Formal Law, Informal Social Norms, and Natural Resource Governance in Fiji’s Qoliqolis

Terra Lawson-Remer
The New School
Council on Foreign Relations
lawsonrt@newschool.edu

Working Draft
June 2012

Abstract: Through a careful case study of Fiji’s collectively owned fishing grounds, this article demonstrates how formal laws and informal mechanisms of internal governance shape each other in reciprocal relation. The interdependence between the formal and the informal in shaping de facto institutions is a pervasive but poorly understood phenomenon in rich and poor countries alike, yet a clear understanding of this complex and context-specific interplay is essential for any kind of effective policymaking. This article also traces the ways in which the existing institutional environment determines the terrain of possible policy reform. Finally, this article illustrates that a cooperative equilibrium for collective ownership of a common pool resource can emerge even when a community receives weak property rights protections from formal legal institutions and is subject to significant encroachment by outsiders. Fiji’s fisheries provide key insights regarding collective ownership institutions governed internally by informal social norms but simultaneously embedded in a larger formal legal system.
1 Introduction

Understanding the interaction between state and customary law is essential to virtually every deliberate attempt to transform social relations through legal and institutional reforms, including such grandiose projects as “nation building” in Iraq and Afghanistan; transitional justice and justice reform initiatives in Rwanda, Timor, and other post-conflict environments; and the plethora of “capacity-building” and “governance reform” projects sponsored by the World Bank, bilateral aid agencies, and non-governmental organizations. A clear understanding of this complex and context-specific interplay is essential for any kind of effective policymaking.

Institutions are always constituted by a dialogic relationship between formal laws and informal social norms. The formal and the informal influence each other in terms of both how rules are enforced, and what rules emerge and take root.

Collective ownership institutions for governing common pool resources—dependent as they are on both internal informal governance mechanisms and the external institutional context—are particularly important instances of multiple normative orders constituted in reciprocal relation. Natural resource governance in Fiji’s fisheries illustrates the role played by, and the complex interaction between, various normative orders in the collective ownership of common pool resources. This ethnographic case study provides important insights regarding the structure and functioning of collective ownership institutions governed internally by informal social norms, but simultaneously embedded in a larger formal legal system.

The insights from this careful case study of the fishing grounds collectively owned by villagers on Yanuca Island, in Fiji, are particularly salient to efforts that aim to utilize customary legal forms in conjunction with state law mechanisms to foster ecosystem conservation and sustainable development. Initiatives of this genus range from elements of
the global carbon emission regulatory regime emerging under the UN Framework Convention on Climate Change (UNFCCC); carbon and forestry finance projects funded through the World Bank’s Global Environment Facility (GEF); wildlife conservation programs throughout Eastern Africa that aim to reduce poaching of lions, elephants, and zebras by devolving control of wildlife areas to local communities; and the broad movement across the South Pacific to reduce overfishing and protect delicate reef ecosystems through Locally Managed Protected Areas (LMMAs).

The article has four main findings. First, contrary to assumptions in much of the collective ownership literature, a cooperative equilibrium for collective ownership of a common pool resource can emerge even when a community of resource owners receives weak property rights protections from formal legal institutions and is subject to significant encroachment by outsiders. In other words, exclusion of outsiders does not always need to by highly certain and exogenous for a tragedy of the commons to be avoided. This is an important insight, given that in many countries “customary” collective ownership rights over forests and fisheries receive weak protection from the state or are ambiguous in meaning and extent. Second, as has been found in other contexts in Africa and Asia, the formal law on the books significantly shapes internal mechanisms of informal “customary” governance, both instrumentally and constitutively, and plays a central role in the allocation of “customary” collective ownership rights among competing groups. Third, although informal norms rather than formal state law largely determine the rights enjoyed by collective resource owners, the content of these “customary” norms mimic analogous but legally inapplicable formal state laws. And fourth, the de facto institutional environment produced by the intersection of formal law and informal social norms simultaneously creates and limits the terrain of possible policy reform.

Section II reviews the literature regarding both collective ownership and the relationship between formal law and informal social norms, and then briefly discusses the Fijian context. Research on the two distinct and rarely connected topics of collective common pool resource ownership and the relationship between formal law and informal, non-state normative mechanisms in protecting property rights security are the building blocks for
the analysis. Section III examines internal group governance, rule compliance by clan members, and enforcement of property rights against outsiders. Sections IV and V analyze how formal laws and informal social norms regarding marine resources shape each other. Sections VI and VII address policy implications.

2 Background

2.1 Collective Ownership

There is a common but mistaken perception that collective ownership is equivalent to the absence of property rights. This is not the case. There are three fundamentally different types of property rights regimes: open access, collective property, and private property (Baland and Platteau 1996, 2003; Ostrom and Hess 2010). Private property vests a bundle of rights in a single owner. On the other end of the spectrum, open access is equivalent to a no-property or *res nullius* regime, where no one has superior rights to a resource than anyone else. Collective ownership, in contrast, is characterized by defined boundaries, clarity regarding the identity of those individuals who have a right to exercise resource claims, community-level collective choice arrangements to determine resource use rules, and internal monitoring of rule compliance and enforcement of rule violations by and against community members (Baland and Platteau 1996, 2003; Ostrom 1990). Globally, over 300 million members of an estimated 6,000 indigenous groups hold land and other resources communally, in accordance with “customary law” (Stavenhagen 2004, UN Permanent Forum on Indigenous Issues 2009).

Fisheries are a quintessential common pool resource, and therefore pose an archetypal conjuncture of challenges in terms of fostering efficient and sustainable resource use (Béné et al. 2003; Clark 1980; Wyman 2008). Common pool resources (CPRs) consist of both an underlying stock, such as healthy reef ecosystems and fish populations, as well as a harvested flow like fish or irrigation water (Lueck 1995; Ostrom 1990). This dual nature of CPRs means that both provision and protection of the resource stock and utilization of the resource flow are potentially subject to collective action failures.
There are three basic puzzles regarding how self-organizing, self-governing institutions for collective common pool resource ownership emerge and endure (Ostrom 1990): supply—even if the institution benefits all, why will anyone want to invest the cost to create it as all could free-ride?; commitment—why would anyone follow through and cooperate in adhering to resource-use rules and restrictions if defection is more personally beneficial?); and monitoring and enforcement—necessary for commitment, but costly. This study of qoliqoli governance in Fiji illustrates how the supply, commitment, and monitoring/enforcement problems are overcome through strong informal social control in a close-knit community.

Previous studies of long-enduring institutions for collective ownership of common pool resources have likewise examined the structure and functioning of such institutions, and proposed an array of principles that explain when, how, and why collective ownership regimes are successful (Agrawal 1994, 2000, 2001; Acheson 1998, 2003; Baland and Platteau 1996, 2003; Cox, Arnold and Tomás 2010; Gordon 1954; Govan, Tawake and Tabunakawai 2006; Ostrom 1990, 2005; Ostrom, Schroeder and Wynne 1993; McCarthy, Dutilly-Diane and Drabo 2002; Ostrom and Nagendra 2010; Wade 1988; etc.). These characteristics vary depending on the specific case study, but generally include: clearly defined boundaries for the common pool resource (not open access); rules regulating appropriation must be related to local conditions and to rules about provision; collective-choice arrangements allow the appropriators to participate in modifying the rules; monitoring must happen, and monitors should be accountable to the appropriators; low-cost conflict resolution mechanisms; and the right of appropriators to devise their own institutions should not challenged by external authorities (Agrawal 2001; Ostrom 1990, 2005; Ostrom, Schroeder and Wynne 1993; Wade 1988).

However, this broad body of research on successful institutions for collective common pool resource ownership often assumes that the determinants of property rights security and the exclusion of outsiders are exogenous to the community, controlled by the external institutional environment rather than the enforcement choices of group members (Ostrom
1990, 2005; Platteau and Baland 1996, Agrawal 2001, Calamia 2003). Therefore research has too often neglected the importance and possibility of in-group efforts to exclude outsiders in the absence of an effective state authority protecting collective ownership rights. In many post-colonial societies where collective ownership of common pool resources like fisheries, forests, and savannas is pervasive, group property rights are far from secure. The formal legal framework inherited from colonial regimes often provides ambiguous support for “customary” ownership rights, but even when rights are well-enshrined in formal law the state often lacks enforcement capacity. Outsiders encroach on collectively owned resources—both surreptitiously, through covert raids and incursions, and overtly, through formal legal channels or bribery of powerful in-group members. Therefore it is not sufficient to assume that property rights security is an exogenous function of the external institutional environment; attention to self-enforcement of property rights claims is critical.

At the same time, much of the collective ownership research often assumes static divisions and immutable distinctions between different levels of governance institutions, ignoring the ways in which multiple normative orders actually constitute each other in reciprocal relation. In other words, although with some notable exceptions, collective ownership research has too often neglected the interaction between formal law and informal social norms in creating governance institutions.

2.2 Formal Law and Informal Social Norms

An analytical framework grounded in legal pluralism opens up space to ask how various normative orders interact with each other, and to better understand the complex, context-specific, and dialogic relationship between state law and informal norms, which together determine the de facto institutional environment. Legal pluralism, defined as “a situation in which two or more legal systems coexist in the same social field” (Merry 1988), recognizes the power of multiple non-state normative structures, and requires that the analysis of institutions consider how different forms of social ordering mediate one another. For example, Mamdani’s (1996) analysis of Africa’s colonial heritage uses a legal pluralist
framework to document the process by which European colonizers transformed and reified “customary law”, thereby reinforcing the power of central chiefs and undermining tribal processes that had allowed for the evolution of social norms, and exaggerating tribal distinctions. The concept of semi-autonomous social fields proposes that the small field to be studied should be understood as generating customs and symbols internally while also being vulnerable to rules and other forces emanating from the larger world by which it is surrounded (Moore 1973). State law is mediated by the rules and enforcement mechanisms within any given semi-autonomous social field.

Within this vein, an instrumentalist approach views formal laws and informal social norms primarily as incentives that influence human behavior. The interaction between various normative orders is understood in reference to policy aims and techniques of implementation; rules are assessed as tools to accomplish particular aims (Kornhauser 1986), and the interaction between formal law and informal social norms is evaluated in terms of how implementation of the formal is mediated by the informal. Most germane to this study, state laws may modify the dynamics of groups that enforce non-legal sanctions by changing the incentives faced by individuals within groups (Posner 1996; Cardenas, Stranlund, and Willis 2000).

A constitutive approach focuses on the process whereby laws and norms construct knowledge and understanding (Tushnet 1991, Unger 1983). Such an approach examines the relationship between normative orders in terms of the ideological power of various forms of social ordering (Geertz 1983, Foucault 1978, Bourdieu 1987). For example, individualized property rights have been shown to generate the beliefs that money is extremely important for happiness and that a person can be successful without the support of others (Di Tella, Galiani, and Schargrodsky 2006). State law may borrow the trappings of other normative orders in order to bolster its legitimacy, such as when the new state judicial institutions of Castro’s Cuba clothed themselves in revolutionary symbols (Merry 1988). Likewise, non-state forms of judicial resolution can mimic state law, as when residents of illegal squatter settlements in Brazil use the forms and symbols of state law to
resolve disputes, despite the fact that disputes among illegal squatters are explicitly excluded from the state judicial system (Merry 1988).

A legal pluralist lens, which encompasses both constitutive and an instrumental approaches, and which views collective ownership institutions as semi-autonomous social fields, provides the theoretical framework for this case study.

2.3 Fijian Context

Fiji, an archipelago nation in the South Pacific, is comprised of 322 volcanic islands scattered 2,800 miles southwest of Hawaii and 1,100 miles north of New Zealand. With a per capita income of $4,370 (World Development Indicators 2008), 35% of rural households and 24% of urban households live below the poverty line (Fiji Islands Bureau of Statistics 2002-2003). Fiji’s total population is 840,000; 49% reside in the rural sector and 51% in urban areas. Indigenous Fijians compose 57% of the population while 38% is Indo-Fijian (Fijians of Indian ancestry), descendents of indentured servants originally imported by the British to farm colonial sugar plantations. Fishing, tourism, sugar, and textiles are the main pillars of Fiji’s economy, contributing the lion’s share of Fiji’s export earnings, foreign currency, and GDP (Fiji Islands Bureau of Statistics 2008a, 200b).

Ethnic Fijians hold traditional, clan-based rights over 411 demarcated inshore reef fishing grounds, called qoliqolis. Depending on the qoliqoli, the rights-holding unit is either the yavusa (composed of 2 to 5 sub-groups called matanqalis) or the vanua, comprised of a small number of yavusas. Virtually the entirety of Fiji’s coastline is encompassed by and subsumed within these clan-held qoliqolis (Map, Appendix).

As discussed further in Section VI, absent legislative action by Parliament, a decision to strengthen collective qoliqoli ownership rights can be made at the provincial level or the village level. This entails establishing and enforcing a locally managed marine area (LMMA): “an area of nearshore waters actively being managed by local communities or resource-owning groups, or being collaboratively managed by resident communities with
local government and/or partner organizations ... An LMMA can vary widely in purpose and design; however, two aspects remain constant: (a) a well-defined or designated area, and (b) substantial involvement of communities and/or local governments in decision-making and implementation.” (LMMA Network n.d.). At last count there were 217 LMMA sites in Fiji, involving 347 villages and 10,460 square kilometers (LMMA Network 2007). On Yanuca island, the site of this case study, the village *yavusa* of Nukutabua decided to establish the LMMA on its own, with assistance from non-governmental organizations but without the formal or legal backing of the Provincial government.

3 *Yavusa Nukutabua*

“This is not just our qoliqoli. It is for all our children, you know, into the future. It is our job to protect it for them.”

-- Joseph, Yanuca boatman

The *yavusa* of Nukutabua, which inhabits the 620 acre island of Yanuca, “owns” a wide swath of reef immediately offshore from the populated south coast of Viti Levu. With a two-stroke engine the boat ride from Yanuca to the mainland is 30 minutes. Pacific Harbor, the closest mainland wharf, is 1 hour and 45 minutes by bus from Fiji’s capital city. According to the most recent internal village census, 211 people inhabit Yanuca island; 209 of these are members of the *yavusa* Nukutabua or close relatives living in one of the 48 households that compose the village.

The qoliqoli is the village’s prime asset. With the exception of the Monday sale of coconuts on the mainland (FJD$4 per dozen, average weekly village production of 30 dozen), and the 3 day a week employment of 12 young men as Firewalkers in mainland resorts, income from the qoliqoli is the primary source of cash revenue for the *yavusa*. While household gardens provide staple crops (cassava, breadfruit, dalo, and yams), fish and shellfish are also the villagers’ main source of fresh protein.
The community of Nukutabua, like every community, is characterized by its own idiosyncratic power struggles and personalities. No claims can be made for the general applicability of the nuances of this study to all instances of collective ownership, or even all qoliqolis in Fiji. Regardless of these limitations—inherent in all case studies, be they of Shasta County Ranchers (Ellickson 1993) or the Chagga of Mt. Kilimanjaro (Moore 1973)—close examination of qoliqoli governance on Yanuca island provides important insights regarding collectively owned common pool resources that are governed internally by informal social norms but embedded in a larger formal legal system, and whose property security is not well protected by state law but is instead a function of the choices made by the group and its members. In this sense Yanuca village is its own archetype: of a collectively owned common pool resource, under constant threat from outsiders, and whose property security is endogenous to the level of resources the group devotes to self-protection.

This study examines the enforcement of resource use rules both vis-à-vis in-group members of the collective ownership group, the yavusa Nukutabua, and external encroachers, such as outside fishermen and tourism dive shop operators. Research on the two distinct and rarely connected topics of collective CPR ownership and the interaction between state and non-state law mechanisms in protecting property rights security provide important building blocks for this analysis.

First a brief overview of governance in Yanuca village, occupied by the yavusa Nukutabua. This yavusa is composed of three matanqalis (extended patrilineal families): Nukutabua, Batiluva, and Lutoa. The Nukutabua matanqali has two tokatokas (families): Vunitavola and Daga. The position of village chief, called the Tui Daga, is inherited patrilineally, and is always the eldest male in the Vunitavola tokatoka. The men from the other tokatoka of the Nukutabua matanqali, called Daga, hold the traditional positions of spokesmen for the chief. Batiluva matanqali has only one tokatoka; Lutoa matanqali is composed of the two tokatokas of Vummasei and Nawate. The relationship among tokatokas, matanqalis, and yavusas on Yanuca are mapped in a chart below, drawn by the village headman.