

TEACHING CONSTITUTIONAL LAW TO FIJI STUDENTS: THE SEPARATION OF POWERS AND THE RULE OF WHAT?

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ABSTRACT

In this paper the author reflects upon the challenges of teaching, and more importantly the challenges that students face attempting to learn about, constitutional law within the context of recent political upheavals in Fiji. Whilst on one level, the upheavals provide a topical and even captivating context for what is often seen as a dry area of study, there are a number of more disturbing resonances that emerge, particularly in relation to the cognitive journeys that students experience. Potential fears about academic freedom, and the apparent collapse of the very doctrines being studied, produce a variety of responses from students that reveal anxiety, confusion, resignation and, at times, a realism that is almost as disturbing as it is insightful into the real relationship between law, politics and raw power.

This paper is mostly an action research-based paper that explores student responses and the teacher's own experiences in trying to adapt to this rapidly changing environment. Despite the challenges, the experience is also invigorating because it exposes students and teacher alike to a journey to the fragile edges of the positivist view of constitutionalism and into a very personal and tactile post-structural experience.

I. INTRODUCTION

Teaching constitutional law in the South Pacific can be challenging, culturally confronting and even confusing but it also a very stimulating and educational experience. The cultural diversity in the region and the fact that its constitutional systems are largely the result of a colonial legacy mean that students generally view European-style constitutional arrangements with a distinct air of 'otherness'. This lack of cultural familiarity, combined with a lively history of coups, civil disturbances and other forms of instability, means that teaching constitutional law is a very engaging and uncertain experience. The immediate context of this paper is the recent political upheavals in Fiji, but it is located within the broader context of teaching law to Pacific students more generally. The aim of this paper is to explore these recent events from the perspective of the learning experiences of students and teachers, and to reflect upon the way in which the experience has affected these scholars.

II TEACHING CONSTITUTIONAL LAW IN THE UNIVERSITY OF THE SOUTH PACIFIC CONTEXT

The University of the South Pacific (USP) is an international institution providing legal training to students from at least 12 different Pacific island countries. From the outset, this means that the teaching of constitutional law needs to be centred around historical developments and comparative study, and concentrate upon fundamental conceptual knowledge. The challenge, in fact, goes somewhat deeper because the legal systems in question are culturally foreign to most students in the sense that they represent the historical result of past colonisation.

Established in 1968, USP is one of only two universities of its type in the world. It is jointly owned by the governments of 12 member countries: Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu and Samoa. The

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University has campuses in all member countries. The main campus, Laucala, is in Fiji, and the Emalus Campus in Vanuatu is the location for the School of Law¹

There is a wide range of constitutional models represented within the region, including the more typical Westminster constitutions of former British colonies such as Solomon Islands, Westminster republics such as Vanuatu, presidential models more similar to the United States' constitutional system in the Micronesian countries, and blended models that combine the roles of head of state and head of government with a version of responsible government, such as in Kiribati, all the way through to the monarchist constitution of the Kingdom of Tonga.²

All of the countries are relatively young as sovereign nations (except Tonga), having gained independence between 1960 and 1980, with Tokelau still in the process of gaining full independence from New Zealand.

Whilst it would be inaccurate to describe the area, as some Australian politicians and journalists do, as an arc of instability,³ it is certainly a dynamic region politically. Whilst Fiji has remained the main headline grabber in recent times, Tonga continues its slow walk towards democratisation, Solomon Islands is still in the process of regaining some stability following the intervention of the Regional Assistance Mission to the Solomon Islands (RAMSI) and Vanuatu manages to maintain a sense of calm despite an almost endless migration of members between political parties as the coalitions behind the government of the day continually shift.

Probably most significant from a teaching perspective is the cultural setting within which the study of law generally, and constitutional law in particular, takes place at USP. This more than any other single factor distinguishes the experience of teaching in the Pacific from teaching law in Australia. For Pacific students generally, common law legal systems and the constitutional apparatus that accompanies them have a powerful 'otherness'. Even the notion of nationhood itself is largely a product of past colonisation. This is not in itself a negative thing. On the contrary, this low-level dissonance provides students with a place to stand outside of the subject matter of law. Depending on the approach of the teachers, it can allow students the opportunity to learn law without necessarily being at risk of 'internalising' the lessons in the way that has been prominently described as a feature of legal education in American law schools.⁴

Harvard University Professor of Law Duncan Kennedy once aptly described the potential colonising aspect of legal education as follows:

A lot of what happens [at law school] is the inculcation through a formal curriculum and the classroom experience of a set of political attitudes toward the economy and society in general ... [L]aw school teaching makes the choice of hierarchy and domination, which is implicit in the adoption of the rules of property, contract, and tort look as though it flows from and is required by legal reasoning rather than being a matter of politics and economics ...⁵

Clearly, there are some important ethical issues for legal educators in the Pacific to consider in relation to the potential for law study to alter previous world views. For critical educators, the presence of dissonance is experienced as an advantage rather than as a challenge, as it actually assists the process of critical education.

1 *About the University*, University of South Pacific <http://www.usp.ac.fj/index.php?id=usp_introduction> at 28 September 2009.

2 Consolidated versions of these constitutions are available from Pacific Islands Legal Information Institute <<http://www.pacii.org/>> at 28 September 2009.

3 Robert Ayson, 'The "Arc of Instability" and Australia's Strategic Policy' (2007) 61(2) *Australian Journal of International Affairs* 215.

4 Duncan Kennedy, 'Legal Education as Training for Hierarchy' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (1982) 38.

5 Kennedy, above n 4, 42-5.

III. TROUBLESOME KNOWLEDGE

Recent pioneering research on the idea of threshold concepts and troublesome knowledge provides an important set of theoretical tools for understanding the challenge of teaching law to students in situations where it may challenge their own pre-existing world views or cultural settings. Erik Meyer and Ray Land⁶ have used the term ‘threshold concepts’ to describe fundamental ways of thinking and practising in a discipline that also have the potential to be transformative for students, in the sense of challenging and potentially altering their world views.⁷

The exploration of the idea of threshold concepts was sparked initially by inquiry into those particular points at which students commonly become ‘stuck’ when encountering a new educational discipline or discourse. Earlier descriptions of this process referred to these difficult thresholds as a form of ‘troublesome knowledge’ that represented particular barriers to a student’s further progress in a given subject or discipline.⁸

David Perkins identifies four forms of troublesome knowledge, of which his descriptions of ‘conceptually difficult knowledge’ (counterintuitive knowledge), and ‘foreign knowledge’ (knowledge representing perspectives foreign to the student’s world view) are the most significant for present purposes.⁹ Meyer and Land also add a further category, that of ‘tacit knowledge’, to refer to complex knowledge that contains paradoxes, seeming inconsistencies or at least subtle distinctions, particularly where these are based upon unstated assumptions within the discourse.¹⁰

Ricketts has identified a further form of troublesome knowledge, which has been described as ‘loaded knowledge’.¹¹ This is where the discipline itself attempts to mandate the acceptance of ideological or philosophical assumptions which privilege certain world views over plausible alternatives. Loaded knowledge is particularly prevalent in legal study because of the pervasive but often understated influence of underlying political ideology on legal thinking.

A. Reflective Practice

An awareness of the cognitive processes associated with troublesome knowledge and threshold concepts can assist in the design of learning experiences that help students to understand previously foreign concepts, whilst at the same time allowing students to maintain some personal distance from the ideas being studied. The author utilises reflective essays as a form of assessment and as way of encouraging students to articulate and reflect upon troublesome knowledge. In the reflective essay, students are asked to briefly respond to the following question:

What new concepts have you learned that you have found surprising or challenging or that have changed the way you think about constitutional law or law generally?¹²

6 Erik Meyer and Ray Land, ‘Threshold Concepts and Troublesome Knowledge: Implications for Course Design and Evaluation’ in Chris Rust (ed), *Improving Student Learning: Diversity and Inclusivity* (2005) 1.

7 Erik Meyer and Ray Land, *Threshold Concepts and Troublesome Knowledge* (2003) Enhancing Teaching and Learning Project, Occasional Report 4, University of Edinburgh. <<http://www.ed.ac.uk/etl/publications.html>> at 28 September 2009.

8 David Perkins, ‘The Many Faces of Constructivism’ (1999) 57(3) *Educational Leadership* 6, 10
9 Ibid 10.

10 Meyer and Land, above n 7, 7.

11 Aidan Ricketts, ‘Threshold Concepts: “Loaded” Knowledge or Critical Education?’ in Caroline Bailie, Ray Land and Erik Meyer (eds), *Threshold Concepts and Transformational Learning* (2009) (upcoming publication). See also Aidan Ricketts, ‘Threshold Concepts in Legal Education’ (2004) 26(3) *Directions: Journal of Educational Studies* 2.

12 Aidan Ricketts, LW 207 *Constitutional Law Course Guide* (2009) University of the South Pacific, 8.

For the teacher, these reflective exercises become a form of action research as they allow the students to inform the teacher about what concepts have been most troubling, surprising, challenging or transformative. A good deal of the research basis for this paper comes directly or indirectly from the information gained from reading students' own reflections.

B. Cultural Dissonance

Common law legal systems reflect hundreds of years of English history and culture and are structured around deeply embedded world views about individuality and property, and in the case of constitutional law, well-developed ideas about the legitimacy of centralised authority and the rule of law. All of these underlying concepts may be loaded knowledge for students from different cultural backgrounds.

There is a real risk that the study of law may have a 'colonising' effect on the minds of such students if it is presented in an uncritical way by teachers. However, there is conversely also a much greater opportunity to engage in sustained critique of the foundational assumptions of the legal system precisely because the students tend to approach law from the perspective of it being culturally foreign.

Stephen Brookfield has written extensively about the nature of critical thinking in higher education and argues that the aim of a critical educator should be to provide students with information and experiences that allow students to uncover for themselves the hidden assumptions in the subject matter.¹³

In the case of Pacific students, the pre-existing level of cultural dissonance becomes an advantage to the project of fostering a critical approach to legal concepts. Conversely, the risk of students uncritically accepting the foundational assumptions of the legal order are correspondingly higher in Australia, where the same level of innate dissonance is not likely to be present. A study of first-year law students entering an Australian law school in 2005 revealed a high level of underlying approval of Australia's current legal and political arrangements and a resistance to deep questioning of the legitimacy of central authority.¹⁴

Fostering deep critical thinking about constitutional law in Australia can therefore be very challenging and is frequently viewed by many students, and indeed by many colleagues, as not only politically radical, but more pervasively as lacking practical application. Deep critique can be negatively characterised as a largely academic enterprise at the margins of a sensible, empiric and mostly positivist legal education, and usually as having very little value as a vocational skill.

At risk of reducing the complexity of the situation to a simple generalisation, the stability of legal arrangements in Australia and their general cultural familiarity to the large majority of students and law teachers combine to produce a kind of comfortable positivism that mostly avoids deep questioning of foundational assumptions of the legal regime. Deeper questions about issues such as political legitimacy, the origins and appropriateness of centralised systems of authority and the limitations of a formalist view of power relations are mostly seen as verging on the soft edges of the legal discipline. To describe such critiques as post-structural often has the effect of further marginalising what may in fact be a very practical analytic process.

Conversely, legal education of Pacific students starts from a baseline in which the legal system and its underlying assumptions already have a definite 'otherness' embedded in them. Maintaining a critical distance helps students to better understand a system that for them is culturally foreign, and it also helps sustain the critical approach required to deal with the very real political upheavals that students observe around them. A comfortable positivism is simply not possible when students are regularly exposed to coups, civil disturbances and other forms of instability, and would itself create enormous frustration for students.

13 Stephen Brookfield, *Developing Critical Thinkers: Challenging Adults to Explore Alternative Ways of Thinking and Acting* (1987).

14 Ricketts, above n 11.

C. Framing the 'Otherness'

A key challenge for a critical legal educator in the Pacific context is to be able to offer learning experiences that allow students to understand the key threshold concepts in the discipline without being required to internalise those concepts in a way that may displace the students' own cultural or contemporary perspectives. Explaining not only the function, but the meaning, purpose and value of concepts, like the separation of powers, responsible government or the rule of law, requires some way of explaining how these culturally contingent ideas have evolved in their legal systems of origin. Surprisingly, it is possible at times to find partial cultural equivalences. Maintaining the 'otherness' by explaining that the story of British constitutionalism is a story about British customary law has proved an effective way of traversing this difficult terrain.

Similarly, the idea that British constitutionalism is an expression of British customary law also helps explain why former colonies have rigid written and supreme constitutions but the template model in Britain is far more flexible. The apparent contradiction of reducing an unwritten system to a written form is resolved, as students understand that the virtual codification of British constitutionalism was necessary precisely *because* it was being transplanted into an unfamiliar cultural setting.

Such an approach simultaneously helps to explain the conceptual and cultural underpinnings of the imported legal system, whilst leaving the student free to ponder the appropriateness of having installed the customary law of another country into their own society.

This kind of open-ended contemplation is evident in the words of the following student:

Constitutionalism is based on rational principles rather than the traditions and customs of people. So, could the constitution be regarded as an initiating factor to the degradation of culture today? Probably, but the question still remains. Do we really need a constitution at all? Can other countries exist like United Kingdom, where there is no Constitution at all? ... It is hard to imagine a world without laws completely, because there would be a total chaos. However, a world without constitutions is thinkable (at least for me!).¹⁵

The project of attempting to explain the function, meaning and value of constitutional concepts like the separation of powers, responsible government or the rule of law clearly is challenging enough given the underlying sense of otherness. However, far more challenging in 2009 has been the attempt to give meaning and weight to such ideas for students from Fiji who are living an experience of seeing these concepts routinely manipulated, abused and misrepresented, not only by politicians, but by the head of state, and most problematically by the judiciary. In a sense, the upheavals in Fiji have meant that for Fiji-based students there are two powerful forms of dissonance interacting simultaneously. In the first place there is the background perspective on the imported legal system as being culturally and historically foreign. However, in addition, there is a more pressing and urgent form of dissonance provided by seeing the foundations of that system being abrogated and undermined by current events.

IV. THE FIJI EXPERIENCE

Fiji is the central campus of USP, and even for the law school which is based in Vanuatu, the majority of USP law students are still resident in Fiji and study the course online.

Fiji has a three-decade long history of constitutional upheaval. Independence from Britain was first obtained in 1970.¹⁶ Fiji became a republic following two coups in 1987, which led

¹⁵ Student comment contained in Reflective Exercise, LW 207, Constitutional Law, University of the South Pacific, Semester 1, 2009.

¹⁶ *Qarase v Bainimarama* [2009] FJCA 9 (9 April 2009) para 7 <<http://www.pacii.org/>> at 28 September 2009.

to the promulgation of the new republican constitution of 1990.¹⁷ The 1990 constitution was amended and passed by both houses of Parliament in 1997.¹⁸

There was a further coup in 2000 — the attempted ‘civilian’ coup that was staged by George Speight and supporters. This coup was successful in removing the then Prime Minister from office. However, following military intervention and negotiations for the release of hostages, the military commander, Colonel Bainimarama, established an interim military government which later led to the appointment by the President of Mr Qarase as interim Prime Minister.¹⁹

The establishment of the interim regime was reviewed by the High Court in *Prasad v Republic of Fiji* in November 2000, holding that the purported abrogation of the 1997 constitution had not been made in accordance with the doctrine of necessity and was of no effect.²⁰

Subsequently, the President appointed a new interim Prime Minister, and by August 2001 a new general election was held in which Mr Qarase was elected Prime Minister.

This is a very shortened history and much is left out. The purpose here is not to engage with the legal issues as such but to give some background to the ongoing turbulence in Fiji politics. Significantly, the turbulence during all of this time involved all three branches of government — not only were the executive and legislative branches embroiled in the coups, but the judiciary also was divided politically.

Some judges strongly supported the 1997 constitution whilst others implicitly supported the various interim administrations. In the most recent Court of Appeal decision, the court specifically traces the political divisions inside the judiciary, openly referring to one group of judges as ‘the judges in the constitutional camp’.²¹

Mr Qarase was re-elected in May 2006 and re-appointed as Prime Minister. Following several months of acrimony between the Qarase government and the military commander, the latest military intervention occurred in December 2006.

For current purposes, that is where this story really starts. Immediately after the 2006 coup, the military commander assumed the role of head of state and appointed an interim Prime Minister, who advised dissolution of the Parliament. In January 2007, the interim Prime Minister resigned, the military commander handed back presidential power to the President and was quickly appointed interim Prime Minister by the President.

Clearly these kinds of power plays are always going to be confusing for students, and the country as a whole. What makes the most recent coup far more challenging from an educational perspective is that, unlike the previous coups, it was continually presented (at least until most recently) as lawful and in compliance with the constitution. It is hard to imagine that constitutional law students could be asked to grapple with the idea of a ‘constitutionally valid coup’, but in effect this is what the October 2008 decision of the Fiji High Court had produced.

In October 2008, the High Court held that the actions of the President subsequent to the 2006 coup — ratifying the military’s dismissal of the elected Prime Minister, the military’s appointment of an interim prime minister, and the dissolution of Parliament — were ‘valid and lawful acts in exercise of the prerogative powers of the head of state to act for the public good in a crisis.’²² The High Court also upheld the President’s grant of immunity for all those involved in the 2006 coup.²³

17 Ibid para 14.

18 Ibid para 16.

19 Ibid para 33.

20 *Prasad v Republic of Fiji* [2000] FJHC 121 (15 November 2000) <<http://www.paclii.org/>> at 28 September 2009.

21 *Qarase v Bainimarama* [2009] FJCA 9 (9 April 2009) para 59.

22 *Qarase v Bainimarama* [2008] FJHC 241 (9 October 2008) para 173 <<http://www.paclii.org/>> at 28 September 2009.

23 Ibid para 173.

A. Teaching Constitutional Law in the Shadow of a ‘Constitutionally Valid Coup’

The 2008 academic year had ended with the bizarre finding by the High Court that the actions of the President to uphold the military coup of 2006 were a ‘valid and lawful exercise of the prerogative powers of the head of state’.²⁴ For the start of the 2009 academic year, it was necessary to find a way to respond to these developments.

There is naturally a certain level of risk, but also of academic responsibility, in dealing with such a situation. It would be impossible to ignore such a far-reaching and unusual constitutional decision, but there were also very real dangers for the university, the law school and the students in engaging in too much open critique. Perhaps conveniently the curriculum was already set in place by print-based course materials published prior to the High Courts decision.

The best and safest way to respond was to invite students to review the case in the major critical essay. In what is probably yet another example of the pedagogical challenge of teaching in such circumstances, the Court of Appeal heard an appeal from the 2008 case during the middle of the semester and overturned the earlier decision. This necessitated a rewriting of the original essay topic and a significant extension of time for students.

What the reading of these essays revealed was the complex ways in which the various forms of dissonance were informing the students’ own constructions of knowledge. Whilst many students were able to distinguish the theoretical principles from the current political reality they were experiencing, many also clearly struggled with the growing disparity between the theories of constitutional law and the reality in Fiji.

Below is a series of excerpts from students’ essays that convey some of the different ways in which students reacted to the circumstances they were in.

A number of the students displayed an understanding and support for the doctrines of constitutionalism, but expressed dismay at the abuse they felt they had witnessed. These students at least were able to constructively use the conflicting messages they were receiving to develop a more mature perception about the interplay of the ideal and the real:

It can be so maddening to hear that such a document is the supreme law of a country and that absolutely everyone is subject to the law ... I feel that this is more of an ideal state which society should aim to obtain but for now, realistically, it is not so. Such occurrences (the coup) led to me perceiving a constitution as a weak and irrelevant document drawn up as a matter of procedure rather than having any real legal authority ... I struggle to find the stability that a constitution promises and beyond that if the government can at any time launch emergency decrees and stifle the very rights it (the constitution) aims to protect, it is but a meaningless letter only worth the paper it is written on²⁵.

In summary, the judgment instills in the President unlimited powers to take over government at his discretion, and then take whatever action he or she believes is needed, with no form of accountability possible. The decision disguised illegal acts as legal and constitutional and the perpetrators walked away freely. This decision can be said to be very damaging to a country that calls itself democratic. It ignores the values that make up democracy, gives a flawed interpretation of the Constitution while undermining it and questions the rule of law in the country. Such decisions make one question whether Fiji is in actual fact a democratic republic or if that is just an illusion that we all live under.²⁶

Personally, without the Constitution I feel I’d probably be living under an oppressive government. However, if I look at Fiji’s current situation, I cannot deny the reality. It seems the Constitution has lost its supremacy and the idea frightens me deeply because doing this course has made me realize that my identity, my rights and my future are at stake and I generally have no defense if

24 Ibid para 173.

25 Student comment contained in Reflective Exercise, LW 207, Constitutional Law, University of the South Pacific, Semester 1, 2009.

26 Student comment contained in Critical Essay, LW 207, Constitutional Law, University of the South Pacific, Semester 1, 2009.

the Constitution protecting me is being disregarded or even worse, abrogated. Even whether I'll want to practice as a lawyer largely depends on how secure the Constitution in Fiji would be when I graduate because if things don't improve, I see a bleak future ahead of me.²⁷

Other students struggled much more to find some way of reconciling the theories they were learning with the reality they were experiencing. In a sense, these students struggled more because they tried to make sense out of irreconcilable experiences and concepts.

I always thought that the law was something that other institutions operated under. What surprised me was that while courts are to uphold the law, it is during times of political upheaval where the fabric of the law is stretched, that they become a sort of a tool for determining the legality ... of regimes that usurp power. How can it be that the courts use legal principles to determine the legality of a regime which has taken power illegally?²⁸

This case has brought home to me how much about the law depends on perceptions and interpretations. I used to wonder what law lecturers mean when they said there is no right or wrong answer; what matters is how you argue your point. Well, now I know.²⁹

The other feature is the fact that some constitutions are normative which is enforceable in practice and respected and obeyed by the people and carried out in practice. On the other hand some constitutions appear nominal in nature that is, parts or all of a constitution are in not in fact respected or obeyed by the people or they just exist in name. This brings me to the concern that whether the current constitution of Fiji is a normative constitution or has become nominal since the recent 2006 military coup.³⁰

Perhaps most problematic of all is that group of students who struggled to actually accept and internalise the message they were getting, particularly from the High Court's decision.

When I first enrolled for this course, I had a mistaken understanding that whoever unlawfully takes over a legitimate government that is elected by the people through a constitutional model of government shall be easily found guilty for treason, and the court would reinstate the elected government accordingly ... One assumes the Constitution is 'dead' when an unlawful takeover happens. Yet, the unlawful government operated for a while, side by side with the Constitution, and the court ruled in its favour.³¹

I used to think that a constitution, being the supreme law of a country, once removed meant that any legal action afterward was baseless and the legal system was powerless. To the contrary, I have come to realise that there is quite a great deal of power still vested in the hands of the judiciary and they have the final say in determining whether or not to recognise a new regime as legitimate.³²

And, finally, there are those students whose ultimate response was to accept and even value the role of the military in supervising elected government.

This decision has in a way approved of Coups. This will cause fear amongst the future politicians of Fiji. People who behave like small spoilt children cannot govern a country, there must be mature people who put other people's needs before themselves. This decision does not guarantee

27 Student comment contained in Reflective Exercise, LW 207, Constitutional Law, University of the South Pacific, Semester 1, 2009.

28 Student comment contained in Reflective Exercise, LW 207, Constitutional Law, University of the South Pacific, Semester 1, 2009.

29 Student comment contained in Critical Essay, LW 207, Constitutional Law, University of the South Pacific, Semester 1, 2009.

30 Student comment contained in Reflective Exercise, LW 207, Constitutional Law, University of the South Pacific, Semester 1, 2009.

31 Student comment contained in Reflective Exercise, LW 207, Constitutional Law, University of the South Pacific, Semester 1, 2009.

32 Student comment contained in Critical Essay, LW 207, Constitutional Law, University of the South Pacific, Semester 1, 2009.

that those people who are democratically elected stay in power. It allows for people to conduct coups and also guarantees their immunity if they follow in the steps of Mr Bainimarama.³³

Furthermore the military is a political institution of a very particular kind. The armed forces of a nation are generally regarded as being above politics because they guarantee the security and integrity of the state and are the storehouse of the national interest. This ensures the military a special status and respect thus allowing them to intervene in politics particularly when, in its view, fundamental national interest are threatened. Also the military was interfering with politics to protect the political and economical life of its people ... Military intervention of this kind also took place in Nigeria in 1983 which marked the overthrow of four years of civilian rule because the economy was going down caused by falling oil prices. In concluding I would say that the actions of the military are alright.³⁴

These various responses show some of the ways in which the experience of the political upheavals shaped students' construction of constitutional knowledge. It was not a simple matter of contrasting the ideal with the real or the legitimate with the illegitimate. There were clearly many shades of meaning that students could construct.

The period between the High Court decision in October 2008 (upholding the coup) and the Court of Appeal decision in April 2009 (which overturned that decision) was a bizarre and challenging journey for teacher and students alike. A straightforward unlawful seizure of power would not have been so problematic. The most confusing aspect was that the judiciary had intervened to use legal principle to uphold an unlawful overthrow of the elected government.

Following the Court of Appeal decision in April, the President and military finally moved to abrogate the constitution, and dismiss the judiciary, and from the perspective of a constitutional lawyer and educator, and from the perspective of many students, this is a much more understandable outcome. It doesn't change the fact of which elite is holding on to political power, but it is a far more honest and transparent way of conducting an overthrow.

V. CONCLUSION

In the Pacific, and in Fiji in particular, there are complex sources of dissonance for students as they encounter the theories of constitutionalism, including the underlying foreign character of constitutionalism itself as well as the lived experience of upheaval. There is very little place for the comfortable positivism of Australian constitutionalism. For Pacific students, the rule of the law remains more of an aspirational concept than a reality, and there is a need to accept that political, economic and cultural sites of power outside of the formal legal system often exert equal or greater weight than the legal system itself.

From the perspective of a critical legal educator, perhaps the most fascinating and enlightening aspect of the experience is the way in which these conditions seem to upend or reverse some of the traditional political battle lines in legal education experienced in Australia. Suddenly, positivism or black letter legal theory becomes an aspirational political value and is stripped of its clothing of empiricism, whilst a more critical, even post-structural, approach becomes an essential tool for practical, even vocational, training of lawyers.

As a critical educator, one's role is to ensure that students are exposed to a variety of views and provoked into challenging previous assumptions so that they are able to embark upon their own critique and cognitive journey. In Australia this appeared to be a relatively straightforward role of intentionally unsettling the comfortable orthodoxies surrounding constitutionalism: the legitimacy of centralised authority and the role of the nation state. In a sense, in the Australian classroom, 'otherness' becomes a quality that the critical teacher deliberately needs to introduce

33 Student comment contained in Critical Essay, LW 207, Constitutional Law, University of the South Pacific, Semester 1, 2009.

34 Student comment contained in Critical Essay, LW 207, Constitutional Law, University of the South Pacific, Semester 1, 2009.

into the classroom in order to provide students enough critical challenge. In the Pacific, however, otherness is the very medium within which learning takes place. Initially there is a primary otherness born of the students' own cultural backgrounds, but in the case of Fiji students, there is yet another powerful source of dissonance emanating from within the modern nation state itself. Consequently, the project of teaching constitutional law begins with an attempt to explain and articulate new concepts and troublesome knowledge and then is challenged further by contemporary events that undermine even the promise of stability, enforceability and consistency that was supposed to accompany a constitutionalist approach.

Perhaps the most powerful lesson as a teacher has been that helping students to negotiate troublesome knowledge and fostering critical thinking requires the teacher to continually reposition to strategically respond to students' own backgrounds and experiences. In summary, it is a fascinating journey for teacher and students alike, and one in which a critical approach, an open mind and a dedication to flexibility and lifelong learning becomes not just an aspiration but a basic precondition to continued professional practice.