CHAPTER THREE: THE RULE OF LAW

Introduction
This chapter focuses on the rule of law, beginning with a reflection on relevant theoretical issues, followed by both focus group participants' and interviewees' responses to the questions they were asked during this Study.

Originally, most societies lived under the 'rule of man', where one leader or ruler (who was not elected, but had obtained that position through birth or use of force) had complete power over everyone living within his jurisdiction. The supremacy of these leaders did not automatically mean that all their decisions would have been - from today's perspective - either unfair or arbitrary. However, when these all-powerful leaders did use their powers in unfair or arbitrary ways, there was generally no avenue for challenging their decisions (Clarke 1998).

The concept of the 'rule of law' was developed as a response to 'rule of man' systems; the earliest form of this concept was contained in the Code of Hammurabi, drawn up in Babylon in 1750 BC. This Code established a system of common rules of conduct, even if the penalties for breaking them were extremely harsh. It was the first system which held that government should be subject to the law, and that those laws should be based on rules which were neither divine nor secret. In addition, the laws were to be applied and enforced by a panel of judges. Over 1,200 years later, first the Athenians and then the Romans developed the rule of law concept further, adding the notions of a jury of one's peers, equal access of citizens to the court system, and the requirement that laws be made public so that people would know how to behave etc.

Academics point to the Magna Carta (1215) as having the next biggest impact on the rule of law. It was the first document to limit a monarch's power over his subjects by ensuring certain liberties, and preventing arbitrary decisions without the consent of parliament (albeit a parliament which was not fully elected). The Habeas Corpus Act of 1679 had a similar impact on the rule of law: it ensured that the government was not above the law when dealing with citizens, by guaranteeing that citizens could not be imprisoned without due cause. The Act gave rise to the question as to who should enforce the law, a question answered by, amongst others, Baron de Montesquieu, who stated in 1748 that,

...there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control,
for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.  

Today, most societies live under some form of the rule of law. Modern democracies generally implement the rule of law by establishing a court system that is independent both of the executive and the legislature, and that is guided by clearly stated and published laws, rather than being subject to political considerations or arbitrary decisions. This separation of powers is an extremely important component of the current concept of the rule of law.

Even though the rule of law concept is a fairly old one, experts still do not agree on its precise form.  

However, Kleinfeld Belton has developed a particularly clear list of its main elements, consisting of five principles:

1. a government bound by and ruled by law;
2. equality before the law;
3. the establishment of law and order;
4. the efficient and predictable application of justice; and
5. the protection of human rights (Kleinfeld Belton 2005: 27).

In order to implement and enforce these principles, Kleinfeld Belton has identified three essential instruments and institutions:

1. the existence of comprehensive laws or a constitution based on popular consent;
2. a functioning judicial system; and
3. established law enforcement agencies with well-trained officers (Kleinfeld Belton 2005: 27).

The UN Secretary-General’s definition of the rule of law follows similar lines:

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently

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41 In addition, the Western concept of rule of law is said to include, as a basic constitutional principle, the separation of religion and State (Democracy Web, available at: <http://www.democracyweb.org/rule>). This is an indication that different concepts of the rule of law are possible, given different cultural and religious contexts.
adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency (UN Secretary General 2004: paragraph 6).

How the rule of law is put into practice may differ from country to country. For example, it is possible to live in a state with laws that on the surface may seem unjust, but which still treat people fairly. On the other hand, it is possible to live in a society which has very good laws and legal institutions, but where the law is ignored by the state, resulting in unfair treatment. The state in this second scenario can be said to be practising rule by law, rather than adhering to the rule of law. Rule by law can be described as government using legal rules to guarantee the uniformity of a legal system, but seeing itself as above the law (Samuels 2006: 10). It is clear, then, that it is not solely the presence of laws which is important, but also the substance of these laws; furthermore, the efficacy and independence of the institutions which protect them is equally important (Clarke 1998).

It is in this context that at least two principal conceptions of the rule of law can be identified: a formalist or ‘thin’ definition, and a substantive or ‘thick’ definition (Tamanaha 2004). Formalist definitions do not make a judgment about the ‘justness’ of law itself, but rather, they define specific procedural attributes that a legal framework must exhibit in order to be compliant with the rule of law. Substantive conceptions of the rule of law go beyond this, and include certain substantive rights as well (Craig 1997: 467).

The International Bar Association passed a resolution in 2009 endorsing the substantive definition of the rule of law, which it argues includes:

An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental principles of the Rule of Law. Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process, are all unacceptable ... It establishes a transparent

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42 A number of Asian countries are seen as practicing rule by law, rather than rule of law (Samuels 2006: 10). An example of such a country is Indonesia.
process accessible and equal to all. It ensures adherence to principles that both liberate and protect.\textsuperscript{43}

One of the most important pillars of the rule of law is the protection and promotion of human rights. Human rights are ‘literally the rights one has simply because one is a human being’ (Donnelly 1989: 9); they arise from ‘the inherent dignity of the human person’.\textsuperscript{44} ‘Violations of human rights deny one’s humanity; they do not necessarily keep one from satisfying one’s needs. We have human rights [to protect] those things “needed” for a life of dignity, for a life worthy of a human being, a life that cannot be enjoyed without these rights’ (Donnelly 1989: 16).

It is argued by some that because human beings are individuals, only individuals have human rights. This gives rise to the claim that human rights regimes promote individualism over communitarian societies, and that these regimes are unsuited to non-Western cultures (Legesse 1980: 124, 129). ‘These societies recognize that certain social guarantees are essential to realizing human dignity and they have elaborate systems of human duties designed to protect human dignity. But human rights are foreign to their approaches’ (Donnelly 1989: 50).

On the other hand, there is also the argument that human beings are part of communities, and have duties to these communities, and that therefore individuals can hold rights both as individual human beings and as members of a community (or multiple communities). As a member of a cultural group, a human being has certain cultural rights; these rights are held by each individual, rather than by the group itself. However, each person exercises these rights through his or her membership of that group: ‘Furthermore, all human rights are embedded in a social context and have important social dimensions ... [for example] speech, work and politics take place only in communities’ (Donnelly 1989: 20).

An example of a non-Western instrument which deals with the issue of individual and group rights, as well as the linked issue of rights as opposed to duties, is the African Charter on Human and People’s Rights (1981). Its Preamble highlights the importance of context through its commitment to ‘virtues of [the] historical tradition and the values of African civilization’. The Preamble also notes that the ‘enjoyment of rights and freedoms also implies the performance of duties on the part of everyone’. In line with this approach, Articles 27 to 29 deal solely with duties. For example, Article 29 states that,


\textsuperscript{44} See the Preamble to the International Covenant on Civil and Political Rights.
The individual shall also have the duty: 1. to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need; 2. to serve his national community by placing his physical and intellectual abilities at its service; ... 7. to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society...

The Charter demonstrates that it is possible to marry group and individual rights, and rights and duties in a way that is commensurate with African culture, traditions and values.\(^{45}\) There is no reason why Fiji cannot do the same in accordance with its own particular South Pacific-centred culture, traditions and values, without being in breach of its international human rights obligations.\(^{46}\)

Finally, we turn to a critical issue in Fiji: that of the existence of customary rules alongside state law. This was identified by both participants and interviewees as being in urgent need of consideration, given that the majority believe there is a 'clash' between these two systems.\(^{47}\) The legal pluralism theory may offer some assistance in comprehending the relationship between the two systems, and is defined by Griffiths as:

one in which law and legal institutions are not all subsumable within one 'system' but have their sources in the self-regulatory activities which may support, complement, ignore or frustrate one another, so that the 'law' which is actually effective on the 'ground floor' of society is ... enormously complex (1986).

This reflects the reality in Fiji, and, it is argued, may provide a more helpful approach to both understanding and working with dual systems of rules than that of legal positivism, which permits the state to recognize customary rules, or to integrate them into state law. This is because legal pluralism takes a less Western-
centric approach to the relationship between state law and institutions, and customary rules and processes (Forsyth 2009). A debate is urgently required to determine which approach to adopt in order to comprehend and analyze the role, content and institutions of customary rules in Fiji, in order to provide a solid framework within which to resolve the perceived ‘clash’ between customary and state law (Forsyth 2009).

With this brief theoretical background in mind, we turned to the focus groups participants and interviewees for their opinions on these issues. The main question asked of them was: ‘What kinds of rules/laws guide your conduct?’ We also suggested possible follow-up questions, which included asking people to identify the different institutions in society which generate laws, and which of these sets of rules and conduct they felt they should adhere to; explain if there are any they feel are in direct conflict with each other, give some examples of these, and explain how they respond to conflicting rules, that is, how they choose which ones to follow; and identify who implements and enforces these rules and how they feel about the ways in which this is done.

**Focus Group Participants’ Responses**

We started by asking people what rules govern their conduct in order to ascertain the broader context within which they view the concept of the rule of law. Participants explained that they are subject to various sets of rules, such as home and family rules, village and customary rules, religious rules and government decrees, legislation and regulations. One group said that, ‘The laws [we] know are taught from home by [our] parents and the bible from church’ (iTMY semi-urban 29.10.11). Many stated that they are mostly guided by rules instilled in them by their families: ‘Respect and love [are] the core basis of values, taught in homes to guide the conduct in communities ... In daily relationships, [we] ... don’t even think about country level laws. We are all humans and that’s the basis of our relationships with each other’ (IFF rural 21.09.11). Participants then added other ‘layers’ of rules on top of these home rules:

> I will begin with law and rule of the home. You are born – there are certain customs you have to follow, when you grow up, you go to class one then you will follow school laws (example: rules of travelling in bus), then you will also go to religious organizations (example: church, temple) that’s where the religious law comes in (while the home law is still intact), and finally comes the Government law (example: if you misbehave you are taken to court). [But] the primary context is the one from home (IFM 08.10.11; also iTF urban 04.10.11).
Although participants agreed that their lives are governed by a number of sets of rules, they prioritize these sets of rules differently. For example, some participants give priority to family and religious rules: ‘Religious, family and cultural values, and the law of the country all are instrumental in guiding the day to day conduct of the people. Most affecting are the religious and family values that basically make a person’ (ITM semi-urban 12.10.11). Similarly it was felt that, ‘If I follow God’s law all other laws will be covered in that’ (IFM urban 08.10.11; also ITMY rural 14.11.11). However, some focus groups felt that their context at a particular time determines which rules take priority: ‘When at home I follow house rules but when out I would stick to the national rules’; but, even then, these rules are measured against those they saw as framing their lives, ‘[nevertheless] I mostly live by my home made rules and my religious laws’ (IFF urban 06.10.11).

**The ‘Clash’ between Customary Rules and State Laws**

For the many participants living in rural areas, attempting to adhere to various rules and determining which to prioritise, gives rise to difficulties. In particular, these difficulties are experienced as the result of a perceived clash between customary rules and state laws: ‘Government laws or village laws are so different’ (ITF rural 14.12.11). This was echoed by another participant, who raised the issue of the customary settling of disputes in relation to the rule of law: ‘The law does not recognise traditional forms of settling disputes and wants everything to be settled legally … [for example, if he] had reconciled with his son using traditional means, the rule of law would not tolerate or recognize it. Legitimacy is only recognized to be present by the rule of law’ (ITM rural 27.07.11). The manifestation of the conflict of laws is explained in more detail by another participant: ‘Sometimes the laws of the government and of the villages clash. Sometimes government may bring in a new law but the village would already have a rule in place that relates to village life here. For example, if someone in the village was to disobey a rule, he would be disciplined by corporal punishment. But government laws forbid this now so you can see that these laws clash’ (ITM rural 04.10.11).

It should be noted that many urban dwellers did not know much about customary rules, and felt unaffected by them (IFF urban 04.11.11). This was particularly the case in relation to Indo-Fijians: ‘Fijian laws are recognized to be in place for dealings with Fijian communities; however, we do not have any personal experiences with them’ (IFM semi-urban 12.10.11). As for iTaukei living in urban areas, these rules mostly affected them when they returned to their villages: ‘People living in urban areas have to follow the rules and laws of the government and people back in the village will follow the village laws … most laws are completely different where the government uses the constitution and the rural or villages use customary law’ (ITM urban 09.11.11(a)).

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48 Also IFF urban 06.10.11, and IFM urban 10.11.11.
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The issue of corporal punishment was raised frequently when discussing this clash: ‘Corporal punishment is not allowed under the state law however it is allowed by village law, so there is conflict’ (iTM rural 14.12.11). Another group said:

Traditionally, rules are made for children and punishment should be given in order to correct the child if he/she disobeys ... there was a clash between customary law and government law. This is because the parents do not know where they stand when it comes to disciplining a child (physically) because if the matter is reported to the police, they can be charged. The result is that the child misbehaves and does not listen to the parents or teachers because they know that they won’t be punished (iTF urban 17.08.11). 49

Perceptions of Human Rights in Relation to Customary Rules

It became clear that, for participants, the nature of the ‘bumps between customary and rule of law is found in human rights. This right allows them the freedom to express themselves. Looking from the lenses of customary law this weakens the relationship amongst the people ... [there is] a collision when customary law wants to maintain its version of respect while human rights are adopted as a state law’ (iTM rural 27.07.11). This contention was supported by another participant: ‘There are tensions between democracy and human rights, especially when it comes to individual rights such as women’s rights, children’s rights ... traditional law is sometimes in conflict with modern law’ (iTM rural 14.12.11). There was a more or less even split between those participants who believe that ‘[h]uman rights conflict with customary laws. The iTaukei way ... takes precedence over human rights’ (iTF rural 14.12.11), and those who feel that ‘human rights should be paramount at all times, and treated as the supreme law in dealing with all kinds of situations’ (IFF semi-urban 27.10.11). The majority of participants appeared to think that ‘Western-style’ human rights, when implemented without concern for local culture and context, do not work in Fiji: ‘Human rights are still foreign to most of us. It is creating conflicts among us as we are of different races and from our birth there are laws that are already instilled in us in our families, our race, and our religion. These are unwritten laws but we have come to be bound by them by when growing up’ (iTF rural 21.10.11).

The current government has attempted to codify these ‘unwritten’ customary rules, through drafting ‘village by-laws’, since ‘customary laws in the rural areas are the

49 However, corporal punishment was not only discussed in light of the ‘clash’; a majority of participants felt that the ‘reintroduction of corporal punishment in schools will make for better discipline in children ... The abolition of such ‘punishments’ has given room for breeding of indiscipline that does not augur well for the society’ (IFF semi-urban 12.10.11).
ones that people follow most of the time' (ITM semi-urban 29.09.11). For example, village by-laws call for 'traditional reconciliation', which is consistent with the customary means of dispute resolution: 'If a mistake is caused by the Vanua, a certain (traditional) procedure is followed' (ITM rural 04.08.11); 'people in the rural areas have been following customary laws their whole lives and it is rooted within their culture, and for them to follow the new state laws would be very difficult' (ITM semi-urban 29.09.11). Groups also noted that village laws could not be imposed in urban areas without conflicts resulting there too: 'Customary laws would not be followed in city or urban areas as people here are of different ethnic groups. They would not understand some of the laws and this would not be good for them' (ITM semi-urban 29.09.11).

In relation to this rural / urban divide, it was felt that, 'if they bring customary laws to be part of the government law, it will be hard for the people to follow because people in the city are living the modern life rather than traditional life ... the two laws should not be combined because what works in the village would not work in the city and vice versa therefore they should be kept separate as they are working in their areas' (ITFY urban 04.08.11, and ITF rural 22.08.11).

Indo-Fijian groups concurred, confirming that disputes are dealt with differently in their communities: 'The Advisory Council mechanism in this village is alive as it is consulted whenever a community issue brews in the area. This is similar to how it was happening previously. If for some reason the matter is beyond the council, then it gets reported to police and if need be taken to courts' (IFM semi-urban 12.10.11). However, not many Indo-Fijian communities appeared to have active Advisory Councils, and participants felt that they were lacking in this area.

**Enforcement of Customary Rules**

Generally, the power to investigate, charge, try and punish is a function of the state (the police and the courts); however, some forms of behaviour (some of which are defined as crimes in national legislation) are dealt with by customary structures: 'There are some government laws which are part of the customary laws as well, e.g. rape, attempt to rape, domestic violence etc' (ITM urban 09.11.11(a)). If a crime is alleged to have been committed, the customary dispute resolution system is activated: 'If a crime is committed in a village, the victim is not allowed to report it directly to the police. Firstly, he or she has to follow the village structure and report

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50 In 2009, the Ministry of Indigenous Affairs drafted model legislation for village by-laws, following complaints from some provincial councils that there was a 'breakdown of order' in some villages. This draft was given to villages to discuss. However, some of these villages went ahead and enforced them, even though they had not yet been adopted at a national level. There were allegations that people, particularly women, had been assaulted due to breaking these by-laws. The by-laws have not yet been implemented nationally, but are still going through a consultation process (Fiji Government News, and the US State Department Human Rights Report 2010.)
to the village ‘gatekeeper’ on the crime that has been committed. The gatekeeper will then try and resolve the issue within the village’ (iTM semi-urban 29.09.11). 31 However, some participants reflected that, as a result of the influence of state law, ‘now serious cases such as sexual offences or murder are taken down to the nearest police station to be dealt with by the police force. Yet as mentioned, before the case is taken to the police, the gatekeeper still needs to be informed’ (iTM semi-urban 29.09.11).

Customary rules are sometimes preferred to state law for practical reasons: ‘in terms of government law, if anyone is found to have committed a crime he or she is arrested under the law and he or she will end up in court and they see that no one is there to help you out. However, for customary law there is a process to follow within a village for solving problems’ (iTM urban 09.11.11(a)). One group said legal certainty was another reason that people wanted customary rules to remain in place, ‘There are existing laws and new laws and while we are aware of the amendments made to these laws, my concern is that these laws are not fully endorsed and implemented which is why in the village setting, traditional laws is a float around idea’ (iTF rural 21.10.11).

Not everyone responded positively to the idea of by-laws; some participants felt pressured to use the customary system of reconciliation, rather than report a matter to the police, if they chose: ‘In certain incidences the villages are not encouraged to do so because they have their traditional ways of solving these grievances or problems ... if we wanted to report [a matter] ... people would say why you want to report it to the police, the village headmen has given the law to solve this conflict’ (iTF rural 04.10.11; similarly, iTF urban 17.08.11, and iTFY urban 04.08.11). Some women saw the by-laws as another way of controlling their behaviour, ‘I’m frightened about the by-laws in the village’ (iTF rural 05.09.11). Other participants said that customary rules were harsher than state laws. For instance, under state laws, they said that it:

...takes time for evidence to be gathered before a person is charged with the crime; even then they are seen as innocent until proven guilty. However, in the village setting this is different. For instance, once the gatekeeper has been informed that a person has committed a serious crime, he calls a village meeting to inform everyone and to determine what is to be done. There are times when the suspect is told to leave the village and not return and anyone who tries to defend him/her (including their family) is also banished with them. Also, they cannot simply move to a neighbouring village as the news will spread to the

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31 The term ‘gatekeeper’ is used in urban informal settlements. The role and status is similar to the Turaga-ni-koro in a Fijian village.
whole province and people will need to move very far away and this really affects their families (iTM semi-urban 29.09.11).

A further problem was identified by another group: 'Although this may resolve the matter, it does not resolve the bad feeling that may arise due to the crime ... often, this ill feeling remains with the victim and his/her family and they express this towards the perpetrator in different ways such as always going against them in village discussions or ignoring them completely. In some instances, they feel that traditional laws do not completely resolve issues and this leads to more conflict within the village' (iTFY urban 04.08.11).

Participants explained that the heads of various levels of customary structures, beginning with the family (Tokatoka), enforce customary rules: 'Family is the basic unit that enforces this law' (iTM rural 27.07.11). However, it was noted that, 'parents are not enforcing it from their own households. [A participant] says that he has been trying to discipline the youths to behave in a manner that observes the custom, but it is hard if parents continue to neglect their roles in teaching their children the custom' (iTM rural 27.07.11).

Other customary structures responsible for enforcement are the mataqali: 'Most of the residents abide by the decisions of the mataqali as they live on their land' (IFF rural 12.10.11). One group was reported as saying:

Living on leased land, the group recognized the mataqalis' role in times of conflict resolution and crime control in the area ... most families there are long settled leaseholders. [W]orkers from outside also come to live in the area during cane cutting seasons. These 'outsiders' are seen as those behind the criminal activities. In the majority of the cases the community relies on the mataqali to sort out minor crime complaints and the decision by the mataqali in terms of who stays on in the area and who doesn't is closely followed. Only in extreme cases is police help sought (IFF rural 12.10.11).

In terms of enforcement on a national level, there is no longer a customary institution to deal with these issues, as the GCC was abolished in March 2012. Some participants felt that the GCC should be reconstituted: 'The government needs to reinstate GCC for a traditional system within the government to be followed' (iFM rural 21.09.11).\(^{53}\) Another group said, 'If customary laws and practices are to be observed and practised, the Bose Levu vakaturaga has to be re-established to enforce it' (iTM rural 27.07.11).

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\(^{53}\) The Great Council of Chiefs is known in Fijian as the Bose Levu Vakaturaga.
Most participants believe that currently, state law and customary rules cannot work if applied simultaneously: 'There are Vanua (customary law), lotu (religion) and matanitu (government). Even though they are different, they apply to everyone and people should not mix them up. For example, don’t bring someone from the Government to solve a Vanua (traditional) issue/problem. It’s a big problem when we mix them altogether. Each of them needs to be used at the right time it applies. Because most of the time they will clash and there is always disagreement or conflicts between them' (iTM rural 04.08.11).

In case of a conflict between customary and state law, some participants said, 'The customary law wins out as the villagers have been following these rules and laws for a long time now and they see that the government laws have only come lately but are causing a lot of problems in the village' (iTM urban 09.11.11(b); also IFM urban 28.09.11(a)). Others agreed, saying, 'It [is] better for [us] to follow the customary rule of law rather than the government rule of law because if there are conflicts in the village, it is settled within the village rather than taken to the police' (IFF urban 17.08.11). Nevertheless, there were some groups which ‘do not believe that there are any conflicts between state law and customary law, if these different sets of law are practiced in their place' (iTM semi-urban 29.09.11).

A smaller number of participants took a more nuanced approach to dealing with any conflicts. One group said, 'We would first have to see the differences between these laws and see how they are run. If these are in conflict, some of us would follow the government laws, but others of us think that most people in Fiji do not know the rules and laws properly and that we should see these first before we make decisions on which one to follow' (IFM urban 10.11.11). Another group said, 'In the village, we follow the rules that have been given and we make all efforts to do that, taking the good and leaving the bad ... thus we do the same for the laws that are passed by the government' (iTF rural 14.12.11).

Other discussions reflected the strong influence of morals and values learnt in the home in deciding how to deal with conflicting laws:

[We] would first look to what we have learnt at home and then compare the government rules to this. If there was any conflict, then [we] would think about what was right and which path to follow ... if there was a grey area and things were not clear, then [we] would first reflect on this and look to [our] culture for answers before turning to the government rules and laws (IFM urban, 28.09.11(a)).

Generally, it is agreed that, where there is a conflict of laws, state law trumps customary rules, 'However the government laws will have to be respected and
followed because they are passed by this new government' (iTM rural 04.10.11, IFM urban 28.09.11(a), and IFM urban 28.09.11(b)).

Two main ways of resolving the clash between customary rules and state laws were put forward by participants: the first approach moots passing state laws which either incorporate customary rules, or which recognize customary rules as being paramount in the villages: 'If laws were passed that respected the traditional ways of the iTaukei then there would not be these inconsistencies' (iTM rural 04.10.11); and, 'If there is a conflict then the government should put a law where they can be combined together and also that they cannot oppose. The government law came in later, the village laws were here first' (iTM semi-urban 31.10.11).  

The second approach, mostly advocated by Indo-Fijians, entails developing a single set of laws for everyone to follow: 'There needs to be one set of law for the whole country. Different sets of laws for different communities cannot work. If there are numerous sets of laws in the country, some can use it to turn situations to their own advantage and thus infringe on the rights of others' (IFF semi-urban 27.10.11). Another group said, 'In a multiracial country there needs to be one set of laws for everyone, e.g. all rape cases should be dealt with in court and not a dual system where one group is dealt with in court while one can be allowed to go free after presentation of traditional obligations (ai Bulubulu)' (IFM semi-urban 12.10.11).

Legal Clarity and Certainty

One of the issues which arose across the board in focus groups were concerns around a key rule of law issue, that of legal certainty and clarity, both in relation to customary rules and state laws. This uncertainty manifested itself in two main areas: firstly, due to the unwritten nature of customary rules: 'Written rules are easier for me to follow. As for unwritten rules, I find it difficult to follow; I do not know how strict the unwritten rules will be' (IFFY urban 07.11.11). Secondly, participants are subject to different, and often conflicting, sets of rules: mainly, this is a difficulty faced by iTaukei participants, but was also a recurrent theme amongst Indo-Fijians, and is of equal concern to both rural and urban communities. 'I think it is because we don’t deal with the law, we don’t really know which law applies' (iTF urban 04.11.11); and, 'Before the law is laid down everyone should be aware of it' (iTF semi-urban 07.10.11).

In addition, participants are confused about which laws are currently applicable, as they keep changing (participants made reference to the 1990 Constitution, the 1997 Constitution, and the Decrees issued by the current government since 2006). 'Right

53 A further argument in favour of recognizing customary rules over state law was the protection of iTaukei culture: 'Customary law should be recognized at all levels [as this] will benefit the people and revive our culture' (IFF urban 17.08.11).