Gaming for 'Good Governance' and the Democratic Ideal: From Universalist Rhetoric to Pacific Realities Seen Through a Fijian Microscope*

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> The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew.
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> *Abraham Lincoln, Message To Congress, 1 December 1862*

Abstract

At the start of the 21st century, the international community appears open, cosmopolitan, accommodating and neutral with sovereignty seen as a set of powers and competencies that can be enjoyed by all States regardless of their particular cultural identities. However, it should not be forgotten that sovereignty is a flexible instrument that readily lends itself to the powerful imperatives of the civilizing mission, in part because through that mission, sovereignty extends and expands its reach and scope. This article canvasses the international rubric and dynamic that informs the democracy and good governance crusade before moving the discussion to a regional setting targeting Pacific Island Countries with Fiji as a case study. It seeks to argue that democratic experimentalism, not the so-called 'McDonaldisation' (globalisation as homogenisation) of the world, is important. This is based on the premise that 'McDonaldisation' minimises the complex way in which the local interacts with the international. The efficacy of democratic experimentalism is that it acknowledges that rights are not based on first principles, but that, they are inevitably socially constructed and historically contingent, and thus closely connected with both individual and group identity.

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Introduction

The historical development of human rights law provides the normative basis for the right to democracy. There is a persuasive case to be made for a democratic tradition in international law. Richard Barnes notes: 'Even the strongest critics of democracy are not denying the value of the concept, but rather they are cautious about accepting it blindly and ignoring the consequences and other potentially valid ideological perspectives.'[1] The *Universal Declaration on Human Rights* is the premier instrument on the right to democracy, and it contains the clearest statement on the issue of democracy.[2] While United Nations General Assembly ('GA') Resolutions are often regarded as not binding, it must be noted that the *Universal Declaration of Human Rights* is not just another GA Resolution. 'It has become an edifying referent for state constitutions, whose contents sometimes are a wholesale adoption of provisions of the Universal Declaration.'[3] Consequently, the conclusion that the declaration is a mere recommendation is based on narrow logic indeed. If the fundamental principles of the United Nations ('UN') are collectivism and sovereign equality, then one must concede at least that the declaration carries the collective moral force of the opinions of most sovereign States. The GA's *Uniting for Peace Resolution*[4] demonstrated the residual legal capacity of the GA. In any event, there can be no better evidence of a general practice accepted as law than a declaration of States reached in the most widely representative and democratic organ of the UN.

The influence of the *Universal Declaration of Human Rights* on subsequent international and regional developments regarding democratic governance is testament that it has effectively shed whatever stigma attended the circumstances of its birth. The eminence of the declaration is evident in its endorsement as a reflection of customary international law.[5] In fact the UN observes that the broadest legally binding human rights agreements, the *International Covenant on Economic, Social and Cultural Rights*[6] and the *International Covenant on Civil and Political Rights*[7] have 'take[n] the provisions of the Universal Declaration a step further by making them binding upon States parties'.[8]

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1 Richard Barnes, 'Book Review: Democratic Governance and International Law' (2000) 8 *Indiana Journal of Global Legal Studies* 281 at 297.

2 *Universal Declaration on Human Rights,* UNGA Resolution 217A (1948), art 21.

3 Reginald Ezetah, 'The Right to Democracy: A Qualitative Inquiry' (1997) 22 *Brooklyn Journal of International Law* 495 at 506–507.

4 UNGA Resolution 377A (1950).

5 The *Universal Declaration of Human Rights* is seen as having 'evolved into the Magna Carta of the international human rights movement and the premier normative international instrument on the subject': Thomas Buergenthal, 'The Human Rights Revolution' (1991) *St. Mary's Law Journal* 3 at 7; See also, Philip Alston, 'The UN's Human Rights Record: From San Francisco to Vienna and Beyond' (1994) 16 *Human Rights Quarterly* 375 at 376.

6 *International Covenant on Economic, Social and Cultural Rights*, opened for signature on 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

7 *International Covenant on Civil and Political Rights*, opened for signature on 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); 6 ILM 368.

8 See United Nations Department of Public Information, *'Human Right' in Notes for Speakers: The United Nations at 50* (1995) at 52.

Article 21 of the *Universal Declaration of Human Rights* emphasises the overriding importance of the will of the people.[9] Therefore, a government that is not based on the consent of the governed is not democratic. In addition, the government must be substantially representative of all distinct groups in the country. It follows that representation should be manifest in active as opposed to nominal participation such that 'representation and participation (are) experienced as part of a continuum'.[10] To be legitimate and democratic in international law, the emerging government must be based on the consent of the people, and participants must be representative of all national and distinct political groups in the country, not just those with access to resources and votes.

In some countries, including several in Europe and elsewhere, the problem is just the opposite: elections frequently and often predictably result in governments that are too responsive to the popular will of an ethnic majority, and insufficiently attentive, or openly hostile to, minority group interests.[11] The classic result in such cases is the tyranny of the majority. In other countries, elected governments abandon democratic principles altogether after attaining office.[12] In such cases, political actors make a mockery of traditional instruments and practices of democratic electoral practices. What is clear from the history of political evolution is that the acceptance, ownership, and entrenchment of democratic ideals and practices involves the infusion of democratic social organisation in key State mechanisms besides the current over-reliance on formal procedural democratic processes. Concern with furthering democracy requires moving beyond the procedural motions of democracy, such as universal suffrage, to the realisation of democracy in substance. While formal mechanisms may constitute necessary components of a democratic society, they fall far short of being sufficient in achieving the substance of democracy. Failure to provide sustained investment in the growth and strengthening of domestic roots in stake-holder communities will result in a poor crop at best, political conflict and war at worst.

The international community has a crucial role to play in providing the right environment for new democracies to get off the ground. At both the international and regional level, democracy has been recognised as an international norm. Unfortunately, however, support for democracy is still expressed in general terms. To this day, no clear-cut international consensus exists that adequately lays down the criteria that should be used to judge whether a particular government is substantively 'democratic' or not.[13] In part, this is because many States still do not share the West's enthusiasm for liberal, parliamentary democracy.[14] Crucially also, many States that invoke the internal non-interference norm, proscribed under article 2(7) of the *Charter of the United Nations*,[15]

9 *Universal Declaration of Human Rights*, above n2 at art 21(3).

10 See Patrick Thornberry, 'The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism' in Christian Tomuschat (ed), *Modern Law of Self-Determination: Towards a Democratic Legitimacy Principle* (1993) at 116.

11 See Edward Mansfield & Jack Snyder, 'Democratization and War' (1995) 74 *Foreign Affairs* 70 at 87.

12 See Robert Rotberg, 'Democracy in Africa: The Ballot Doesn't Tell All' *The Christian Science Monitor,* 1 May 1996.

13 See Brad Roth, 'Evaluating Democratic Progress: A Normative Theoretical Approach' (1995) 9 *Ethics and International Affairs* 55.

remain firmly convinced that the character of a State's government and the management of its internal affairs are fundamentally matters of domestic concern.[16] Some States, however, acknowledge that democratic governance has become a subject of international commitments and therefore of international concern, but believe strongly that change should be effected through dialogue and negotiation rather than through any other more pragmatic measures.[17] This is of course the ideal path, but it is a course that is open to be ignored or toyed with by those wishing to appear to be learning how to play fairly.

This article canvasses the international rubric and dynamic that informs the democracy and good governance crusade before moving the discussion to a regional setting targeting Pacific Island Countries, with Fiji as a case study. It seeks to argue that democratic experimentalism, not the so-called 'McDonaldization' (globalisation as homogenisation) of the world, is important.[18] This is based on the premise that 'McDonaldization' minimises the complex way in which the local interacts with the international.[19] The efficacy of democratic experimentalism is that it acknowledges that rights are not based on first principles, but that they are inevitably socially constructed and historically contingent, and thus closely connected with both individual and group identity.[20]

1. Enshrining & Championing the Democratic Ideal in International Law

A number of articles in the *Universal Declaration of Human Rights* substantiate provisions of the *UN Charter* relating to the rights of the citizenry in member States. Articles 55 and 56 of the *UN Charter* contain specific provisions in this respect. Article 55(c) commits the UN to the promotion of 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.[21] Under article 56, 'All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in article 55'.[22]

14 This enthusiasm is, however, not entirely free of problems. The mishandling of the situation in the Occupied Territories after a Hamas majority was elected to the Palestinian Legislature in early 2006 hardly provides much in the way of inducement for actors to step up on to the stage of electoral politics.

15 *Charter of the United Nations,* art 2(7) ('*UN Charter*').

16 See Gregory Fox, 'The Right to Political Participation in International Law' (1992) 17 *Yale Journal of International Law* 539 at 590–91.

17 See Lori Damrosch & David Scheffer (eds), *Law and Force in the New International World Order* (1992) at 4.

18 See generally Benjamin Barber, *Jihad vs. McWorld* (1995).

19 See Arjun Appadurai, 'Disjuncture and Difference in the Global Cultural Economy' in Mike Featherstone (ed), *Global Culture: Nationalism, Globalization and Modernity* (1990) 295 at 304, discussing the complexity of globalisation and the international implications stemming from ideas of nationhood.

20 Charles Sabel & Michael Dorf, 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia Law Review* 267 at 470–73.

21 *UN Charter,* above n15 at art 55(c).

22 Id at art 56.

The UN has promulgated instruments that are collectively equivalent to an International Bill of Rights[23] and helped gather international consensus for the idea that the populations of States have rights under international law. This extends to the protection of these rights, even against the government. Beginning with the *UN Charter* and the *Universal Declaration of Human Rights*, the UN has constructed a normative framework for the realisation of rights for the people.[24] The framework has been sustained over time by the actions of States in signing and ratifying various international human rights Agreements and related instruments, some of which are now part of customary international law. The international collaborative efforts involving UN organs, human rights workers and others have helped publicise the plight of the oppressed millions who yearn for more personal liberties and freedom from arbitrary detention, execution and political purges.

Among the human rights deemed fit objects of international concern is the right of political participation. This right is embodied in article 21 of the *Universal Declaration of Human Rights*, which states that 'the will of the people shall be the basis of the authority of government', and that 'this will shall be expressed in periodic and genuine elections'.[25] Implicitly then, article 21 links governmental legitimacy to respect for the popular will. However, this linkage does not appear in the subsequent, and legally binding *ICCPR*.[26] Article 25 of the *ICCPR* speaks of the right to participate in public affairs, including the right to genuine and periodic elections, but it does not purport to condition governmental authority on respect for the will of the people.[27] The language of article 25 was drafted intentionally to be broad enough to accommodate the wide range of governmental systems in place among the initial parties to the *ICCPR*.[28] As a result, even Soviet-bloc States felt free to ratify the *ICCPR*.[29] From their perspective, communist States satisfied the requirements of article 25 by affording voters access to various participatory mechanisms as well as an opportunity to ratify their leadership in periodic, albeit single-party, elections.[30] The cost of consensus was language broad enough to obscure sharp differences among States on the nature of their commitment to democratic rule.

Tragically, outside of the decolonisation context, during the Cold War era, there was little international consensus on the requirements of democratic governance beyond the general but limited insistence on periodic and genuine elections found in the *ICCPR* and

23 The International Bill of Human Rights consists of the *Universal Declaration of Human Rights*, the *ICESCR* and the *ICCPR* and its two Optional Protocols.

24 See United Nations Centre for Human Rights, *United Nations, Human Rights and Elections: Handbook on the Legal, Technical and Human Rights Aspects of Elections*, United Nations Doc HR/p/ot/2 (1994).

25 Universal Declaration of Human Rights, above n2 at art 21.

26 ICCPR, above n7.

27 ICCPR, above n7 at art 25(a),(b).

28 See Henry Steiner, 'Political Participation as a Human Right' (1988) 1 *Harvard Human Rights Year Book* 77 at 87–88, 90, 93.

29 Id at 91, noting that an amendment requiring a pluralist political party system was withdrawn as a concession to the Soviet Union.

30 Steiner, above n28 at 93.

a number of other international legal instruments. As a result, States lacked generally accepted criteria by which to judge other States' compliance with substantive democratic principles.[31] With the end of the bi-polar ideological competition that characterised the Cold War,[32] there has been a widely publicised shift in the character of public pronouncements about democracy. More States have made, through treaty or by means of non-binding but still influential declarations, formal commitments to democratic governance.[33] In addition, States, international organisations, human rights tribunals and legal scholars have sought increasingly to imbue that commitment with some real content to move beyond the simple but vague commitment to free elections contained in the *ICCPR*.[34]

The democracy discourse, however, remains 'straitjacketed' by article 2(7) of the *UN Charter*, which prohibits intervention in the 'domestic affairs' of other States. This article remains a pillar of the *UN Charter* system and continues to cast a shadow over all debates relating to government legitimacy or illegitimacy. Accordingly, although many States have joined the promulgation of Resolutions and declarations proclaiming support for democracy and the right of political participation,[35] they also stress that each State has the 'sovereign right freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other States'.[36] Though the international community may, under articles 55 and 56 of the *UN Charter*, promote State observance of the right of citizens to participate in their governance, there is no clear authority to mandate a particular allocation of decision-making power within a sovereign State. In any event, an election's 'genuineness' as referred to by both participation provisions, has no obvious criteria.

In a bid to give the participation provisions content and contour, in December 1988, the GA called on the United Nations Human Rights Commission 'to consider appropriate ways and means of enhancing the effectiveness of the principle of periodic and genuine elections' ,albeit 'in the context of full respect for the sovereignty of Member States'.[37] The result adopted by the Economic and Social Council in May 1989 was a 'framework for future efforts', the first heading of which was: 'The will of the

31 See Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46 at 47, discussing the problems associated with examining and monitoring elections for compliance with the existing ambiguous standards.

32 Gregory Fox & Georg Nolte, 'Intolerant Democracies' (1995) *Harvard International Law Journal* 1 at 5.

33 See, for example 'Joint Communique of United States-Mexico Binational Commission', 7 August 1989, (1990) 29 ILM 18; 'Conference on Security and Co-operation in Europe: Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect For Human Rights, Pluralistic Democracy, The Rule of Law, and Procedures for Fact-Finding', 3 October 1991, (1991) 30 ILM 1670.

34 See Fox & Nolte, above n32 at 3–5, describing efforts of the international community to address the perennial question of what makes a State 'democratic'.

35 See, for example Daniel Bell, 'The East Asian Challenge to Human Rights: Reflections on an East West Dialogue' (1996) 18 *Human Rights Quarterly* 641 at 656, noting that most East Asian States endorsed the *Universal Declaration of Human Rights* 'for pragmatic, political reasons and not because of a deeply held commitment to the human rights norms it contains'.

36 UNGA Resolution 45/150 (1990).

37 UNGA Resolution 43/157 (1988).

people expressed through periodic and genuine elections as the basis for the authority of government',[38] a phrase that clears up the above-mentioned ambiguity in article 21 of the *Universal Declaration of Human Rights*. The document included mention of 'the right of citizens of a State to change their governmental system through appropriate constitutional means', and 'the right of candidates to put forward their political views, individually and in cooperation with others', and the need for 'independent supervision' of elections.[39]

Election monitoring by the UN in independent nations signaled the start of a new foray by the UN. UN-monitored elections became one of the most visible manifestations of the right of peoples under international law to a democratic form of government.[40] Governments' recognition that their legitimacy depended on meeting a normative expectation of the community of States[41] indicated that the norm was undergoing a period of definition and realisation.

The 1990s witnessed a number of exciting new developments in the UN as it sought to match its democratic rhetoric with the necessary normative and institutional framework. In November 1991, the Secretary-General's guidelines on elections monitoring were released.[42] In 1992, the GA welcomed the Secretary-General's plan to establish both a focal point and an Electoral Assistance Unit within the Secretariat, and to establish two trust funds for electoral work.[43] The Electoral Assistance Unit came into being in 1992.[44] The office became a Division in 1994, and is now located within the Department of Political Affairs.[45] In 1993, the GA placed electoral assistance in the context of democracy promotion by including language on ensuring 'the continuation and consolidation of the democratization process' in the body of the Resolution.[46] This Resolution also addressed some of the practical concerns emerging from the UN's new

38 *Report of the Economic and Social Council: Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, 44 UN GAOR, Annex Item 12, UN Doc A/44/454 (1989) at 2.

39 Id at 12.

40 See *ICCPR*, above n7 at art 25 for the legal basis of this right.

41 See Franck, above n31 at 64, discussing the Cold War impeding the ability of the Human Rights Committee to enforce participatory rights. During the debates over the adoption of the *Universal Declaration of Human Rights*, the Soviet government strongly supported a concept of sovereignty that would allow a State a free hand within its own borders. Continuation of the discussion in the *Draft International Declaration of Human Rights: Report of the Third Committee,* 3 UN GAOR 3rd Comm, Annex Item 13, UN Doc A/777 (1948) at 922, advocating a view of national sovereignty as 'the right of a state to act according to its own will, never serving as a tool of the policy of another State…'.

42 The Guidelines were approved by the General Assembly in December 1991. See UNGA Resolution 46/130 (1991).

43 See UNGA Resolution 47/138 (1992). The two trust funds were the United Nations Trust Fund for Elections Observation and the UNDP Trust Fund for Technical Assistance to Electoral Processes. See above n42. The same day, the yearly sovereignty resolution passed. See UNGA Resolution 47/130 (1992).

44 See Electoral Assistance Division: Department of Political Affairs, *Institutional History* <www.un.org/Depts/dpa/docs> accessed 18 May 2003.

45 Ibid.

46 UNGA Resolution 48/131 (1993). The Resolution also linked electoral work to the maturing human rights framework by recalling and affirming language from the World Conference on Human Rights' *Vienna Declaration* recognition that electoral assistance is 'of particular importance in the strengthening and building of institutions relating to human rights and the strengthening of a pluralistic civil society...'.

work in the field.[47] In 1994, the GA Resolution supporting electoral work linked human rights work and democratisation. In 1995, the GA passed its standard electoral assistance Resolution, with the term 'democratization' in its title.[48]

In 1998, about a decade after the GA had flagged a new role for the UN in seeking to uphold participatory rights of peoples,[49] the UN again passed two Resolutions. The sovereignty Resolution remained substantively the same as previous Resolutions[50] but the electoral assistance Resolution was broader, a sign that this aspect of UN involvement in the democratic crusade was coming of age.[51] Despite important developments, a bifurcated development continues to persist between the need to enforce democracy as a universal norm and the need to guarantee sovereignty of States. This bifurcation opens up an avenue for States with concern about shielding their internal policies from UN scrutiny, especially so in view of the anxiety that the democratic crusade generates among many non-Western nations.

2. The Vagaries of Anchoring Democracy in International Law & in Practice

The idea of democracy is supported by fundamental instruments of multilateralism. The *UN Charter* under article 1(2) provides that 'the Purposes of the United Nations are . . . to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'.[52] Other important instruments articulating this right are the *Universal Declaration of Human Rights*, the *ICESCR* and the *ICCPR*. The *Universal Declaration of Human Rights* states:

> The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.[53]

The *ICESCR* and the *ICCPR* provide that: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and

47 The 1993 Resolution stressed the importance of adequate time in carrying out electoral work. It recommended that the UN ensures pre-election preparatory and post-election follow-up work; it called on the focal point to undertake more intensive coordination efforts with other UN organs involved in electoral work, especially the Human Rights Centre and the United Nations Development Programme (UNDP); and it called for coordination with NGOs. See UNGA Resolution 48/131 (1993). The yearly sovereignty and non-interference Resolution passed the same day. See UNGA Resolution 48/124 (1993).

48 See Strengthening the Role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization, UNGA Resolution 50/185 (1995). The 1995 Resolution also changed the time frame for the Secretary-General's reporting on electoral matters: instead of a yearly report to the General Assembly, he was requested to report back after two years. See UNGA Resolution 48/124 (1993).

49 See UNGA Resolution 44/146 (1989); UNGA Resolution 44/147 (1989).

50 See 52 UN GAOR 3rd Comm, Annex Item 112(b), UN Doc A/C.3/52/L.44 (1998) (subsequently passed as UNGA Resolution 52/119 (1998).

51 Ibid.

52 *UN Charter*, above n15 at art 1(2).

53 *Universal Declaration of Human Rights*, above n2 at art 21(3).

freely pursue their economic, social, and cultural development'.[54] Thomas Franck argues that these documents together with regional instruments constitute 'a net of participatory entitlements'.[55] Commentators note that the right to democracy has developed within international agreements. Franck finds that democracy, 'while not yet fully word made law, is rapidly becoming in our time, a normative rule of the international system'.[56] On his part, Gregory Fox asserts that 'parties to the major human rights conventions have created an international law of participatory rights'.[57]

International conferences in the 1990s further buttressed the entitlement to democracy. Key among these was the *Vienna Declaration and Programme of Action*[58] of the United Nations World Conference on Human Rights, which 'considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right'.[59] The participating States expressly defined self-determination to include a democratic entitlement, noting that it is through self-determination that peoples 'freely determine their political status, and freely pursue their economic, social and cultural development'.[60] The *Vienna Declaration* further affirmed that the 'World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right'.[61] The participating States asserted that 'democracy, development and respect for human rights, and fundamental freedoms are interdependent and mutually reinforcing'.[62] Finally, the participating States agreed that 'democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives'.[63]

The biggest stumbling block in the move towards democracy as an entitlement is that both within the UN and regional organisations there is no special set of institutional procedures for handling interruptions in democratic governance, much less for addressing undemocratic regimes generally. As a result, any effort to promote democracy through the political organs of the UN is subject to all the vagaries of UN politics.

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54 *ICESCR*, above n6 at art 1(1); ICCPR, above n7 at art 1(1).

55 Franck, above n31 at 79.

56 Franck, above n31 at 46.

57 Fox, above n16 at 607.

58 'United Nations World Conference on Human Rights: Vienna Declaration and Program of Action' (1993) 32 ILM 1661 at 1665 ('*Vienna Declaration*').

59 Ibid. The World Conference on Human Rights was assembled in Vienna by the United Nations on June 14–25, 1993. Representatives of 171 States attended. The *Vienna Declaration* was adopted by acclamation on 25 June 1993 at 1661. It states that the focus of 'cooperation, development and strengthening of human rights' should be on 'strengthening and building of institutions relating to human rights, strengthening of a pluralistic civil society and the protection of groups which have been rendered vulnerable.' To this end, assistance is necessary for 'the conduct of free and fair elections, … the strengthening of the rule of law, the promotion of freedom of expression and the administration of justice, and… the real and effective participation of the people in the decision- making processes' at 1683.

60 *Vienna Declaration,* above n58 at 1665.

61 Id at 1661.

62 Id at 1666.

63 Ibid.

3. One Step Forward, Two Steps Back: Responses to the 2006 Fiji Coup

At 6pm on 5 December 2006, the elected government of Fiji was coercively removed from office by the Head of the Republic of the Fiji Islands Military Forces ('RFMF'), Commodore Voreqe 'Frank' Bainimarama. This was neither sudden nor unexpected. Indeed, this was just the final play in a game that had been in progress ever since the recently re-elected Prime Minister, Laisenia Qarase, made it clear that Bainimarama would not be reappointed as the head of the military. This was an audacious and provocative move, considering that Bainimarama had originally installed Qarase as *prime minister* after the coup led by George Speight in 2000.

Despite the fact that this showdown had been anticipated for so long, it was remarkable how little was done to protect the government from such open internal hostility. In what unfolded, regional powers, such as Australia and New Zealand, along with the UN and the Commonwealth, and other regional international actors, appeared united in their criticism of the situation but were ultimately powerless to do or say much, except make strongly worded proclamations of discontent.[64] The most that the outgoing UN Secretary General, Kofi Annan, could do was to threaten to stop Fijian military personnel participating in UN Peacekeeping operations as a means of diminishing the international prestige of the Fijian defence forces.[65] In the face of such an egregious affront to constitutional rule, this seemed like a mere slap across the wrist. However, this was not the Honiara of 2003, or the Dili of 1999. Though there were some reports of violence and two civilians did die in military custody[66] the situation had not deteriorated into widespread violence.

Qarase's government did ask for military assistance from the Australian and New Zealand governments, but these requests were rejected. The Australian Government deployed a Task Group in early November 2006 but this was tasked with providing security and transport for up to 7,000 Australian citizens still in Fiji. The Australian Defence Force ('ADF') Task Group included several naval vessels, transport aircraft and an elite SAS contingent, along with other specialised evacuation and medical teams. Altogether, some 800 ADF personnel were involved.[67] In addition to this highly visible

64 See, for example Secretary General of the United Nations, 'Secretary-General Strongly Deplores Fiji Military's Seizure of Power', (Press Release, 5 December 2006), SG/SM/1077 <www.un.org/News/Press/docs/2006/sgsm10777.doc.htm> accessed 21 April 2008.

65 'Condemning coup in Fiji, Annan urges return to constitutional rule', *UN News Centre*, 5 December 2006 <www.un.org/apps/news/story.asp?NewsID=20852&Cr=fiji&Cr1=> accessed 15 July 2006.

66 There are only two reports of deaths in which the military are implicated. Amnesty International ('AI') reported that Human Rights Watch, in a letter to the interim Prime Minister Bainimarama in early January 2007, called for an investigation into the death of Nimilote Verebasaga. Mr Verebasaga was taken into military custody over a dispute with a neighbour and was pronounced dead on arrival at the Queen Elizabeth Barracks. A second man, Mr Sakiusa Rabaka Ligaiviu, also died after allegedly being assaulted while in military custody. AI also reported an increasing number of requests for the urgent investigation of human rights abuses. See Amnesty International, *Fiji's Coup Culture* <www.amnesty.org.au/Act_now/campaigns/asia_pacific/features/fijis_coup_culture> accessed 20 July 2007.

67 Department of Defence, 'Planning to Support Australian Citizens in Fiji' (Press Release, 20 December 2006) <www.defence.gov.au/fijisupport/default.cfm> accessed 20 July 2007.

presence, controversy surrounded the arrival in Fiji of an SAS unit complete with weapons and communications equipment.

In response to this military presence, Commodore Bainimarama made repeated announcements assuring that the Fijian military would provide adequate security and threatened to use force in retaliation to any uninvited foreign intervention. On 26 November, over 1,000 armed Republic of Fiji Military Forces ('RFMF') reservists were recalled and put onto the streets of Suva in full combat fatigues as a demonstration of force. Interviewed during talks in New Zealand, Bainimarama described the act as preparation for the 'clean-up' of the Qarase government.[68]

Despite the failure to protect the government from the military, the separate but unified responses to the coup give reason for a modicum of optimism. In the aftermath of the coup, and amidst a chorus of local and international condemnation, numerous States, including Australia, New Zealand, the United Kingdom, the United States and the European Union, declared the suspension of a raft of bilateral assistance programs as well as a series of sanctions aimed at punishing Fiji's hastily formed government. Where possible, 'smart sanctions' were crafted to target the military and specific individuals rather than punishing the general population, which had already suffered prolonged and repeated periods of political instability. Specific measures ranged from imposing limitations on the travel of political and military leaders implicated in the coup (especially through the regional transit hubs provided by New Zealand) to the cancellation of foreign military assistance programs, and the imposition of embargoes on sales of military hardware to the Fijian defence forces.[69] Such measures, if they are sustained, will undoubtedly inconvenience the individuals responsible and possibly assist in weakening the military establishment over time.

While responding appropriately to offences against the democratic rights of people is one thing, protecting them from such offences occurring in the first place is another altogether, and it is one where the capacity and will of the international community have been found wanting. On this point, it is hard to miss the irony of the Fijian scenario. The military (or at least Bainimarama) perceives itself as the rightful guardian of governance, not its enemy.[70]

This role is rapidly being formalised and entrenched across numerous branches of the Fijian government with the appointment of senior government positions being made by the military, sometimes with military personnel. As one commentator has observed:

> It is clear that the military now seeks a more enlarged, permanent public role for itself. It does not wish to remain simply an institution of the state but seeks to play an important role in the affairs of the state… Along with the parliament and (until

68 'Fiji military recalls 1,000 reservists for "clean-up"', *ABC News Online*, 26 November 2006 <www.australiandefencereport.com.au/11-06/fiji_military_recalls_1000_reser.htm> accessed 23 July 2007.

69 See Glyn Davies, Deputy Assistant Secretary for East Asian and Pacific Affairs, 'U.S. Policy Toward South Pacific Island Nations, including Australia and New Zealand', (Press Release, 15 March 2007) <www.state.gov/p/eap/rls/rm/2007/81777.htm> accessed 15 July 2007.

70 *The Fiji Times*, 17 October 2006.

> recently) the Great Council of Chiefs, the military regards itself as a major centre of power in Fiji.[71]

In defence of these appointments, the new Director of Immigration, Viliame Naupoto (himself appointed by the military), has cited the high level of training received by the military and their 'usefulness' to the nation building process. More worryingly though, Naupoto goes further, suggesting that the entrenching of the military in government is actually a way of addressing the problem of 'coup culture', saying 'Military people are useful and it is my answer to killing the coup culture. If you keep using the military as a watchdog the chain might break and bite people.'[72] The implications of this logic are clear: the government is only safe from the military 'watchdog' if the military itself is allowed to control the government. This is like suggesting that the only reason that coups take place is because the military exists. But in a modern democratic system, the watchdog is not responsible for holding the leash of government. The watchdog is charged with protecting the house, not occupying the master bedroom. Perhaps also, if as Naupoto suggests, coups are the result of the military's disconnection from government, the real alternative is not to have a military in the first place.

The challenge for the people of Fiji, as well as the UN and its member States is to assist in the evolution of stable and democratic political environments in Fiji and elsewhere; environments where existing elite structures (including the military) recognise, protect and build upon the benefits of inclusive and stable systems of democratic governance.

4. Constitutionalism on Slippery Ground: Waltzing on 'Revolutionary' Treacle

A. The Roar of the Courts Then, Reduced to A Whimper Now?

In the 1999 election held under the *1997 Constitution*,[73] leaders of all the major parties stood for 'open' rather than 'reserved' seats. A multiracial coalition achieved a landslide victory paving the way for the first Prime Minister of Indian origin, Mahendra Chaudhry, who led the dominant partner in the coalition. The promise of greater inter-ethnic harmony held out by the results of the 1999 election, however, did not last. Within a year the promise of closer inter-ethnic ties in governance lay in smouldering ruins. The Chaudhry government was deposed in a coup d'etat mounted on 19 May 2000 by George Speight with many of its members held hostage at gunpoint in the Parliament building while bloody riots and looting raged outside. The revolutionary events of May 2000 had the 'effect of upsetting a delicate and carefully-crafted constitutional settlement

71 Brij Lal, 'Anxiety, Uncertainty, and Fear in Our Land: Fiji's Road to Military Coup, 2006' (2007) 96 *The Round Table* 135 at 151.

72 Verenaisi Raicola, 'Naupoto backs military postings,' *Fiji Times Online*, 23 July 2007 <www.fijitimes.com/story.aspx?id=66968> accessed 23 July 2007.

73 See *Constitutional (Amendment Act)* 1997 (The Republic of the Fiji Islands).

which had sought, democratically, to promote freedom, equality and justice among the country's deeply-divided peoples.'[74]

The swiftness with which the law and order enforcement agencies in Fiji reacted to the derailment of democracy by Speight and his accomplices went some way in stemming the country's slide into irreversible lawlessness and anarchy. Instrumental to this achievement were the efforts of the Fijian judiciary in insisting on a return to a higher rule of law standard embodied in the pre-coup constitutional order, and thus playing a significant part in strengthening the weakened State commitment to liberal political virtues and stemming the illiberal tide. In the process they not only helped restore democracy but also the rule of law. In the first of a series of high-profile rulings,[75] the High Court of Fiji, sitting in Lautoka, held, among other things, that:

(a) the coup mounted by George Speight and his supporters had been unsuccessful;

(b) the purported abrogation of the Constitution by Commander Bainimarama was null and void; and

(c) the Parliament which had been elected in 1999 had not been dissolved, but was merely prorogued.[76]

The sentiments of the High Court were endorsed by the Fiji Court of Appeal in appellate proceedings brought by the government. The judgment was significant for asserting the illegitimacy of the actions of George Speight and his henchman. More importantly, they bound Commodore Bainimarama in a legal web which thwarted an insidious move by the military in the unsettled climate to seek to impose its authority. Thus, the Fijian judiciary served as a beacon of hope in a bleak political landscape. By their principled approach, which steered well clear of confrontational tactics or needless grandstanding, the judges managed to acquire a degree of legitimacy unmatched by any other agency of State.[77]

Ironically, it was on the peg of the rule of law that the makings of the 2006 coup had its genesis. In a speech on 22 September 2006, Commodore Bainimarama attacked government policies claiming among other things that the government's leniency towards perpetrators of the 2000 coup had created a culture of disrespect for the law, to which he attributed the increasing incidents of lawlessness that included desecration of Hindu temples.[78] Considering that one of the contentious bills that the government was considering at the time related to reconciliation and proposed amnesty for the 2000 coup offenders, this point had a resonance of both rationality and validity.

The accusation of Commodore Bainimarama at that point in time did get traction as it championed the centrality of the rule of law, with the courts in the past having been

74 Venkat Iyer, 'Restoration Constitutionalism in the South Pacific' (2006) 15 *Pacific Rim Law and Policy Journal* 39 at 45.

75 *Chandrika Prasad v Republic of Fiji* [2001] NZAR 385.

76 Venkat Iyer, above n74 at 59.

77 Id at 62.

78 2006 Fijian coup d'état, *Wikipedia Encyclopedia*, <en.wikipedia.org/wiki/2006_Fijian_coup_d'état> accessed 15 January 2008.

able to rein in the unconstitutional actions of George Speight and his followers as well as bringing them to legal accountability. In this regard, this article does not seek to suggest that Commodore Bainimarama was entitled to make the comments in the manner he did and particularly so as he hinted at the might of the army. Rather it is to acknowledge that the government of the day may have overstepped the mark and Bainimarama was merely blowing the whistle. It was not long, however, before the military intervened and proceeded to cast the whistle aside and write the song sheet for governance in its image when it moved on the government. Any claim that Commodore Bainimarama and the military may have had as a defender of the rule of law vanished in the early days of its assumption of authority and disappeared on 18 January 2007, when President Ratu Josefa Iloilo who had been 'rehabilitated' back to office and enjoys authority through the patronage of the military signed a decree granting the military commander and all military personnel, along with all officers and members of the police force, prison officers and all who served the interim government formed after the coup, immunity from all criminal, civil, legal or military disciplinary or professional proceedings or consequences.[79] This must have been one of the high points of hypocrisy considering that part of the military's anger with the government was based on a proposed amnesty for perpetrators of the 2000 coup, yet they felt no qualms in hijacking this legal avenue to grant themselves immunity thus sealing the 'drama' as one of the powerful dividing the spoils or dividends of power, in this case unconstitutional power that stank of illegitimacy.

B. A Fresh Coat of Paint for the Great Council of Chiefs

The indigenous Fijian and Indian populations have, for the most part, remained separate over the years, each adhering to its own culture, religion, language and social customs. The sole determinant of identity is ethnic affiliation, with de facto segregation featuring in almost all walks of life, including clubs, trade unions and other voluntary organisations. Ghai & Cottrell state:

> There have been sharp divisions of opinion throughout Fiji's modern history between those advocating an integrated, non-racial state, based on individual rights, and those in favour of a political order based on ethnic communities. Integration and consociation, perhaps, are not apt terms to categorize this division, but, certainly, they have some resonance. Fiji's experience shows that this polarity has limited intellectual or policy value. Consociation easily and, in Fiji's case, seamlessly slides into hegemony.[80]

One of the great native institutions is the Great Council of Chiefs ('GCC'). This is intended to reflect local interests in the legislature and designed to respond to the needs of indigenous communities and advocate on their behalf. The GCC has an important role to play: it institutionalises forms of traditional governance geared to foster dialogue

79 Ibid.

80 Yash Ghai & Jill Cottrell, 'A Tale Of Three Constitutions: Ethnicity And Politics In Fiji' (2007) 5 International Journal of Constitutional Law 639.

between different ethnic groups and is a critical player in governance as well as an effective tool in conflict resolution.

It was not long before the military had a run in with the GCC. Commodore Bainimarama announced he had toppled the elected government and taken control, assuming the presidency until the GCC reappointed the deposed president. In a brave and welcome move, the GCC slammed Bainimarama's 'illegal, unconstitutional' activities and cancelled a planned meeting indicating that they were not keen to meet following the turbulent events. This posed a potential obstacle to coup leaders who were meanwhile advertising for candidates for posts in the interim government. Bainimarama's reaction was one of anger as well as that of a person who now held the reins of supreme authority. He declared that his interim government could rule for 50 years if the GCC continued to hold off appointing a new president of Fiji, who would swear in a military-backed government. In the process he purged a number of senior civil servants who were regarded as uncooperative and banned the GCC from holding further meetings, except with military approval, until further notice. Later an accommodation of 'convenience' was reached.

It can be argued that the 'old' ways would surrender to contemporary culture considering that some leaders represented in this body are often ineffective or in many instances corrupt and self-indulgent. Giving further traction to this point is the suggestion that the George Speight-engineered events of May 2000 may have drawn sustenance from serious tensions that had been growing over the years between Fijian commoners and the traditional chiefs.[81] 'Many prominent politicians representing Fijian interests had been prophesying an end to the power and privilege enjoyed by the chiefs and to their dominance in government.'[82] However, democracy in its true sense treats all individuals the same, placing all members of society on equal footing, void of special privileges based on the fact that special representation is in stark contrast with the principles of democracy exemplified in direct representation or representational democracy. In any case mechanisms of special representation may adversely affect the quality of legislative candidates because 'special' legislators would be viewed as less competitive and may produce inferior candidates. Similarly, the voters' ability to punish candidates who engage in wasteful redistribution or corrupt political practices may be reduced. In particular representatives may be more willing to 'curry favour along group identity lines' thus leading to non-minority individuals disengaging from the political process, inciting conspiracy or possibly rebelling.

However, the blunt reality is that customary law and traditional indigenous institutions have an important place in the societies of Pacific Island States.[83] In many of the States, custom predominates in resolving disputes at the local level. Custom and

81 See Brij Lal, 'Madness in May: George Speight and the Unmaking of Modern Fiji' in Brij Lal (ed), *Fiji Before the Storm: Elections and the Politics of Development* (2000) at 192.

82 Ibid.

83 See New Zealand Law Commission, *Converging Currents: Custom and Human Rights in the Pacific* (16 October 2006) <www.lawcom.govt.nz/UploadFiles/Publications/Publication_120_340_SP17.pdf> accessed 10 January 2008.

human rights can live comfortably together. It is pure nihilism to assert that they cannot. Of significance is the fact that one of the central tenets of Western neo-liberal tradition is the centrality of the individual; however, this should not be the basis of bias against communal-centered communities which seek to weave together institutions that are informed by two models. To dismiss one or the other usually tends to result in neo-liberalism as a casualty as societies stick to their comfort zone and conjure all sorts of reasons for digging in. It is not a black and white issue of right or wrong, but rather the creation of space for cross-cultural and ideological dialogue.

Perhaps part of the problem is granting sweeping unbridled special status to Fijian customary law and native institutions. Schemes, such as those of the 1990 Constitution that hindered the State imposing discipline over the GCC by excluding the purview of the ombudsman and granting powers to Parliament to curb freedom of expression in order to protect the dignity and esteem of the GCC, may well have been unwise. Evidently, it is unwise in the sense that they seek to consolidate the power and authority of the GCC but place it in a paradoxical position as exposed by the showdown with the military regime — great power and authority, but depending on who is running the show transforming the GCC into part of the partisan political machination which undercuts its esteem and justification. To guard against this, Fiji should resist the temptation of freeing indigenous institutions from constitutional supervision as this would only facilitate native institutions becoming instruments of the State. They would become institutions of patronage and ultimately an anathema to the very mandate that legitimates their existence.

C. Raising Political Capital through Socio-Economic Emasculation?

It is to be recalled that of the nine demands by the military pre-coup was one that centered around withdrawing any political machinations which would potentially further economic inequality based on racial grounds through the 'Qoliqoli Bill'. It is a plus that among the reasons advanced by the military was the 'Qoliqoli Bill', a natural resources bill that sought among other things to vest the resources of the continental shelf and control of seabed resources in indigenous Fijians. On 25 September 2006 military spokesman Major Neumi Leweni not only stated the military's aim to seek court action over the constitutionality of the amnesty for 2000 coup perpetrators but also in the same breath reiterated the opposition of the military to the 'Qoliqoli Bill'.[84]

The opposition by the military to the natural resources bill was a positive, particularly since the political order of Fiji has always been organised on a basis of treating the communities as corporate entities. Many important rights depend on membership in a community. The constitutional framework for the organisation of the State and State power in Fiji, since independence, has been of greater critical importance than economic or social frameworks because of ethnic fragmentation, despite the reality that common interests have developed that cut across racial divides.

84 2006 Fijian coup d'état, above n78.

Under successive Fijian Constitutions (1970, 1990 and 1997), the land rights and resources thereof are enshrined in the constitution (and a brace of other legislation) in favour of indigenous Fijians: they control about 83 per cent of the land which they dominate through law and presence. For example, the 1990 Constitution enhanced the entrenchment of legislation protecting Fijian land and other interests.[85] In particular, it also changed the rule whereby minerals belonged to the State. Now minerals are vested in the owners of the land where they were found — potentially a major shift of resources from the State to the one community that owns most of the land.[86] The operational reality of the 'Qoliqoli Bill' viewed alongside other constitutionally-entrenched rights would have been to further neuter Indo-Fijians and drive yet another nail in the coffin of the 'we and the other' syndrome in a country that is multi-ethnic and in which Indo-Fijians account for almost 50 per cent of the population.

5. *Between a Rock and a Hard Place? The Constitution and Rule of Law*

Commodore Bainimarama, after venting his spleen on a number of governmental activities and particularly criticising them as unconstitutional, began the military lordship of the country on that very note. He dismissed a number of senior public servants specifically those who refused to cooperate with his regime. At some point, Fiji's largest newspaper, the *Fiji Times*, refused to publish an edition, citing military interference. Soldiers not only temporarily occupied the paper's premises but seemingly put aside their guns for the day and picked up pens to be news editors. Staff were warned against publishing 'propaganda' from the deposed government with military personnel insisting on monitoring news content and seeking to abrogate rights to vet editorial material. This was symptomatic of other print and electronic media outlets which received threats, with State television and radio news scripts and broadcasts under military scrutiny.

The 2007 interim government's proclamation that it will focus on integration[87] should be cautiously noted but not welcomed until it takes on practical dimensions. In the statement, the interim government announced plans for the review of the 1997 Constitution with the goal of 'rid[ding] the Constitution of provisions that facilitate and exacerbate the politics of race [in] such areas as the registration of voters and the election of representatives to the House of Representatives through separate racial electoral rolls.'[88] However, the government should tread with care and avoid swinging the pendulum too far — something that seems to characterise Fijian constitutional engineering. If the review involves tweaking the 1997 Constitution, rather than a new constitution, this is welcome, since the authors view the 1997 Constitution as a strong document. On the balance, it embodies a Compact among Fiji's peoples based on a set of principles which reflect shared understandings about the future participation of all

85 *Fiji Constitution of 1990* section 78.

86 Id at section 9(7).

87 Fiji Ministry of Information, *Moving in the Right Direction* (April 2007), <www.fiji.gov.fj/uploads/Roadmap_2007.pdf> accessed 17 January 2008.

88 Ibid.

ethnic communities and groups in Fiji's life and government. It also contains a Bill of Rights, which is binding on all three branches of government at all levels and on any person exercising public functions, and guarantees basic freedoms and liberties and generally offers a fair deal to all Fijians. What need a closer look are the constitutionally-enshrined 'discriminatory' provisions; otherwise it has the makings of a document full of promise for inter-ethnic relations along the consociation and integration continuum.

'Most constitutions are the embodiment of compromises made between different societal groups. Where a prior constitution is the result of a duly constituted deliberative process, conducted on largely democratic lines, there is, arguably, a strong presumption of legitimacy attached to it which cannot be easily dismissed.' In this regard, Ventak Iyer's comment that constitutions 'should not be allowed to be tinkered with unless absolutely necessary, lends a presumptive advantage to the process of restorative constitutionalism in post-revolutionary situations.'[89]

The new government has signalled its intention to strengthen democracy and make the institutions of State responsive to the needs and aspirations of the Fijian people. Although ethnic rivalry and dissatisfaction among both the indigenous Fijians and Fijians of Indian descent over access to political power and economic resources still remain, a significant measure of communal harmony can be restored. Fiji should seek to return quickly from a state of constitutional breakdown to a democratic *status quo ante*. Military intervention only serves to entrench undemocratic practices and radicalise the schisms in Fiji's socio-political landscape. The key dilemma that the interim government faces is how to ensure that the powerful players in Fiji participate and are committed to the process of restoring constitutional order, and also at the same time ensure that the process fosters political dialogue and empowers the people. So far the score sheet doesn't look pretty. The contribution that constitutional law offers in 'transitional situations relates to the phenomenon of "restoration constitutionalism", a process under which, as part of the liberalising agenda, the transitional society is sought to be returned to the constitutional order that prevailed before the eclipse or collapse of democracy and/or the rule of law, rather than being faced with the prospect of fashioning a new constitutional order.'[90]

6. Beyond the Coup: Looking Back & Looking Forward

Looking at the political challenges faced by Fiji today, one is reminded of the often mentioned, but little understood, visionary model of early democratic government: 5th century BCE Athens. Of course, one needs to be selective about which parts of the Athenian model one picks as providing any kind of *exemplum* for the modern world. It is useful, however, to briefly consider Cleisthenes' reforms from approximately 510 BCE, when he successfully transformed the basic form of political organisation away from kin-based group, by creating ten new 'tribes'.[91] Each of the new tribes was composed of

89 Venkat Iyer, above n74 at 47.

90 Id at 40.

91 'Cleisthenes' in Simon Hornblower & Antony Spawforth (eds), *The Oxford Classical Dictionary* (1999) at 344.

three *trittyes*. Each individual *trittys* represented a combination of unconnected *demes* (like small parish areas), so that one was from the city, one from the country and one was from the coastal regions. By bringing these disconnected political units together they were forced to act out of collective interest rather than divisive self-interest.[92]

Of course, Cleisthenes' reforms also need to be seen in context. One of the fundamental features of the geopolitical landscape of the late 6th and early 5th centuries in ancient Greece was the rapid urbanisation of the new city-state and the exacerbation of potentially disastrous disparities as a result of rapid population growth. In short, a new political system built on compromise and collective action rather than competition and individual profit was necessary. Crucially, this compromise was generated from within the elite of Athenian society. This was not a grass roots campaign, though it had major benefits for the non-elite majority.

The situation we see when looking back at Athens is quite similar to that which we have seen evolve in Fiji in recent times. The internal political conflict is no longer just focussed on divisions between Indo-Fijians and the indigenous Fijian population, though these are still present. We now see antagonism between the traditional power bases of the indigenous elite, notably the Methodist Church, the GCC, and the military. Indeed, Brij Lal observes that the GCC was one of the most serious and unexpected casualties of the coup.[93] Like Athens, there is an urgent need for bold thinking and well-directed efforts to move out of the coup cycle, and into a new period of stable constitutional rule where the people and government do not have to live with the expectation that the next coup is always just around the corner.

In order to complement existing measures taken against the military controlled government, efforts need to be made to bring together and facilitate discussion between representatives of each of the key local stakeholders. Crucial to this process will be the inclusion of the military. Though the military can be easily seen as a belligerent in the disturbance of the democratic process, its cooperation and participation in the bargaining process will continue to be fundamental to any lasting vision for Fijian society. The military is an important player in the old game of ethnic and identity politics in Fiji. While openly and strongly condemned by foreign governments and the international media, it has had significant local support for the stated goals, if not the methods, of its 'clean-up' campaign within Fiji.[94] The reality is that instruments revered in the democracy or governance discourse in the West for measuring public opinion such as yes/no referendums, and single-issue election votes, etc. can be divisive and unsatisfactory in the particular context of Fiji. At the heart of this conundrum is the fact that there are two dominant layers of authority: one in the 'formal' Westminster model and another in the 'informal' traditional leadership (the GCC and the church), which while lying outside the former nonetheless exerts a powerful influence particularly at the grassroots. This means that groups remain fluid and it is important that the interests they represent do not become entrenched.

92 Ibid.

93 Lal, above n71 at 148.

94 Id at 148, 150.

While bargaining across the traditional centres of power is a given, this new period of change and negotiation necessitated by the coup should be treated as an opportunity to bring to the table other key Fijian groups that have been effectively marginalised till now. Not least of these are the major women's associations such as the Fijian Women's Rights Movement ('FWRM') and Women's Action for Change ('WAC'). Women are poorly represented in the Fijian parliament and this political marginalisation is only an echo of the broad and deep problems facing women and other stakeholders in Fiji.

Sabel and Dorf[95] articulate the primary tenets of a properly functioning democratic deliberation as an ongoing, argumentative process properly characterised not only by a respect for individual rights, but also by a strong sense of political participation and active citizenship.[96] Democratic experimentalism questions the ability of any group legitimately to speak for all of its members, on every issue, across time and space. It denies that there can be any unshakeable group-based 'way to be' that can prescribe and predict individual potential in every respect. Thus it recognises that important group identities, while they are entitled to space and respect, are nonetheless complicated and contestable.[97] Democratic experimentalism imagines a collaborative method of social problem solving that can only occur through an ongoing, open-minded and respectful dialogue between social stakeholders, primarily at the level of direct democracy.

Democratic experimentalism shows the influence of Roberto Mangabeira Unger's important work on 'radical democracy' based on a flexible, plastic structure that encourages and assumes constant revision by human agents. Unger points out the relevance of underlying institutional structures, what he calls 'formative contexts',[98] in shaping and limiting peoples' imaginative assumptions about the range of options available to them. He criticises existing social democratic norms for insulating their fundamental institutions from deep criticism and revision, for overemphasising technocratic solutions to political problems, and for miring the delivery of social services in a bureaucratic, procedural ethic that disempowers and disengages citizens.[99] Unger advocates creating structures that are capable of de-insulating aggregated power (both in privileged populations and areas of governance) from democratic control. He asserts that a comprehensive understanding of citizens' legal rights should include 'destabilization rights', which would allow citizens to challenge existing hierarchies of power and privilege and empower them to prevent factions from gaining a long-term hold upon the levers of social power.[100]

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95 Joshua Cohen & Joel Rogers, *On Democracy: Toward a Transformation of American Society* (1983); Frank Michelman, 'Symposium: The Republican Civic Tradition: Law's Republic' (1988) 97 *Yale Law Journal* 1493.

96 Charles Sabel and Michael Dorf, above n20 at 293–314.

97 See Martha Minow, *Not Only For Myself: Identity, Politics and the Law* (1997) at 34–46, who has commented on the tendency, in group-based analysis, to reduce complex individuals to one identifying trait and then to imagine that they can be described for all purposes along that axis. There is also the related tendency to neglect intersectionality – the fact that all individuals are members of multiple groups to some degree – and there are problems with what Minow calls group 'boundaries, coherence, and content.' Minow points out that real-world group identities are blurry, fluid and contestable; to describe them otherwise is to do violence to the full personhood of its members. On the problem of essentialism, see Angela Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford Law Review* 581.

98 Roberto Unger, *Politics: Social Theory: Its Situation and Its Task* (1987) at 130–31.

99 Roberto Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (1987) at 585–86.

By using a new bargain to focus efforts on tackling this situation, we may ultimately end up moving forward in ways that will not only help stabilise constitutional rule in Fiji but will also help to deliver tangible benefits to the wider community beyond the elite. This enhanced vision of a broader base of political representation and participation should also deliver a model of democracy that reflects the evolving reality of the Fijian polity rather than merely fitting in with the Western models against which democratic systems are usually compared. Even the most perfect public deliberative process is incomplete and fragile without some sense of the social ends toward which it is directed. Thus, it is imperative that we experiment with ways to measure 'voice' in a bid to balance individual and group interests. With the benefit of the country's diverse socio-political structures, creative new options for a satisfactory collective future can facilitate entrenched antagonisms giving way to shifting, overlapping coalitions and novel accommodations — contingent always, issue-specific, pragmatic and discrete — and by an accretion of small agreements where even the issues refine and reformulate themselves. After all, democracy is, if nothing else, a process and a work in progress that is expressed not as much by institutions but by the system's ability to respond peacefully to the changing realities of the day.

Conclusion

Over the course of the last six decades, the international community has made significant progress towards enshrining democratic participation as a right *in law* if not in practice. But clearly, there is still a long way to go towards protecting these rights both at the level of the individual State and at the international level. Regrettably, the narrow logic of self-interest persists in hampering efforts toward substantive change.

Glancing across the globe, it is easy to downplay the radical differences that separate the social and political legacies of States, and the implications that this continuity of difference has for the way States approach the evolving normative regimes of international rights. The discourse around sovereignty, to cite one well-known example, diverges greatly between that of the European Union (where member States have through negotiation been prepared to cede a range of sovereign rights) and some of the relatively new States (like Malaysia and Indonesia) and some of the older ones (like China) of Asia and the South West Pacific. For some of these States, sovereign status is still no more than two generations old and in some much less than that. It is hardly surprising that these States are not at all keen to rescind sovereign powers, except under extreme duress.

Ultimately, the international community may try to set certain standards for States to attain and it may even accept the charge of being the protector of last resort. But neither rights nor well-intentioned commitments to protect them will be sufficient if political solutions are not resolved at their source in a manner that overcomes the many divisions that can be expected (and some that can not) in complex, multi-ethnic societies. If we can learn anything from the Athenians, it is not so much in the details of 5th century party

100 Unger, above n99 at 530.

politics; instead, it is actually the value of genuinely creative thinking, of vision. The Athenians were not conforming to any existing set of norms, they were creating them to suit their particular requirements. The alternative is that we will always be limited to repeating the errors of the past rather than being inspired by them.

At the start of the 21st century, the international community appears open, cosmopolitan, accommodating, and neutral with sovereignty seen as a set of powers and competencies that can be enjoyed by all States regardless of their particular cultural identities. However, it should not be forgotten that sovereignty is a flexible instrument that readily lends itself to the powerful imperatives of the civilising mission, in part because through that mission, sovereignty extends and expands its reach and scope. Not surprisingly, the essential structure of the civilising mission can readily be reconstructed in the contemporary vocabulary of human rights, governance, and economic liberalisation. The so-called 'McDonaldization' of the world minimises the complex way in which the local interacts with the international.[101] Much of what is described as 'local culture' as opposed to 'outside ideas' is in fact already a reflection of the global. In an observation that challenges 'McDonaldization' (whose basis is 'universalism'), Cristie Ford cautions:

> …questions about language, identity, and culture cannot be contained within the abstract world of formal politics; in complicated and immediate ways, they spill over into the personal, cognitive, social, economic, and local realms. New stakeholders emerge and the community seems more diverse than ever.[102]

101 See Arjun Appadurai, above n19.

102 Cristie Ford, 'In Search of the Qualitative Clear Majority: Democratic Experimentalism and the Quebec Secession Reference' (2001) 39 *Alberta Law Review* 511 at 513.