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DEFINING GROUP RIGHTS AND DELINEATING SOVEREIGNTY: A CASE FROM THE REPUBLIC OF FIJI

JOSEPH E. BUSH^{*}

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INTRODUCTION

Tensions among Fiji's distinct ethnic communities¹ have shaped political dynamics in Fiji since colonial times. In recent years, how-

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1. See FIJI CONSTITUTION REVIEW COMM., *THE FIJI ISLANDS: TOWARDS A UNITED FUTURE*, PARL. PAPER NO. 34, at 31 (1996). Approximately half of the Fiji electorate is the indigenous Pacific Islanders of Fiji. *See id.* The other half of the population is of Indian origin, largely the descendants of British indentured laborers. *See id.* The Fiji Constitution Review Commission estimated the percentage of indigenous Fijians at 50.7% and the number of indo-Fijians at 43.5%. *See id.* Estimates showed all other ethnic groups to comprise 5.8% of the population. *See id.* The 1986 census (taken prior to the coups of 1987) showed figures of 46% and 49% for indigenous and indo-Fijians respectively. *See id.* The results of another census, conducted concurrent with the work of the Commission, were not yet

ever, conflicting currents in Fiji's bicultural and biracial society² have presented particular problems for the nation's constitutional governance, and have prompted a formal review of Fiji's Constitution over the last three years.

Of fundamental importance in the recent review of Fiji's Constitution are: (1) the recognized rights of the indigenous people to their traditional lands; (2) the right of the indigenous people to self-determination within this bicultural society; and (3) the resulting implications for national sovereignty. In particular, this essay explains the strong popular tendency to interpret the right to self-determination in terms of the paramountcy of indigenous Fijians over other ethnic groups in political life³ and how this link is partially justified by appeal to the collective right of indigenous Fijians to ownership of eighty-three percent of Fiji's land.⁴

The popular debate about indigenous Fijian self-determination presents the problem as a competition among different ethnic groups for sovereign rights in Fiji. A constitutional review, however, reveals a more fundamental tension between the individual and collective rights of indigenous Fijians themselves, with regard to both self-determination and land ownership. As these rights are more clearly defined through the constitutional review process, tensions become salient, rights become more limited in scope, and the need for compromise becomes apparent. Nevertheless, these apparent limitations

tabulated when this paper was written.

2. See MANFRED ERNST, *WINDS OF CHANGE: RAPIDLY GROWING RELIGIOUS GROUPS IN THE PACIFIC ISLANDS* 206 (1994). The indigenous Fijians are overwhelmingly Christian and primarily Methodist (74.2%). See *id.* The indo-Fijians are primarily Hindu. See *id.* at 223. Approximately one-sixth of the indo-Fijians are Muslim; only about two percent are Christian. See *id.*

3. See SABRINA P. RAMET, *WHOSE DEMOCRACY? NATIONALISM, RELIGION, AND THE DOCTRINE OF COLLECTIVE RIGHTS IN POST-1989 EASTERN EUROPE* 9 (1997) (referring to this understanding of self-determination as the "hegemonist variant" of the collective rights doctrine). This doctrine supports societal equality as a whole by asserting that members of the state-forming nation are empowered to protect their culture, language, and history but members of non-state-forming nations are not. See *id.* The interpretation of self-determination advocated by the Commission, conversely, corresponds with the "autonomist variant" of self-determination such that societal subgroups enjoy different rights. See *id.*

4. See EDDIE DEAN & STAN RITIVI, *RABUKA: NO OTHER WAY* 35 (1988) (emphasizing the importance of land to the indigenous Fijian culture).

and compromises are perhaps necessary if the concept of group rights is to be effective in shaping the governing structures of Fijian society and if these same governing structures are to protect and enforce such rights.

I. THE 1990 CONSTITUTION

Ethnic tension in Fiji is a perennial part of Fiji's political landscape, but a series of military coups ten years ago precipitated the current constitutional crisis. In 1987, a Methodist lay preacher, Lieutenant-Colonel Sitiveni Rabuka, led two military coups to overthrow a democratically elected, multiethnic government with the additional intent of establishing Fiji as a Christian state.⁵ Rabuka justified this military intervention by appealing to the need to protect the rights and interests of indigenous Fijians, especially Fijian ownership of land and political power.⁶

As a result of the coups, the new government abrogated the earlier Constitution, which had been in place since the time of national independence in 1970. A presidential decree then promulgated an amended version of that Constitution in 1990, albeit without significant public input. It is the 1990 Constitution, successfully amended in July 1997, that is the subject of the recent review.

The 1990 Constitution attempted to protect indigenous Fijian interests and rights by structuring political institutions and the electoral process in such a way as to ensure indigenous Fijian control over both the executive and the legislature. Notably, the Constitution divided the electorate into completely separate electoral rolls by ethnic community.⁷ The 1990 Constitution additionally guaranteed that a

5. See *id.* at 17 (elaborating on Rabuka's dream for a Fiji of the future). Sitiveni Rabuka is currently the Prime Minister of Fiji. It is ironic that he became one of the strongest advocates of multiracialism in government during the recent period of Constitution review.

6. See *id.* at 14-19 (describing Rabuka's rule over Fiji).

7. See FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 295 (describing the abolition of communal voting arrangements). The 1970 Constitution also called for the utilization of communal electoral rolls, but in conjunction with a national roll that included all voters regardless of ethnicity. Thus, voters elected some legislators by an ethnic constituency and others by a multiethnic constituency. The 1990 Constitution deletes the provision for a national roll and thus removes the possibility of voters voting across racial lines.

majority of the elected House of Representatives would represent indigenous Fijians.⁸ Moreover, the Great Council of Chiefs, an exclusive body representing the chiefs of greatest traditional authority among indigenous Fijians, appointed the President.⁹ The President appointed the Prime Minister, who in turn appointed a majority of the Senate who, according to the 1990 Constitution, were to be comprised of indigenous Fijians.¹⁰ In addition, the Constitution removed consideration about customary law and land ownership from the jurisdiction of the courts and placed these matters entirely in the hands of the Native Lands Commission.¹¹

The earlier Constitution of 1970 included an ample Bill of Rights based on the European Convention on Human Rights¹² and the United Nations Universal Declaration of Human Rights.¹³ Chapter II of the 1990 Constitution largely retained that Bill of Rights but made emendations that weakened the justiciability of these rights over and against the power of the state. For the most part, the rights enumerated are individual rights including freedom of conscience, religion, expression, movement, assembly, and association. Furthermore, Chapter II offers protection from discrimination based on race, creed, or otherwise.¹⁴

Immediately following the Bill of Rights in Chapter II, however, the 1990 Constitution added a section giving *carte blanche* priority to the corporate interests of the indigenous Fijian people over all of the enumerated individual human rights.¹⁵ The section reads:

8. See FIJI CONST. ch. VI, sec. 41 (1990).

9. See *id.* ch. V, sec. 31.

10. See *id.* ch. III, sec. 55.

11. See *id.* ch. VIII, sec. 100.

12. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

13. *Universal Declaration of Human Rights*, G.A. Res. 71 U.N., U.N. Doc. A/810 (1948).

14. See FIJI CONST. ch. II, sec. 16 (1990).

15. See *id.* ch. II, sec. 21(1). In addition, both the Parliament as a "special act" and the President as "emergency powers" can act in contravention of the entire chapter on human rights. See *id.* ch. 13, secs. 12, 162.

Notwithstanding anything contained in Chapter II of this Constitution Parliament shall, with the object of promoting and safeguarding the economic social, educational, cultural, traditional and other interests of the [indigenous] Fijian and Rotuman people, enact laws for those objects and shall direct the Government to adopt any programme or activity for the attainment of the said objects and the Government shall duly comply with such directions.¹⁶

Not only does this section give blanket justification for the Parliament to contravene the Bill of Rights in the perceived interest of the indigenous people, but its language apparently mandates that Parliament do so. Consequently, both indo-Fijians and indigenous Fijians have expressed dissatisfaction with the 1990 Constitution—criticizing it for protecting the political privileges of a single race and placing the human rights of all Fijians in a precarious position.

II. CONSTITUTIONAL REVIEW

The formal review of the 1990 Constitution has occurred in three phases, beginning with the establishment of an independent Constitution Review Commission ("Commission") on March 15, 1995.¹⁷ The "terms of reference," or mandate, given by Parliament and the President to guide the work of the Commission emphasized the importance of considering "internationally recognized principles and standards of individual and group rights."¹⁸ In particular, the Commission was to "take into account that the Constitution shall guarantee full protection and promotion of the rights, interests and concerns of the indigenous Fijian and Rotuman people," as well as the "rights, interests and concerns of all ethnic groups of people in Fiji."¹⁹ In other words, the purpose of the Commission from its inception was

16. *Id.* ch. II, sec. 21(1); *see also* ERNST, *supra* note 2, at 198 (describing Rotumans as a type of ethnic group). Rotumans are the culturally distinct people of Rotuma, an island that is part of the sovereign territory of Fiji but lies a few hundred kilometers north of the rest of Fiji. *See* ERNST, *supra* note 2, at 198.

17. *See* FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 1 (describing how the President appointed the three members of the Commission, including Chairman Sir Paul Reeves from New Zealand, Tomasi Rayalu Vakatora (indigenous Fijian), and Brij Vilash Lal (indo-Fijian) after a process of consultation).

18. *See id.* at 754.

19. *See id.* at 754-55.

to evaluate constitutional provisions for securing both individual and group rights of the indigenous and other peoples of Fiji.²⁰

After a year of extensive consultation and research, the Commission submitted its 800-page report to the President of Fiji on September 6, 1996 ("Commission Report")—thus completing the second phase of constitutional review.²¹ A bipartisan Select Committee of Fiji's Parliament then had the task of interpreting and implementing this report. The Select Committee issued its recommendations to Fiji's Parliament on May 13, 1997.²² Finally, after discussion and emendation, Parliament succeeded in amending Fiji's Constitution on July 25, 1997.²³

III. SELF-DETERMINATION

The continuing concept of the paramountcy of indigenous Fijian interests as a principle of governance in Fiji dates back to the time of British colonial administration and the introduction of Indian indentured laborers. The first British Governor of Fiji, Sir Arthur Gordon, began the policy of recording and protecting indigenous ownership of land against alienation to settlers in the 1870s. The law currently in place for determining the claims of land ownership by the ex-

20. See *id.* at 40 (listing the international instruments that the Commission particularly utilized as sources for standards on human rights). These instruments include: Charter of the United Nations, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, Apartheid Convention, Convention on the Elimination of all Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, ILO Convention No. 169 on Indigenous and Tribal Peoples, and Draft Declaration on the Rights of Indigenous Peoples. See *id.* The Commission also looked to regional instruments such as the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights. Curiously omitted from the official list is the draft Pacific Charter of Human Rights proposed by LAWASIA. See *Draft Practice Charter of Human Rights, located in* ESSAYS AND DOCUMENTS ON HUMAN RIGHTS IN THE PACIFIC, 145-59 (1992).

21. See FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at xix, 1.

22. See PARLIAMENT OF FIJI, REPORT OF THE JOINT PARLIAMENTARY SELECT COMMITTEE ON THE REPORT OF THE FIJI CONSTITUTION REVIEW COMMISSION, PARL. PAPER NO. 17, at 4 (1997) [*hereinafter* JPSC].

23. See FIJI CONST. amend. (1997).

tended families of indigenous Fijians dates from 1905 and grew out of Governor Gordon's policies.²⁴ This law and several others protecting the land, leadership, and customs of the indigenous Fijians became entrenched in the 1970 Constitution, requiring a parliamentary majority of three-quarters to be altered.²⁵

During the years after independence, however, the idea of the paramountcy of Fijian interests became increasingly synonymous with that of political paramountcy for the indigenous Fijians. This principle subsequently provided justification for the coups of 1987 as well as the provisions calling for the political priority of indigenous Fijians in the 1990 Constitution. Relying on the political paramountcy of indigenous Fijians in Parliament, the Constitution of 1990 requires only a simple majority to alter the laws protecting indigenous Fijian land ownership.²⁶

The argument justifying the political privilege of indigenous Fijians on the basis of the paramountcy of indigenous Fijian interests is exemplified by the submission to the Commission by Reverend Manasa Lasaro, a former President of the Methodist Church in Fiji. Invoking the Deed of Cession of Fiji to Great Britain in 1874, he wrote:

The British Government in acknowledgment of the voluntary surrender and the spirit of faith and trust in which the Fiji islands and all that it possesses were given over to its governance, committed itself to the preservation and paramountcy of Fijian interest. It is important to note that the question of paramountcy was related specifically to the status of the Fijian people as British subjects, because later on the economic interest of the British Government resulted in the introduction of migrant slave labour [indo-Fijians] whose interest inevitably had to be weighed against the in-

24. See generally PETER FRANCE, CHARTER OF THE LAND: CUSTOM AND COLONIZATION IN FIJI 102-07 (1969) (describing the history of land ownership in Fiji).

25. See FIJI CONST. sec. 68 (1970).

26. See *id.* sec. 78. The relaxed restrictions pertaining to the laws governing land tenure may be more than an irony. While most indigenous Fijians trust their chiefs to protect their interests, one can not help but notice that it is the chiefs and not the commoners, who would most likely benefit both from being elected or appointed to Parliament and profiting from any sale of native lands. See LAW, GOVERNMENT AND POLITICS IN THE PACIFIC ISLAND STATES 65 (Yash Ghai ed., 1988) (referring to the increasing "monopolization of political power by the chiefs" as chiefly hegemony).

terest of the "*i taukei*" [indigenous Fijians]. The implication of the concept of paramountcy of Fijian interest meant that prior to being British subjects, the "*i taukei*" had full, complete and absolute governance rights over this nation. It stands to reason therefore that upon independence in 1970, the elimination of the status of the "*i taukei*" as British subjects . . . should have resulted in the restoration of full and absolute control including total governance rights over this nation.²⁷

Reverend Lasaro thus argues from the paramountcy of Fijian interests during the colonial period to a putative absolute right of indigenous Fijians to sovereignty over a multiethnic Fiji during the contemporary period of independence.

The Commission Report assesses the claim of indigenous Fijian paramountcy in light of international human rights instruments and in view of Fiji's political history. The Commission distinguishes, however, between the paramountcy of indigenous Fijian interests and specifically political paramountcy. The Commission concludes that indigenous Fijian interests should be considered paramount. Nevertheless, according to the Commission, this paramountcy of interests does not justify the political paramountcy of indigenous Fijians over other ethnic groups in the governance of Fiji as a whole. Referring to International Labour Organisation Convention 169 on Indigenous and Tribal Peoples²⁸ ("ILO Convention 169") and the Draft United Nations Declaration on the Rights of Indigenous Peoples²⁹ ("Draft United Nations Declaration"), the Commission concludes: "Nothing

27. REV. MANASA LASARO, SUBMISSION OF THE METHODIST CHURCH THROUGHOUT FIJI AND ROTUMA TO THE CONSTITUTION REVIEW COMMISSION 2 (1995). There is some controversy about the authority of this submission; it purports to be an official submission of the Church, but members of the Methodist Standing Committee have told me that it was never presented to them for approval and that it represents the personal opinions of the President. Rev. Lasaro was President of the Church during the time of the Constitution Review; the office was subsequently held by Ilaitia Sevati Tuware who has different views on this subject. It is currently held by Tomasi Kanailagi.

28. International Labour Organisation, Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, *reprinted in* 28 I.L.M. 1382 (1989) [hereinafter ILO Convention 169].

29. *Draft United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/1995/2, Aug. 26, 1994, *reprinted in* 34 I.L.M. 541 (1995) [hereinafter *Draft United Nations Declaration*].

in either instrument gives an Indigenous people superior or paramount rights in taking part in the government of their country.”³⁰

The Commission affirms the right of the indigenous people of Fiji to self-determination, but finds that this right has limited application to the question of sovereignty in a multiracial society. The Commission notes that the Draft United Nations Declaration affirms that indigenous peoples, by virtue of the right of self-determination, “freely determine their political status and freely pursue their economic, social and cultural development.”³¹ The Commission interprets this language, however, as referring to the right of indigenous peoples to “control over their own affairs.”³² Summarizing its position, the Commission states: “We are simply saying that no political community, by reference to either ‘self-determination’ or ‘sovereignty’, can legitimately claim that it has political rights which entitle it to a position of dominance over other groups forming part of the same national society.”³³

The Commission, however, does advocate the paramouncy of indigenous Fijian interests as a “protective” principle for guiding Fiji and its Constitution. The Commission Report states: “The object of the principle is to ensure that [indigenous] Fijian interests are not subordinated to the interests of any other community. We emphasise, however, that the thrust of the principle is protective. It can never justify ignoring or riding roughshod over other communities’ interests.”³⁴ The Commission thus argues that the Constitution should reassure indigenous Fijians that their interests are being protected and treated as paramount. The Constitution could then provide the basis for “reconsidering the question of political paramouncy,”³⁵ and allow Fiji to move toward more equitable political processes and multiracial structures of national governance.³⁶

30. FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 44.

31. *Draft United Nations Declaration*, *supra* note 29, art. 3, 34 I.L.M. at 548.

32. *See* FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 45.

33. *See id.* at 46.

34. *See id.* at 54.

35. *Id.* at 51.

36. *See id.* at 295-301 (discussing that the Commission recommends that the majority of members of both the *Bose Lawa* (House of Representatives) and the

IV. GROUP RIGHTS

Regarding group rights, the Commission attempts: (1) to define the relation between individual and group rights (based primarily on the scrutiny of international instruments); (2) to distinguish between group rights, on the one hand, and the interests or concerns of groups on the other, and to specify precisely the group rights or interests that should be protected by the Constitution; (3) to understand how the rights or interests of particular ethnic groups might be understood to be compatible or contradictory; and (4) to assess different constitutional strategies for protecting group rights and interests.

In understanding the relationship between individual and group rights, the Commission observed and affirmed the central emphasis on individual human rights and freedoms in international instruments. This emphasis on individual rights extends to two documents that deal primarily with the rights of indigenous peoples. The Commission Report cites Articles 2 and 3 of ILO Convention 169 and

Bose e Cake (Senate) be open seats elected from a common roll of voters rather than from communal rolls). The *Bose e Cake* (Senate) would be comprised of thirty-five members, twenty-eight of whom would be elected without restriction by race, one of whom would be elected to represent Rotumans, and six of whom would be appointed by the President to represent under-represented communities or groups. *See id.* at 298. The *Bose Lawa* (House) would consist of seventy members, the majority of which (forty-five members) would be open seats; only twenty-five seats would be reserved for ethnic communities: twelve for indigenous Fijians (including other Pacific Islanders), ten for indo-Fijians, one for Rotumans, and two for General voters (a catch-all category for "others"). *See id.* at 295. Thus, indigenous Fijians would no longer enjoy a constitutionally guaranteed majority in Parliament and voters would no longer be restricted to voting solely within ethnic communities.

These recommendations of the Commission concerning the Parliament were rejected by the Parliamentary Select Committee, but the Committee did move to re-establish open seats elected from an open electoral roll. *See id.* at 300. The Committee recommended seventy-one members for the House, twenty-five of which would be open seats and forty-six would be by communal rolls as follows: twenty-three from the indigenous Fijian roll, nineteen from the indo-Fijian roll, one from the Rotuman roll, and three from the General Electors. *See JPSC, supra* note 22, at 20. The Committee rejected the Commission's idea of an elected Senate in favor of a Senate appointed by the President (as is the tradition in Fiji under both the 1970 and the 1990 Constitutions). *See id.* The Constitution was subsequently amended according to the Committee's more modest recommendations rather than the Commission's. *See FIJI CONST. amend. secs. 51, 64 (1997)*. Nevertheless, this does represent a move away from purely ethnic politics and toward greater multiracialism in government.

Articles I and IV of the Draft United Nations Declaration, and concludes as follows:

The clear inference is that, at the national level, the political and other rights of Indigenous peoples are on exactly the same footing as those of other members of the national society. Both instruments see the special rights of Indigenous peoples as distinct communities as supplementing the fundamental human rights and freedoms they already share with all other citizens.³⁷

The Commissioners thus insist that individual rights should be defined and protected equally for all citizens of Fiji regardless of a person's ethnicity. Group rights, once affirmed, must also be reconciled with the recognized equal rights of individuals in Fijian society or, conversely, justified as providing a necessary limitation on certain individual rights under certain circumstances.

The Commission Report distinguishes between group rights and group interests. The Commissioners consider group rights to be legally enforceable rights, perhaps enshrined in the Constitution.

37. FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 44. The Articles quoted are as follows:

[E]nsuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population.

ILO Convention 169, *supra* note 28, art. 2.2(a), 28 I.L.M. at 1385, *quoted in* FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 44.

Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination

Id. art. 3(1), 28 I.L.M. at 1385, *quoted in* FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 44.

Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognised in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Draft United Nations Declaration, *supra* note 29, art. 1, 34 I.L.M. at 548, *quoted in* FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 44.

Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, social and cultural life of the State.

Id. art. 4, 34 I.L.M. at 548, *quoted in* FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 44.

Group interests, on the other hand, are a broader category. The Commission Report attempts to identify specific group interests—particularly the interests of the indigenous peoples of Fiji—and to determine which of these group interests should be constitutionally protected as rights. As a general guiding principle, the Commission affirms that indigenous Fijian interests should be considered “paramount.”³⁸ At the same time, the Commissioners attempt to discern which of these interests should be legally protected as substantive rights.³⁹

The Commission identified several interests that have group rights associated with them. These interests pertain to “land, fisheries, minerals, chiefly titles, the arrangements for the governance of the community, the customary law and methods of dispute settlement.”⁴⁰ According to the Commission, communities of indigenous Fijians, as well as smaller minority communities of indigenous peoples—such as Rotumans and Banabans⁴¹—possess rights to these interests.

Surprisingly, the Commission finds that the identification of particular group rights for specific peoples within Fiji does not create conflicting rights and interests among groups.⁴² For the most part, traditional groups lay claim to separate areas of natural resources and agree with one another about means for dispute settlement in the event that disagreements about boundaries and rights of usage arise. Additionally, customary authority over community life tends to affect only those members of the community in question. Thus, the particular rights of different groups do not seem to conflict. This is particularly so since spokespersons representing the dominant non-

38. See FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 57 (finding all communities should affirm their willingness, in such negotiations, to apply paramountcy of Fijian interests as a “protective principle”).

39. See *id.* at 48 (differentiating between moral, natural, and legal rights).

40. *Id.* at 582.

41. See *id.* at 602-03 (setting forth the Banaban Settlement Act and the definition of Banabans). Banabans are actually not indigenous to Fiji but are environmental refugees from the Micronesian island of Banaba in Kiribati. They have been allowed to settle in Fiji on the island of Rabi. See *id.*

42. See *id.* (explaining that other groups agree that “Fijian rights to land must be protected”).

indigenous ethnic group, indo-Fijians, do not dispute indigenous Fijian claims to ownership of eighty-three percent of Fiji's land.

The Commission's Report discusses three strategies for the protection of group rights.⁴³ First, the Commission recognizes that the Constitution protects some group rights through the protection of individual rights.⁴⁴ Second, the Commission notes that the 1990 Constitution depends on guarantees of political power to the indigenous Fijian people to protect their own interests.⁴⁵ Third, the Commission recognizes that legislation can define particular group rights, which in turn can be entrenched in the Constitution. In this way, a typical act of Parliament could not alter these defined rights without more than a simple majority.⁴⁶

The third strategy was the primary one used in the earlier Constitution of 1970. The Commissioners also favor this approach. The Commission's Report advocates a restructuring of political structures and the electoral process to allow for a greater degree of power-sharing among the ethnic communities while simultaneously entrenching legislation within the Constitution to safeguard particular indigenous group rights to land, leadership, and customs.⁴⁷

V. LAND, LEADERSHIP, AND CUSTOMS

By affirming the rights of indigenous Fijians to their land, leadership, and customs, the Commission supports a legal structure of protective institutions that existed before Fiji's independence. For the most part, the Commission does not suggest incorporating indige-

43. See generally *id.* at 25-26 (noting that in addition to the promotion of group rights, the purpose of the Constitution is to make a proper start, set out the conditions on which people agree to be governed, control the actions of the government, and promote important values).

44. See FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 25 (citing the Commission's example of freedom of religion, as provided under Chapter II of the Constitution).

45. See *id.* at 50 (explaining the Commission's view that the Government should be required to establish social programs in addition to standard rights to protect group rights).

46. See *id.* at 26 (explaining that the rights to land of Fijians and of agricultural landlords and tenants are constitutionally protected).

47. See *id.* at 20-23, 300-01 (explaining the Commission's recommendations regarding political restructuring).

nous group rights in the Bill of Rights with its emphasis on individual rights.⁴⁸ The Commission, however, does recommend amending the Bill of Rights in specific ways when necessary and justifiable to limit individual rights for the sake of important group interests.⁴⁹

In other words, the Commission begins with a presumption in favor of protecting individual rights unless these rights are counterproductive to established group interests. In such instances of potential conflict, the Commission weighs the relative risk to each interest, but tends to restrict individual rights for the sake of overriding group interests. To avoid any greater abuse of human rights, however, the Commission confines this restriction specifically to the point of conflict and defines it with precision.

The Commission is not generally concerned with a putative competition among groups within Fiji, but rather with tensions between the collective rights of indigenous Fijian groups and the individual rights of their members. The Commissioners are especially concerned about guarding against the discrimination of indigenous Fijians through the protection of their collective rights. In this regard, the Commissioners meticulously identified particular areas of tension between individuals and groups, with reference to specific legislative acts that could be entrenched in the Constitution, including the Fijian Affairs Act,⁵⁰ the Native Lands Act,⁵¹ and the Native Lands Trust Act.⁵²

48. See Guy Powles, *Essays and Documents on Human Rights in the Pacific*, VICTORIA U. OF WELLINGTON L. REV. 53 (1992). Because this structure of indigenous self-determination is already functioning, the Commission's recommendation is able to avoid potential problems that might arise with the justiciability of group rights if they were invoked in more ambiguous terms in the Bill of Rights. Other Pacific Constitutions that affirm group rights by inserting individual duties to the community into bills of rights have added disclaimers. See, e.g., PAPUA N.G. CONST. sec. 63 (stating that "the Basic Social Obligations are non-justiciable").

49. See FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 121, 123 (explaining that individual rights are not absolute, but the Commission urges that exceptions should be made with caution and precision).

50. Fijian Affairs Act [Cap. 120], 1945 (Fiji).

51. Native Lands Act [Cap. 133], 1905 (Fiji).

52. Native Land Trust Act [Cap. 134], 1945 (Fiji).

VI. FIJIAN AFFAIRS ACT

The Fijian Affairs Act establishes several institutions of self-governance among indigenous Fijians. In fact, the Act provides for an entirely parallel system of government for indigenous Fijians. It establishes the Great Council of Chiefs⁵³—the highest body of traditional authority among indigenous Fijians—a Fijian Affairs Board, and Provincial Councils with the power to issue regulations for indigenous Fijians.⁵⁴ Additionally, the Fijian Affairs Act also establishes a system of Magistrates Courts.⁵⁵

The Commission expresses concern, though, that these separate structures of authority might constitute forms of racial discrimination against indigenous Fijians themselves. The Commission warns: “to the extent that the separate systems of law impose on particular individuals, by reference to and by reason of their race, disabilities or restriction not applying to members of other races, they are inconsistent with the constitutional right to equality under the law and freedom from discrimination. . . .”⁵⁶ The Commission cites Article V of the Convention on the Elimination of All Forms of Racial Dis-

53. See FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 256. The Great Council of Chiefs (“Council”) deserves special mention as the most revered of indigenous Fijian institutions. See *id.* (noting the preeminent respect for the Council’s role in Fijian affairs). The Council serves a largely advisory role in Fijian government. See PETER FRANCE, *THE CHARTER OF THE LAND: CUSTOM AND COLONIZATION IN FIJI*, xiii (1969) (describing Britain’s use of the Great Council of Chiefs in Fiji as “indirect rule”). In the 1970 Constitution, the Council nominated eight out of twenty-two members of the Senate. See FIJI CONST. sec. 45 (1970). The 1990 Constitution more formally recognizes the Council, allowing it to nominate a majority of Senators and appoint the President. See FIJI CONST. secs. 31, 55 (1990). The Commission’s recommendations would limit the Council’s role in choosing the President and Senators for the nation as a whole but would empower the Council to veto any changes on entrenched legislation affecting indigenous Fijian interests. See FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 257-62 (acknowledging the need for greater recognition of the Great Council of Chiefs).

54. See FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 4-6 (explaining that the Provisional Councils also have power to levy taxes against indigenous Fijians).

55. See *id.* at 617 (expressing appreciation for the potential of the Magistrates Courts to bring the administration of justice to rural areas so long as the standards of justice are consistent with other courts in the national system).

56. *Id.* at 604.

crimination⁵⁷ for the proposition that everyone, without distinction of race or ethnic origin, has the "right to equal treatment before the tribunals and all other organs administering justice."⁵⁸

The Commission is particularly concerned about violations of indigenous Fijians' freedom from discrimination because the 1990 Constitution precludes applicability of Section 16, "Protection against Discrimination," to any action authorized by the Fijian Affairs Act.⁵⁹ The Commission cautions that actions authorized by the Act, which might be justifiably beneficial to indigenous Fijians as a whole, should at the same time avoid discriminating against indigenous Fijians on the basis of any other prohibited ground in Section 16, such as gender or age.⁶⁰ The Commission presently recommends adding such a proviso and entrenching the Native Affairs Act within the Constitution. This solution, however, seems problematic since indigenous Fijians have become accustomed to depending on the structures created by the Fijian Affairs Act.⁶¹

The Commission also expresses concern that indigenous Fijians have little choice concerning their submission to these alternative structures of authority. The Commission notes that Article VIII of the Draft United Nations Declaration gives people—individually as well as collectively—"the right to identify themselves as Indigenous and to be recognized as such."⁶² Indigenous Fijians, however, are identified as such by their community; here freedom of association is

57. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 600 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352 (1966).

58. *Id.* at art. 5(a), *quoted in* FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 606.

59. *See* FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 605, 608 (noting that Subsection 6 of the Constitution gives "blanket protection to any regulations made under the Fijian Affairs Act . . . even so far as they may discriminate").

60. *See id.* at 604-09 (asserting that a separate system of laws imposed on groups by reason of their race, though beneficial in some respects, may act to restrict their rights otherwise available under the Constitution).

61. *See* FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 605-09 (alluding to the notion that these acts should continue to be entrenched into the Constitution).

62. *Draft United Nations Declaration*, *supra* note 29, art. 8, 34 I.L.M. at 549, *quoted in* FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 607.

vulnerable because there is no freedom to disassociate from these supplemental indigenous structures of authority.⁶³

VII. NATIVE LANDS ACT AND NATIVE LAND TRUST ACT

Like the Fijian Affairs Act, the Native Lands Act is related to chiefly authority and indigenous custom. Additionally, it addresses land ownership as well. The Native Lands Act establishes a Native Lands Commission that settles disputes over boundaries and chiefly titles.⁶⁴ The 1990 Constitution made the decisions of the Native Lands Commission final without providing for judicial review or appeal to the courts.⁶⁵ It also provided that decisions of the Native Lands Commission and Fijian customary law "shall have effect as part of the laws of Fiji."⁶⁶

The Commission considered this protection of customary law "too wide."⁶⁷ Quoting Article 8 of ILO Convention 169, the Commission notes that customary law should be compatible with other legal and moral standards and rights: "These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights."⁶⁸ The Commission thus argues that even customary law should be subject to the Bill of Rights, but indicates that certain essential interests should not be open to challenge on the basis of racial or ethnic discrimination.⁶⁹

63. See FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 606-07 (explaining that Article 3 of ILO Convention 169 seemed aimed at allowing individuals to identify themselves as members of a group or to refrain from doing so in the exercise of their right to freedom of association).

64. See *id.* at 584 (explaining the functions of the Native Lands Commission).

65. See *id.* at 584-85 (noting that under the 1990 Constitution, no decision "on headship or any matter concerning custom can be challenged in a court").

66. FIJI CONST. sec. 100 (1990).

67. FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 612.

68. ILO Convention 169, *supra* note 28, art. 8(2), 28 I.L.M. at 1386, *quoted in* FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 612.

69. See FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 612-13 (suggesting that customary law based on land, chiefly title, and mineral and fishing rights should not be open to challenge).

The Commission also suggested an appeals process for decisions of the Native Lands Commission.⁷⁰ The national courts would be unable to overturn decisions of the Appeals Tribunal on the merits of the case but would only provide judicial review of decisions of the Tribunal.⁷¹

Probably the most important of the acts dealing with the right of indigenous Fijians to land, however, is the Native Land Trust Act. The Native Land Trust Act controls the ownership rights to eighty-three percent of Fiji's land, including resources of the lagoon and reef.⁷² Extended families, called *mataqali*, own indigenous land. The Act prohibits these indigenous owners of land from selling their land, and mandates that the *mataqali* retain it for their own use and for future generations.⁷³

At the same time, however, the Native Land Trust Act vests control of all native lands in the Native Land Trust Board.⁷⁴ Consequently, *mataqali* control the use of their own land within the indigenous Fijian community, but any leasing of the land outside the community must be approved by the Native Land Trust Board.⁷⁵ Further complicating matters for indigenous Fijians, the Agricultural Landlord and Tenant Act⁷⁶ ("ALTA") additionally regulates the leasing of lands.⁷⁷

Indigenous Fijians face tremendous conflict in their rights to land. They own almost all the land in Fiji, but their rights to this land are actually less than other freehold landowners in the society.⁷⁸ The

70. See *id.* at 586-87 (proposing the establishment of an appeals tribunal).

71. See *id.* (advocating an appellate system that would review Native Lands Commission matters concerning title to land, boundaries, or questions of ownership).

72. See *id.* at 586-87.

73. See *id.* (noting that indigenous Fijians may only alienate land to the state).

74. See *id.* at 587.

75. See FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 588 (noting that the Native Land Board charges twenty-five percent of the rent for providing approval to lease property).

76. Agricultural Landlord and Tenant Act [Cap. 270, Rev. 1985], 1967 (Fiji).

77. See FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 591 (noting that only the Native Land Board may dispose of native lands).

78. I would add that few indigenous Fijians whom I have met have expressed

Commission raises concerns about the indigenous people's lack of a right to sell or lease their own property. Nevertheless, the Commissioners' interpretation of both ILO Convention 169 and the Draft United Nations Declaration allows them to justify continued entrenchment of the Native Land Trust Act and continued restrictions on the right of property disposal for the sake of future generations within the landed indigenous community.⁷⁹

The former discussion outlines the major legal mechanisms that define and protect the interests of indigenous Fijians. The Commission employed the primary strategy of recommending the entrenchment of laws governing indigenous Fijian land tenure, self-governance, and custom to protect indigenous Fijian interests. In effect, the Commission attempted to defuse a potentially explosive political situation by redefining political power and the relation between ethnic groups. The rule of law and not the electoral process, however, should be the guarantor of the most important corporate interests of the indigenous Fijian people.

VIII. RHETORICAL INDIVISIBILITY AND HISTORICAL COMPROMISE

Considering the Fijian struggle for self-determination and constitutional government, two statements emerged from the 1993 World Conference on Human Rights in Vienna and warrant attention. The first is a statement from the official "Declaration" that seems to echo a theme of the Conference as a whole: "All human rights are universal, indivisible and interdependent and interrelated."⁸⁰ The other is a statement from The Working Group on Indigenous Peoples at Vi-

an interest in selling their property; most feel privileged that the land is theirs to pass on to the next generation. At the same time, though, they are restricted in their access to credit and other forms of capital because their property has no market—hence no market value. Without a mechanism to allow them to capitalize without commodifying their land, they are limited to the roles of farmer, landlord, or subsistence lifestyle. Thus, the limitations on property rights also restrict other economic opportunities that might be available to indigenous Fijians.

79. See FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 589-90 (explaining that the Native Land Trust Act is justified as protecting the long-term rights of indigenous Fijians to their land).

80. *Vienna Declaration*, pt. 1, sec. 5 (1993), cited in HUMAN RIGHTS: THE NEW CONSENSUS 195 (1994).

enna that “strongly urges that Indigenous people be recognized with inherent, distinctive, collective rights including rights of self-determination, self-government and autonomy.”⁸¹ Both of these statements are holistic ones that attempt to draw together disparate ideas into a conceptual synthesis. Rhetorically, perhaps even formally, these statements might be true or at least helpful for the sake of proclamation. The experience in Fiji, however, indicates tensions that these statements fail to address adequately.

First, concerning the indivisibility of rights, the process of Fiji's constitutional review clearly reveals conflicts among group rights and individual rights of indigenous Fijians. The measures recommended for protecting the corporate interests of indigenous Fijians—including self-governance over traditional customs, chiefly authority, and tenure of the land—simultaneously, perhaps unavoidably, discriminate against individual indigenous Fijians on the basis of race. To establish institutions for the regulation of indigenous Fijian life—even though administered entirely by indigenous Fijians themselves—is to expose individual indigenous Fijians to structures of authority from which non-indigenous citizens are free. To protect the corporate rights of land ownership for the sake of the indigenous Fijian community and future generations is also to limit the rights of indigenous Fijian families to use and dispose of their own property in ways that are legally guaranteed to non-indigenous landowners.

The rhetoric of the indivisibility of rights addresses tensions between civil and political rights on the one hand and social and economic rights on the other, as represented by the two United Nations covenants.⁸² It does not, however, address the tensions apparent in Fiji's Constitutional review between the cultural rights of the group and the individual rights of citizens and landowners who are part of that cultural group. This conflict between the group and the individ-

81. *Id.* at 233.

82. See YASH GHAI, HUMAN RIGHTS AND GOVERNANCE: THE ASIA DEBATE, ASIA FOUNDATION'S CENTER FOR ASIAN PACIFIC AFFAIRS 1-3, 15 (1994) (noting that the universality and indivisibility of rights is “central to the West's perception of rights” and is challenged by Asian governments). See generally *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1967); *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1967).

ual is actually anticipated in both the Draft United Nations Declaration⁸³ and ILO Convention 169,⁸⁴ which, while generally affirming the rights of individual indigenous persons as defined in other international instruments, nonetheless give priority to cultural groups. These tensions are dealt with contextually and pragmatically in Fiji's constitutional review through a process of defining and limiting the rights in question in relation to each another. The tension, nevertheless, persists.

Second, concerning the apparent equation of self-determination, autonomy, and self-government made by the Working Group on Indigenous Peoples at Vienna ("Working Group"), there is an implied link between self-determination and sovereignty that seems to move a step beyond the official doctrine of the United Nations. George Tinker, commenting on the results of the Working Group, explicitly describes this linkage. He writes:

The question of sovereignty has to do not just with issues of the autonomy of a people or with some vague or indeterminate notion of self-determination. Sovereignty must include the international recognition of a people qua people. Autonomy and self-determination are critical parameters of international recognition and are essential to the international validating process.⁸⁵

Tinker criticizes the Working Group for its individualistic bias in its understanding of rights and its statist bias in its understanding of sovereignty. Concerning the rights of indigenous peoples, Tinker continues:

Pressed by the delegates representing states, the June 1993 human rights gathering in Vienna chose to deal with Indigenous rights in a fashion that finally denies group rights in favor of affirming (western) individual

83. See *Draft United Nations Declaration*, *supra* note 29, arts. 25, 26, 31, 34 I.L.M. at 552-53 (giving priority to cultural groups over individuals).

84. See ILO Convention 169, *supra* note 28, arts. 7-9, 28 I.L.M. at 1384 (giving priority to cultural groups over individuals).

85. GEORGE E. TINKER, *LIBERATION AND SUSTAINABILITY: PROLEGOMENA TO AN AMERICAN INDIAN THEOLOGY* 10 (1993).

rights to all people. Thus they finally distinguished, in these cases, between human rights and right to sovereignty.⁸⁶

Thus, Tinker also criticizes the Working Group for asserting the indivisibility of rights while ignoring the moral claims of indigenous peoples for recognition of sovereignty. Tinker's equation of self-determination and sovereignty, however, may be equally problematic.

The situation of indigenous Fijians differs from that of most indigenous peoples in that, although colonized by the British, they were never dispossessed. They were never alienated from their land to any large extent. Throughout the colonial period, institutions were established to preserve Fijian culture and even develop a degree of self-determination. Prior to independence from Britain in 1970, indigenous Fijian political leaders tended to oppose independence.⁸⁷

From independence until the elections of 1987, indigenous Fijians retained control of the government. Even the elections of 1987, although resulting in a multiracial government, instituted an indigenous Fijian as Prime Minister. Nevertheless, indigenous Fijians see their traditional world changing and often phrase their struggle in terms of survival.⁸⁸

The question of sovereignty is being answered experimentally in the Fijian context. A single generation of Fijians has now experienced at least four very different forms of government, including a colonial government before 1970, a constitutional representative democracy after 1970, a military government in 1987,⁸⁹ and a constitu-

86. *Id.* at 14.

87. See Yash Ghai, *Constitution Making and Decolonisation*, in *LAW, GOVERNMENT AND POLITICS IN THE PACIFIC ISLAND STATES* 8-20 (Yash Ghai ed., 1988) (noting that the 1966 election was fought, to a large degree, over the issue of independence with the largely Indo-Fijian National Federation Party favoring independence and the largely Indigenous Fijian Alliance Party being opposed to it).

88. See FIJI CONSTITUTION REVIEW COMM., *supra* note 1, at 55 (asserting that indigenous Fijians' discussions regarding paramountcy represent an "Indigenous people's yearning for survival" rather than manifest ambitions of racial supremacy).

89. See PAULA NIUKULA, *THE TRIPLE ASPECT OF FIJIAN SOCIETY: THE THREE PILLARS* 82-87. Actually the period 1987 to 1992 saw three different forms of government: (1) a Governor General's Council of Ministers after the first coup in

tional racial paramountcy under the Constitution of 1990. Now they have a new Constitution that took effect in July 1998.

The Constitution (Amendment) Act of 1997 was fully ratified and signed in July 1997. Actually, it looks very much like the abrogated Constitution of 1970. The final Act is not as bold as the Commission Report in moving toward equal suffrage, but it reinstates a general electoral roll alongside the communal rolls, thus allowing Fijians to vote across ethnic lines.⁹⁰ While most parliamentary seats are still reserved for ethnic representation, there is no longer a constitutional guarantee of an indigenous Fijian majority. Finally, the legislation protecting indigenous Fijian interests is entrenched, but not entrenched as deeply as it was in the 1970 Constitution.⁹¹

It is difficult to determine whether Fiji is moving forward or turning back. It is surely significant that a Parliament disproportionately represented by indigenous Fijians voted to alter the Constitution so as to relinquish constitutional guarantees of an absolute majority—though the chances of the process actually working to prevent such a majority are extremely slight. Such a relinquishment—or at least a loosening—of power indicates a discernment among the alternatives displayed in their own history. It indicates confidence in a multiethnic future in which a particular tradition can nonetheless be preserved. It indicates a deliberate choice to share political power, but at the same time to protect paramount interests.

In a recent paper, *Religious Traditions and Corporate Human Rights*,⁹² William Barbieri presents a suggestive skeleton for a theo-

1987, (2) a Military Government after the second coup in 1987, and (3) an "Interim Government between October 1987 and June 1992 when elections were first held under the 1990 Constitution.

90. See FIJI CONST. sec. 51 (1997).

91. The 1970 Constitution required that amendments to these acts be supported by a majority of three-quarters. See *id.* sec. 68. The Constitution (Amendment) Act 1997 (sec. 185) follows the 1990 Constitution (sec. 78) in requiring: (1) a majority of two-thirds only for amending the Agricultural Landlord and Tenant Act, and (2) allowing the other acts discussed in this paper to be amended by a simple majority if also supported by a majority of two-thirds (1997) or three-quarters (1990) of those Senators appointed under the advice of the Great Council of Chiefs.

92. William A. Barbieri, Jr., *Religious Traditions and Corporate Human Rights*, Address at the American Academy of Religion Annual Meeting (Nov. 24, 1997).

retical understanding of group rights. He makes two points that seem confirmed, if not patently obvious, in light of the Fijian experience. First, he suggests that all theories about rights actually emerge out of praxis, experiences of injustice, or domination.⁹³ In other words, we learn from our mistakes. Second, while he affirms both the right of peoples to self-determination and the right of peoples to be free from domination, he suggests that the latter has priority over the former.⁹⁴ His argument is similar to the argument for the priority of the principle of nonmaleficence over beneficence, or for the priority of perfect rights entailing negative obligations over imperfect rights entailing positive obligations. Groups, as well as individuals, have a right to self-determination but not domination.⁹⁵

This approach seems to be consistent with that of the Commission on the issues of indigenous Fijian self-determination and group rights. That approach strives to protect the interests of indigenous Fijians in self-determination until such measures would appear to be dominating of other peoples in the political sphere or individuals within the indigenous community itself. This approach also seems consistent with the lesson indigenous Fijians have learned from their own recent history, and indicates why they are willing, at least partially, to abandon the politics of paramountcy while persisting in preserving paternalistic institutions to protect their traditions. The result is an imperfect compromise that nonetheless allows for both power-sharing and self-determination.

CONCLUSION

There is an irony in the fact that the indigenous institutions that protect the interests, identity, traditions, and even the land of indigenous Fijians, actually represent the bureaucratization of tradition and traditional authority developed during the colonial administration. A cynic might scoff at the so-called self-determination of indigenous

93. *See id.* at 4 (explaining that human rights have arisen as "moral claims in response to concrete tribulations").

94. *See id.* at 7 (suggesting that the relative difficulty of judging group dynamics versus individual domination leads to favoring individual claims over group self-determination).

95. *See id.* at 6 (distinguishing the domination of individuals from self-determination).

Fijians and see in these measures the anachronistic paternalism of their fathers. Yet, these special legal provisions for protecting indigenous Fijian interests have allowed the indigenous people and culture of Fiji to survive the colonial clash of cultures and the contemporary travails of independence. It has allowed them to maintain their way of life on their land and to bypass the pressures for assimilation experienced by other indigenous peoples.

Nevertheless, the lingering paternalism in these protective measures of cultural self-determination is thinly disguised. It is revealed in a continuing tension between these protective institutions and the rights of the individuals whom the institutions are designed to protect—rights to freedom from discrimination based on race, rights to freedom of equality before the law, and even full property rights over the land.

Every indigenous Fijian must contend with two levels of authority—both the regulations of the state and those pertaining to the indigenous people. Individually, they are not really free to choose. Without these protective institutions, however, there would be even less choice for the indigenous Fijians. In the absence of such institutions, the very continuance of the indigenous culture itself would be jeopardized along with the options which that culture presents to its individual indigenous members.