bill become effective, hotels and resorts would have to deal with multiple claimants and more complex scenarios. It was also argued that the urban coastal squatters whose ethnicity ranged from Indo-Fijians, indigenous Fijians to Solomon Islanders would face more demands, even possible expulsion, from the customary owners empowered by such legislation (Bryant-Tokalau 2010). All speculations about the impact of this bill were set aside as Commodore Voreqe Bainimarama staged a military coup on December 5th, 2006 and overthrew Qarase’s government. It was stated that the Qoliqoli Bill as well as two other controversial bills were the reason behind this seizure of power, for it was “racist” and would have hindered Fiji’s economic development. Today the ownership of the physical space of the inshore territorial waters was still vested in the hands of the state, which is clearly stated in section 9 of the Marine Space Act and section 2 of the Crown Lands Act. Furthermore, according to section 3 of the Continental Shelf Act, the state also has sovereignty over natural resources in the seabed or subsoil. On the other hand, section 13 of the Fisheries Act gives the indigenous communities exclusive fishing rights in their customary fishing grounds. They are usually the *de facto* owner and the primary manager of the marine ecosystem. Through local and regional traditional leaderships, they are able to design management plans, declare Marine Protected Areas (MPA), and to accept or reject business investors and commercial fishers who wish to utilize their fishing grounds (Dorsett 2010).

¹ *I-qoliqoli*, or widely simplified as just *qoliqoli*, is a Fijian term referring specifically to the fishing grounds within which *yavusa* (tribe/village) or *vanua* (region/state) hold customary fishing rights, either independently or jointly. It can be in the inshore territories, around outer islets, or in inland freshwaters.

² *Qoliqoli Bill 2006*. <http://www.fjibuzz.com/bills-and-acts/the-qoliqoli-bill-2006>.

This has presented a unique situation that many researchers have termed “dual ownership” of Fiji’s inshore territorial waters (Calamia 2003; Ledua 1995; Muehlig-Hofmann 2008; Vanualailai 2008:242) which at times has led to conflicts and confusions. To begin with, while being almost an autonomous decision-making unit regarding fisheries management, coastal communities are still not the outright owners of the fishing grounds and their marine resources (Adams 1993). Therefore, they don’t have formal authority to stop poachers and commercial infringement (Clarke and Jupiter 2010). Even though traditional chieftains are often called upon in dealing with *qoliqoli* management, the leadership is not always acknowledged even within the community (Cooke and Moce 1995). Different interpretations of the *qoliqoli* boundaries also have resulted in disputes (Ruddle 1995). The “goodwill payments” that communities receive from investors and commercial fishers are also not well-regulated (Prasad and Tisdell 2006:237). Why, then, didn’t the *qoliqoli* ownership in Fiji move towards a more definite and secured property rights regime? Why were both state and customary ownerships allowed to coexist in the inshore territories?

This paper attempts to answer this question by placing the ambiguous inshore territorial ownership in the history of Fiji’s land and marine tenure systems created by British colonial officials. Because of the British common law tradition that differentiates between land and water, by which the latter cannot be possessed by any agency, the marine space was treated as an open access commons allowing both foreign proprietorship and local customary usage to take place. Therefore, unlike lands that were categorized into freehold and native reserves where economic development and native preservation were strictly separated, the marine area was constructed, albeit hesitantly, as an ambiguous space that allowed customary significance to linger, and development initiatives to remain. This is what Margaret Rodman called “breathing spaces” in post-Independence Vanuatu, by which she means a kind of ambiguity that allowed “new ways of doing things to seem old, and old ways to seem new, without old and new coming into conflict and without the contradictions between them becoming abrasive” (Rodman 1995:67). The breathing spaces emerged when the newly independent Vanuatu abolished all freehold lands and returned them to its customary owners. The discourses of *kastom* became the foundation for rural land rearrangements and dispute settlements. Business and development were also given the opportunity to flourish by the endeavors of customary leaders. Rodman concluded that such breathing spaces in rural Vanuatu created flexible solutions before the national government and state law could respond.

While the context of Fiji's inshore territories differ in many ways with that of Vanuatu's customary lands, both have stressed flexible ways to accommodate law, custom, development and indigeneity. With a lot of issues in dire need to be taken care of at the national level, the government of Fiji obviously sees the current *qoliqoli* arrangement as acceptable. Conflicts and confusions do happen, but they are far outweighed by the advantage of having self-regulating communities managing marine resources when the law could not reach, as well as government-mediated projects to continually boost rural development. Moreover, the flexibility that such arrangement provides best suits the current trend of marine resource management in Fiji. I shall elaborate on these points in later sections.

A Brief History of Fiji's Inshore Fisheries

Just like land, the coastal marine area is a vital part of the indigenous Fijian communities, not only in terms of the marine products such as fishes, invertebrates, and sea weeds, but also the territorial customary meanings imbedded within. Both were also ceded to the British Crown in the Deed of Cession in 1874 by Fijian high chiefs and entrusted in the hands of British colonial government. Unlike land, however, of which the majority was immediately returned to Fijian tribes as inalienable property and now 87% is held by customary land-owning unit *mataqali* (clan), the coastal marine area is still under the control of the state. While foreign commercial development was prohibited to enter into the realms of native lands in the early colonial period – a protective policy created by the first governor Arthur Gordon in 1875, the coastal marine area was an open access area to different agencies, in accordance to the tradition of the British common law (Bate 2000; Harris 2001; McCay 1998).

The foreign exploitation of Fijian coastal marine resources began in the 1830s when the *bêche-de-mer* trade found its way into the Pacific (Veitayaki 1994:17; Ward 1972). Traders engaged with local Fijian leaderships according to the customs they understood. Often times, *tabua* (whales tooth) or other forms of gifts were used to seek permission to operate in the customary fishing grounds (Van Der Grijp 2007). These customary arrangements have set up precedence for the interaction between foreigners and local communities. After the Cession in 1874, the British colonial government continued to allow foreigners to share user rights with indigenous Fijians in Fijian waters. In 1880 the Rivers and Streams Ordinance stated that “all waters in Fiji which the natives have been accustomed to traverse ... shall, with the soil under the same, belong to the Crown and be perpetually open to the public for the enjoyment of all rights ...” (Kuemlangan 2004). It wasn't until the 1923 Birds, Games

and Fish Protection Ordinance that the status of traditional fishing rights was recognized, and foreigners who fish in the *qoliqoli* were deemed unlawful (ibid. 2004). However, not only was the boundaries of *qoliqoli* not clearly stated, the enforcement was also sporadic. When James Hornell, the British colonial fisheries expert visited Fiji in 1940, he found out that “fisheries was looked after by no Government officer, and no person was deputed to see to the enforcement of the law Fishery Regulations which are on the Statute Book” (Hornell 1940:1). Under his suggestion, the Fisheries Act was finally adopted in 1942 and became the principal fisheries legal framework for the management of marine resources in Fiji, for both foreigners and indigenous Fijians.

Indigenous coastal communities were mainly involved in low-impact subsistence fishing, but after the Second World War with funding from the national government and international organizations, commercialized fishing ventures flourished among local communities (DeMers and Kahui 2012). Accompanying this development was a growing awareness of customary marine tenure. From 1958 until 1967 the Native Lands and Fisheries Commission began to survey *qoliqoli* territories, mark out boundaries, and register traditional fishing rights in different provinces (British colonial office 1958:99). To this day, 411 such *qoliqoli* were put into record books in the office of the Ministry of *iTaukei* (native) Affairs. While the old statement that “every inch of land in Fiji has an owner” (Pritchard 1866:242) was deemed false, it can certainly be applied to *qoliqoli* as every inch of the coast now has a *qoliqoli* fishing right owner. This type of usufructuary right gives owners of the *qoliqoli* exclusive rights to gather fishes, cockles, and shellfishes in their fishing ground. Such right is not alienable and is transmitted through the patrilineal line of the clan. Anyone who is not a member of the clan is illegal to take fishes in the *qoliqoli*, unless acquiring a license issued by the local Fisheries Department. Any foreigner who wishes to establish commercial marine business in the territory must also obtain permission from the owners of the *qoliqoli* (Adams 1993).

With the development of coastal commercial fishing, reports of overfishing and marine ecosystem damage also emerged. In the 1990s there was a shift of fishery management philosophy in Fiji that put more emphasis on community-based resource management programs. In 2001 a multi-agency platform called Locally Managed Marine Area Network (LMMA) was established and began working with communities, governmental agencies, and NGOs in Southeast Asia and Pacific about sustainable fisheries and marine conservation projects. Fiji became by far the most active country involved in LMMA. In 2010 within a total of 420 LMMA sites spread

among 8 countries in the Pacific, Fiji has 250 of them, involving 388 villages and 235 Marine Protected Areas (MPA) (LMMA 2010).

The Colonial legacy and the Common Law

But if the *qoliqoli* fish rights were firmly legalized, why was the inshore territorial ownership still problematic? For this we have to go back to the colonial history of Fiji's land and marine tenure system. In 1874, due to unmanageable debt crises and emerging social unrest, the high chiefs of Fiji led by the self-proclaimed King of Fiji *Tui Viti*, Ratu Seru Cakobau, ceded the whole country to Her Majesty Queen Victoria and began the British colonial era. In the Deed of Cession, it was declared in the first article that:

...the possession of and full sovereignty and dominion over the whole of the group of islands in the South Pacific Ocean known as the Fijis ... and over the inhabitants thereof, together with the possession of and sovereignty over the ***waters adjacent thereto and of and over all ports harbours havens roadsteads rivers estuaries and other waters and all reefs and foreshores*** within or adjacent thereto, are hereby ceded to and accepted on behalf of Her said Majesty the Queen of Great Britain and Ireland her heirs and successors, to the intent that from this time forth the ***said islands and the waters reefs and other places as aforesaid lying within or adjacent thereto*** may be annexed to and be a possession and dependency of the British Crown.

The sentences highlighted above are considered the legal basis of ceding the Fijian marine areas. The disposition of lands was also stated in article 4, that "the absolute proprietorship of all lands ... shall be and is hereby declared to be vested in Her said Majesty her heirs and successors." But in the last article of the Deed, it was also promised that "all claims to title to land by whomsoever preferred ... shall in due course be fully investigated and equitably adjusted." In 1875, under the direction of Fiji's first governor Arthur Gordon, a Land Claims Commission (LCC) was established to investigate the legitimacy of pre-Cession land transaction between the natives and European estate owners. From 1875 to 1882, more than half of the land claims were disallowed and returned to the hands of native tribes (Ward 1969:3). It was also determined that the natives on their own land should be protected from the harms of capitalist development (such as depopulation, decay of culture), a lesson arduously learned by British colonialists in Australia and New Zealand. A native land tenure system based on Fijian custom understood by the British colonial officials was thus effectuated.

On the other hand, the lands that were approved by LCC for foreign owners and were not returned to the native tribes became the category of “freehold land”. Unlike the policies at issue in the regulation of native land, which sought to balance the protection of the native against the necessities of capitalism, the legal regime governing freehold land was aimed solely at fostering economic development through the efficient use of capital (Riles 2003:197). Freehold lands could be transferred, developed, and assigned with a price. Today only 7% of the lands in Fiji belong to this category. Large-scale estates and plantations that existed before Cession continued to grow after the recognition of freehold lands, experimenting with coffee, cocoa, sugar cane and finally copra. These freehold lands were the corner stone of the young colony’s economy and the mainstay of capital development in Fiji.

On examining colonial legal system in Fiji, legal anthropologist Annelise Riles (2003) argues that there were two separate legal mechanisms at work, which roughly corresponds to the distinct categories of native lands and freehold lands. The first one was carefully crafted by colonial officials to effectuate meaning in native lands, and thus created and objectified a system of Fijian culture. The second one is an instrument to the ends it served, which is the registration of freehold lands. It stripped away any meaning attached to the land, making the process as mechanical as possible. This process has rendered freehold land into an “empty place” (Riles 2006:43), as opposed to native lands as a culturally meaningful site.

If this is the case, then the marine area in Fiji was an ambiguous space moving between those two genres of legal knowledge throughout colonial times. As mentioned earlier, after ceded to the British Crown in the Deed of Cession, the marine area never received the same treatment and investigation as the lands. However, the issue of ownership rights in the fishing grounds were frequently brought up by Fijian high chiefs in the council of chiefs meetings (Anon. 1979:8). The second governor of Fiji William Des Voeux finally promised the chiefs in 1881 that the rights to the reefs would be investigated, but still the colonial government did nothing to secure it afterwards.

The colonial officials nevertheless were constantly pondering on the issue of the fishing grounds. It was obvious that Fijians have held fishing rights in the coast “from time immemorial”. On the other hand, it was also part of the common law tradition that the tidal waters belong to all the subjects of the British Crown. This back and forth has resulted in an oscillation of colonial policies. For example, in 1879 the

government enacted an ordinance to protect *bêche-de-mer*, denying non-Fijians from collecting them. In 1887, however, for the purpose of tax income, the entire reefs of Fiji were opened again to *bêche-de-mer* fishing (Anon. 1979:15).

Why does common law emphasize equal open access rights in the waters? The prevailing British view in the nineteenth century was that the sea and its fish were not private property (van Meijl 2009:171). In this case, what comes into effect is the Riparian Right, meaning that all the riparian owners of a flowing water has equal rights to access it as well as the same responsibilities to maintain it in its natural state. Similarly, every riparian owner is entitled to the free passage of fish up and down the river from the sea to the source (Bate 2000:88). This tradition was then brought to different British colonies and changed the local fisheries management schemes. For example, using colonial cases in the Atlantic coast of British Columbia, Harris argues that the common law doctrine of public right to fish has created an open-access fishery and guaranteed non-Natives access to the marine resources. “Natives gradually became employees, subject to the law of master and servant, in a fishery that they once owned (Harris 2001:203)

In Fiji, this common law tradition went on to another trajectory. In spite of the foreign commercial activities taken place in the marine space, the area was never rendered into an “empty place” as the freehold lands. One of the main reasons is that sea and land are not separate categories in Fijian culture. The Fijian term for land is *vanua*, but it entails customary meanings more than the physical being and could be extended to the sea. For instance, during fieldwork in Taveuni I frequently heard people referring to the Marine Protected Area as *vanua tabu* and the open-access fishing grounds as *vanua tara*. A *vanua* is also a regional polity that incorporates several *yavusa*³ which is the basic *qoliqoli* owning unit in Fiji. As the native lands were empowered by the British colonial policies, so did the marine areas that were considered part of the local chieftainship. It never lost its significance as a crucial aspect of Fijian custom that was so championed by the British colonial officials.

Breathing Spaces, Flexible Arrangements

Now that we have a system that stresses both customary fishing right owners and government sovereignty in the sea, what does this mean to marine resource managements? As mentioned earlier, the trend of inshore fisheries in Fiji today is moving towards conservation and sustainable managements. In 2005, Fiji’s Ministry

³ *Yavusa* is a kinship division that consists of several *mataqali* (clan) and led by a hereditary chiefdom. Its components generally equal to that of a single village.

of Foreign Affairs has proclaimed that by 2020, at least 30% of Fiji's inshore and offshore marine areas will have come under a comprehensive network of MPAs. Most of the existing MPAs in Fiji however are managed by the customary *qoliqoli* owners without financial or infrastructural assistance from the government. Moreover, of all the 235 MPAs in Fiji today, only one (Ulunikoro Marine Reserve in Kadavu, established in 2002) was gazetted and protected by the state law. When I interviewed Fiji's Northern Divisional Fisheries officer Joji Vakawaletabua about this situation, it was explained to me that once an MPA is gazetted, it becomes a permanent MPA. MPAs are understood in Fiji as *tabu*, which is a traditional way of preserving natural resources, as well as demonstration of despotic power (see Williams 1858:234-236). A *tabu* can be put on coasts, lands, rivers and seas; animals, fish, fruit and vegetables. During such period of time, no one should be allowed to get access to these things. It can also be lifted, thus making *tabu* a kind of "temporary closure". MPAs in Fiji today are viewed in the same light. Communities generally retain the right to reopen the MPA and harvest the marine resources should special circumstances arise, i.e. a funeral or wedding. As a result, they would prefer not to have their MPA written in the law.

Why then, a full ownership cannot be given to communities for them to better exercise this autonomy? Here officer Joji offered a very interesting statement which I shall quote in full in the following:

"Mr. Lin, this is just a good example: The land is owned by the *mataqali* (note: clans in Fiji), [but] still no development [happened]. We tell them you can do aquaculture, fish farming, pearl farming, but nothing! Good water sources, good soil type, but nothing. When someone started a small project, the *mataqali* go for him (note: putting him down). The big piece of land is still empty there. That's owned by *mataqali*. But in the sea it's the *yavusa*. See now, we are establishing 20 seaweed farms, from Dakuniba right to Nukubalavu. The government gave free materials. It's an inter-department approach: Fisheries, Provincial [Office], iTaukei Affairs and from National Planning. 20 villages! The fund was about \$60,000. Free seedlings were given. We have the market here. We have a market now and [it] wants 500 metric tonnes a month. Just imagine that!

He has juxtaposed the inshore territorial ownership issue with Fiji's customary land tenure system. It has been argued by many scholars and commentators that the communal ownership of native lands has been an obstacle to rural development in Fiji. Many lands with great potential to be developed remained fallow because community

members did not have the incentives. Since Independence in 1970, agricultural leases on native lands began to be offered to commercial farmers, but the image of the lack of motivation in communal lands had formed in many government officials' heads. If Joji's observation can reflect the current government's mindset, then the state's presence in the inshore territories will still continue.

Here we can see how the "breathing spaces" in Fiji's inshore territorial waters differ from Vanuatu's case. In Vanuatu, development was brought by the traditional warrior chiefs. They accumulated gardens from their followers and even purchased uninhabited lands to establish large-scale plantations. From these endeavors they were able to expand into business in non-customary fields like trucking or retailing (Rodman 1995:102). Rodman argued that they utilized *kastom* to pursue these fortunes, but the nature of these transactions was nothing customary. They were the "Masters of Tradition", making new ways to seem old, old ways to look new. In Fiji, however, development is considered stimulated by the government, but they also have to utilize discourse of tradition to work with communities. The MPA is a good example that shows how new ways of marine conservation can be interpreted as traditional, thus creating flexible arrangements to accommodate both the state and the communities.

Conclusion

Recently several legal changes and processes of reformation have been made in Fiji to create a clearer framework for the inshore territorial ownership situation. For starters, the latest draft of 2013 constitution was released on August 22nd by the government of Fiji. In section 30, it was stated that "All minerals in or under any land or water, are owned by the State, provided however, that the owners of any particular land (whether customary or freehold), or of any particular registered customary fishing rights shall be entitled to receive a fair share of royalties or other money paid to the State in respect of the grant by the State of rights to extract minerals from that land or the seabed in the area of those fishing rights." This not only reaffirms the state's sovereignty over the natural resources in the fishing grounds, but also recognizes the *qoliqoli* owners' right to receive royalties. At the same time, the old ways of using an unregulated "goodwill payment" to compensate customary owners were deemed illegal by the iTaukei Land Trust Board⁴.

On the other hand, three decrees were being designed to replace the Fisheries Act.

⁴ FijiSun May 16, 2012. <http://www.fijisun.com.fj/2012/05/16/goodwill-cash-stopped/>

These are the Offshore Fisheries Management Decree, Aquaculture Decree, and Inshore Fisheries Decree, among which only the Offshore Fisheries Decree has been passed in the cabinet in December, 2012. One of the main focuses of the Inshore Fisheries Decree, already in its third draft, is to address the poaching problems happening in *qoliqoli* and MPAs. If passed, “honorary fish wardens” from the village will be empowered to search boats, examine fishing permits, and bring the suspects to the nearby authorities. However, I was told by persons who were in the meetings regarding the Decree that the government was still hesitant of release more power to the communities and this is why it is still being reviewed.

All signs have pointed out that the ambiguous situation of Fiji’s inshore territorial ownership will remain status quo in the foreseeable future. This is by no means a perfect system, but it gives a government that already has so many issues in hand (new constitution, coming election, post-Coup transitions ...etc.) a “breathing space”, without compromising indigenous rights, development prospectus, and the state’s interests.

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