Taking exception to the rule: a poststructural analysis of legitimacy in Fiji’s new legal order

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Southern Cross University

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A Poststructural Analysis of Legitimacy in Fiji’s New Legal Order
Taking Exception to the Rule

A Poststructural Analysis of Legitimacy in Fiji’s New Legal Order

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Doctor of Philosophy

January 2019
For my mother
I certify that the work presented in this thesis is, to the best of my knowledge and belief, original, except as acknowledged in the text, and that the material has not been submitted, either in whole or in part, for a degree at this or any other university.

I acknowledge that I have read and understood the University's rules, requirements, procedures and policy relating to my higher degree research award and to my thesis. I certify that I have complied with the rules, requirements, procedures and policy of the University (as they may be from time to time).

Signed ..

Date 10/01/2019
Abstract

This thesis is a socio-legal analysis of the concept of legitimacy and the conditions of its possibility in Fiji’s new legal order. The interest in the topic emerges from the writer’s experience teaching law in Fiji in the legally perplexing period after the military coup d’état in 2006. Consistent with contemporary critical approaches to qualitative legal research the thesis involves a multipronged strategy of inquiry, interpretation and explication but engages primarily with the work of Italian philosopher, Giorgio Agamben, to conceptualise legitimacy in terms of the state of exception. Thinking through Agamben’s lens, the thesis inquires into Fiji’s politico-legal system, particularly its advent as a new legal order since 2009, to interpret how the relation between sovereignty and governance functions to produce legitimacy. Ranging over a broad spectrum of historical events from British colonisation to independent nationhood and the fraught politico-legal terrain of coups d’état, the thesis creates a narrative of the flows and changes in Fiji’s law and society that ultimately but not exhaustively or causally gave rise to the new legal order. This contextualisation highlights the fluidity and specificity of power relations peculiar to Fiji which in turn are further interrogated to demonstrate their complicity in maintaining the machine of government and the appearance of its legitimacy.
Acknowledgements

I am so glad for this opportunity to express my gratitude for the enduring support that I have received over my many years of study. I would first like to acknowledge my supervisors, Associate Professor Jennifer Nielsen and Dr Erika Kerruish. Thank you for your encouragement and guidance through the labyrinth, for your preparedness to engage with my ideas, and for your advocacy on my behalf. And thank you for pushing me that little bit further so that I did not settle for less. You have been a dream team. I would also like to thank my other mentors especially Professor Greta Bird and Dr Ros Mills, whose generosity, intelligence and friendship have been inspiring and heart-warming and so helpful. I am grateful to the School of Law, my home away from home for these last few years, which has provided me with all the space, equipment and academic support that I have needed to develop and complete my studies. Special thanks for that goes to the Heads of School during my candidacy, Professor William MacNeil and Professor Rocque Reynolds. Thank you also to Professor Philip Haywood for early supervision support, the law librarian, Kayleen Wardell, who provided research assistance and Dr Janie Conway-Herron who took special time out to read and comment on the draft.

I am very fortunate to have loyal friends who have kept my best interests in their hearts. Thank you Jules for the hours of listening and talking with me about all things PhD, no matter what else was going on in the world; and for putting our most enjoyable times by the sea, on hold. Thank you Shawn for your constant interest and special flow charts and diagrams and concern for me. Thank you Jane for always asking about the process and urging me on. Thank you my oldest friends, Tweetie and Vixen for being so here with me even when far away. And thank you all my other dear friends for keeping the faith in many thoughtful ways.

And my darling family, where would I be without you! Thank you all for riding the waves with me, my beautiful sister Cass, my beloved brother Luke and my wonderful, adorable children, Emile and Marika. Thank you especially to my most patient and loving husband Derviš who has looked after me and humoured me and kept the home fires burning. And finally I would like to thank my dearest mother and father whose love and dreams for me have truly sustained this project.
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**Fijian**

The use of the term ‘Fijian’ is complicated and has been subject to political debate. Historically ‘Fijian’ has mainly been used in reference to the Indigenous people of Fiji. After attempts at different times to make the term apply to all people of Fiji a decree was promulgated in 2010 that deleted the term ‘Fijian’ wherever it appeared in any legislation or State documents referring to the Indigenous people of Fiji.\(^1\) Henceforth it would be replaced with ‘iTaukei’ ‘unless the context otherwise requires.’\(^2\) While ‘iTaukei’ or ‘Taukei’ is accepted nomenclature for Indigenous Fijians (understood as ‘first settlers’ or defined by Unaisi-Nabobo-Baba as ‘people who are of the land, own the land and therefore look after the land’\(^3\)) many Indigenous (and non-Indigenous) people of Fiji still prefer to use ‘Fijian’ as the English word applying to the Indigenous people, practices and institutions of Fiji. I generally use ‘Fijian’ in this sense in the thesis but at times I also use it as a general adjective referring to things of Fiji, which is sometimes replaced with the use of ‘Fiji’ as an adjective. This possibly sounds more confusing than it is in practice, at least in this thesis. As a political issue, however, the word is charged with meaning.\(^4\)

**Indo-Fijian**

Historically the people in Fiji of Indian descent have been referred to as ‘Indian’. In the 1997 Constitution there is reference to ‘Fiji Indians’ but as political commentator, Nadan Warsey, notes, Fiji’s Indians, especially those who have settled abroad ‘know all too well how different they are from Indians from India, despite the common DNA, languages and religions.’\(^5\) There is also the term ‘Indo-Fijian’ (which, according to Narsey is more used by academics). In this thesis all these terms are used, depending on the contexts (the period or as

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2. Ibid s 4.
used by different people). As Narsey and others note, however, when abroad all Fiji’s citizens ‘are referred to and refer to themselves as “Fijian”’.

**European**

In Fiji ‘European’ is commonly used when describing a white, Anglo-Saxon or other racial type of European person. When I first came to Fiji in 2008 this categorisation began on entry into the country with a questionnaire requiring airline passengers to identify their racial background according to different groupings including Fijian, Indian or European. Coming to Fiji from Australia I was initially surprised by this racial categorisation and being seen as European first before being considered Australian. This entry requirement has since been dropped however the term ‘European’ persists and appears in this thesis predominately in relation to electoral and political divisions prior to 2014.

**Native**

The use of this word in the thesis is not meant to offend or to suggest any conscious or unconscious racism on my part. Generally it is used in relation to institutions, rules or practices that feature the word rather than to indicate a person born in Fiji. According to Robert Norton, in Fiji use of the word ‘native’ became less common after the Indigenous Fijian war effort in World War II, reflecting a change in European attitudes towards Indigenous Fijians. This is not to suggest that the term is politically neutral. Indeed, in other instances in the thesis ‘native’ is used in the same vein as theorists such as Achille Mbembe or Mamdouh Mamdani discuss it to mean or to call into question: the colonised subject or the object and subject of colonial power. Mamdani, for example, speaks of ‘the native’ as a creation of the colonial state: ‘pinned down, localized, thrown out of civilization as an outcast, confined to custom, and then defined as its product.’ Mbembe refers to the natives as the raw material of colonial government who ‘had to be enclosed in relations of subjection’. In Mbembe’s work these relations proceeded by way of commandement, a mode of exercising power or a sovereign violence that, lacking justice of its means and legitimacy of its ends, ‘conspired to allow an arbitrariness and intrinsic unconditionality.’

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6 Ibid.
The word ‘commoner’ is used to refer to those involved in the chiefly system who are not chiefs. While indicative of a place in a social hierarchy the use of the word is not intended as a classist denigration.

**Postcolonial**

In this thesis the unhyphenated form of ‘postcolonial’ is used in the sense of a critique of colonialism or as Achille Mbembe puts it: a critique of ‘the effects of cruelty and blindness produced by a [colonial] conception of reason, of humanism, and of universalism.’[11] The hyphenated form (‘post-colonial’) is used to indicate a time after the British colonisation of Fiji ended.

**The Court Structure**

I have included a note here on the courts in order to avoid confusion with their names and roles. In Fiji, as in Australia and elsewhere, the courts are part of a hierarchical structure that has similar divisions but different names. At the top of the hierarchy is the Supreme Court which is the final appellate court in civil and criminal matters and final authority on constitutional questions. The Court of Appeal on the next rung down has jurisdiction to hear appeals from judgments of the High Court in civil and criminal matters as well as constitutional and legislative interpretation. The High Court has unlimited jurisdiction to hear and determine civil matters, indictable criminal matters and appeals, appellate jurisdiction on decisions from the Magistrates’ Courts and referred questions of law. The Magistrates’ Court (divided into three classes) has civil and criminal jurisdiction and appellate jurisdiction in its first class to hear appeals from decisions in the other two classes.

**The Cycling of Names and Events**

A timeline of some of the main politico-legal events is provided in Appendix but a warning may also be helpful: in this Fiji story one does encounter many of the same names (and often the same people) at different times but similarly structured political junctures. One of the possibly more confusing series of events, for example, is the coup in 2000 and then again in 2006. Without wishing to confuse the reader too soon or more than necessary I will simply point out that after the civilian coup in 2000 (the Speight coup), Commander Bainimarama (as he then was) declared the country to be under martial law and appointed Laisenia Qarase as

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Interim Prime Minister. Vice President Iloilo was made President and the interim government continued in office (except for a two day hiatus) despite successful court challenges (the Prasad cases), until the general election in 2001. As a result, Qarase was voted back into office which he retained until 2006 when Commander Bainimarama launched another coup, this time deposing Mr Qarase. The Bainimarama Government, including President Iloilo, held the reins of power until Qarase’s successful challenge in the Court in 2009 (the Qarase cases). Less than a day later the President declared a new legal order with Bainimarama ‘back’ at the helm shortly after that.

Throughout the thesis these main events are revisited from different angles relevant to the discussions in different chapters. For those unfamiliar with the names or the history each rendition may seem like a yet another upheaval but hopefully the repetition helps to familiarise or else add another facet to the story.

Some Pronunciation Tips

‘b’ is pronounced with an ‘m’ sound before: Bula sounds like mbula
‘d’ is pronounced with an ‘n’ sound before: Nadi sounds like Nandi
‘c’ is pronounced as ‘th’: Cakobau sounds like Thakombau
‘q’ is pronounced as ‘ng’: Qarase sounds like Ngarasay
Table 1 Fiji Timeline

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1804</td>
<td>Sandalwood trade begins</td>
</tr>
<tr>
<td>1828</td>
<td>Beche-de-mer trade begins</td>
</tr>
<tr>
<td>1835</td>
<td>First Wesleyan missionaries arrive</td>
</tr>
<tr>
<td>1865</td>
<td>First Cakobau government formed by eastern chiefs with Cakobau chosen as President</td>
</tr>
<tr>
<td>1871</td>
<td>New government formed by a group of settlers with Cakobau named head of Government and King of Fiji</td>
</tr>
<tr>
<td>1874</td>
<td>Deed of Cession. Fiji becomes a British colony</td>
</tr>
<tr>
<td>1875</td>
<td>Arthur Gordon takes over as Governor of the colony</td>
</tr>
<tr>
<td>1879</td>
<td>First indentured labourers arrive from India to work on the sugar plantations</td>
</tr>
<tr>
<td>1916</td>
<td>Indenture ended</td>
</tr>
<tr>
<td>1937</td>
<td>First union – Kisan Sangh (farmers union) established</td>
</tr>
<tr>
<td>1945</td>
<td>The Fijian Administration under the authority of the Fijian Affairs Board created with Ratu Sukuna Secretary of the Board</td>
</tr>
<tr>
<td>1960s</td>
<td>The emergence of party politics (including the founding of the Federation Party and the Alliance Party)</td>
</tr>
<tr>
<td>1967</td>
<td>The UK introduces the Westminster (Cabinet system) government to Fiji</td>
</tr>
<tr>
<td>1970</td>
<td>Independence from Britain</td>
</tr>
<tr>
<td>1972</td>
<td>Ratu Mara elected PM</td>
</tr>
<tr>
<td>1977</td>
<td>The National Federation Party wins the general election but the Governor General overrides results and appoints Mara as head of a caretaker government</td>
</tr>
<tr>
<td>1987 May</td>
<td>General election won by Fiji Labour Party led by Timoci Bavadra</td>
</tr>
<tr>
<td>1987 September</td>
<td>- Lieutenant Colonel Sitiveni Rabuka stages 1st military coup</td>
</tr>
<tr>
<td>1987 September</td>
<td>- Rabuka stages 2nd coup, abrogates 1970 Constitution and announces the Republic of Fiji</td>
</tr>
<tr>
<td>1987 September</td>
<td>Ratu Mara made acting PM</td>
</tr>
<tr>
<td>Year</td>
<td>Event</td>
</tr>
<tr>
<td>------</td>
<td>-------</td>
</tr>
<tr>
<td>1992</td>
<td>General election won by Fiji Political Party led by Rabuka, first PM under new constitution</td>
</tr>
<tr>
<td>1993</td>
<td>Ratu Mara becomes President</td>
</tr>
<tr>
<td>1995</td>
<td>Constitutional Review Commission established</td>
</tr>
<tr>
<td>1997</td>
<td>New Constitution (<em>1997 Constitution</em>)</td>
</tr>
</tbody>
</table>
| 1999 | Fiji Labour Party wins the general election  
Mahendra Chaudhry becomes PM |
| 2000 |  
19 May - Civilian coup led by George Speight topples Chaudhry government  
29 May - Commodore Frank Bainimarama assumes executive power and attempts to abrogate constitution  
July - Bainimarama appoints Laisenia Qarase caretaker PM and Josefa Iloilo becomes President  
November - In the *Prasad* case the High Court declares *1997 Constitution* remains the supreme law of Fiji and that the Parliament as constituted prior to the events of May 2000 still holds office |
| 2001 |  
March - In *Prasad* (appeal) case the Court of Appeal holds that the doctrine of necessity cannot facilitate change to or abrogation of constitution. According to the doctrine of effectiveness no new legal order has been established.  
September - Qarase elected PM (SDL Party) |
| 2006 |  
December - Bainimarama stages coup toppling Qarase’s govt and declares himself president.  
Public Emergency Regulations extended every 30 days |
| 2007 | Bainimarama reinstates President Iloilo who appoints Bainimarama as PM |
| 2008 | *Qarase* case  
High Court finds that the president has ultimate reserve power and therefore has acted lawfully in dismissing parliament |
### 2009

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>9 April</td>
<td>- <em>Qarase</em> (appeal) case. The Court finds that the president did not have the prerogative power to dismiss Qarase and other ministers or to appoint Bainimarama PM. Declaration granted that it would be lawful for the President to appoint a caretaker Prime Minister, to advise a dissolution of Parliament and to advise the President that writs for the election of members of the House of Representatives be issued.</td>
</tr>
<tr>
<td>10 April</td>
<td>- President abrogates Constitution, reappoints himself President of a NEW LEGAL ORDER, ruling by decree, sacks judiciary</td>
</tr>
<tr>
<td>11 April</td>
<td>- President appoints Bainimarama PM</td>
</tr>
<tr>
<td>July</td>
<td>- President Iloilo retires</td>
</tr>
<tr>
<td>November</td>
<td>- Epeli Naulatikau sworn in as new President</td>
</tr>
</tbody>
</table>

### 2012

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>January</td>
<td>- Public Emergency Regulation lifted</td>
</tr>
<tr>
<td></td>
<td>Public Order Amendment Decree declared</td>
</tr>
<tr>
<td>March</td>
<td>- Great Council of Chiefs dissolved by decree</td>
</tr>
<tr>
<td>July</td>
<td>- Constitution Commission begins work</td>
</tr>
<tr>
<td>August</td>
<td>- Ousted former Prime Minister Laisenia Qarase is jailed for a year on corruption charges dating back to his time as head of a state investment company in the 1990s</td>
</tr>
</tbody>
</table>

### 2013

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>January</td>
<td>- Ghai Commission delivers Draft Constitution which is rejected by the Government</td>
</tr>
<tr>
<td>August</td>
<td>- Government presents new Constitution to the public</td>
</tr>
</tbody>
</table>

### 2014

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>March</td>
<td>- Bainimarama resigns as military commander to prepare for elections</td>
</tr>
<tr>
<td>17 September</td>
<td>- General Election</td>
</tr>
<tr>
<td></td>
<td>FijiFirst victory, Bainimarama voted Prime Minister</td>
</tr>
</tbody>
</table>
Figure 1 Map of Fiji
PART ONE:
PROJECT OUTLINE
**Introduction**

In this thesis I am confronted with a new legal order brought about through a suspension of law following a military coup and a decision in Fiji’s courts. The situation brings any lawyer trained in western jurisprudence, face to face with a stark reality evoked at law’s limits. In the absence or suspension of law where can law’s authority lie? In a democracy the authority to make law is a gift of the people, expressed through a parliament of elected representatives. But, in Fiji, the mantle of authority was first assumed by a military commander and a self-appointed president. How can this authority be legitimate in a democracy bound by the rule of law? Drawing its critical edge primarily from the work of Giorgio Agamben, this thesis seeks ways of understanding the nature of power and authority in Fiji’s new legal order as a distinctly Fijian ‘state of exception’.

In 2009 President Ratu Josefa Iloilovatu Uluivuda (Iloilo) inaugurated a new legal order in the Pacific island country of Fiji. The President’s announcement was made the day after Fiji’s Court of Appeal delivered a judgment that in effect rendered the military takeover of government in 2006, unlawful. Significantly for the President, the Court rejected the possibility of prerogative powers outside the Fiji Constitution, such as the President claimed to be exercising in his endorsements of the military coup. Faced with the serious legal and political implications of the judgment, the President stated that the Court’s ruling had left the country without a government, and in order to fill that void and to assure the possibility of future democratic elections, a new legal order would be put in place.¹

Appointing himself Head of State, President Iloilo abrogated the Constitution, sacked the judiciary and (re)appointed the military commander, Commodore Voreqe (Frank) Bainimarama, as Prime Minister. Over the next few years the judiciary was replaced and the militarisation of the public service saw an extensive reshuffling of its personnel. The militarisation of the broader public space entailed the sidelining of institutions once prominent in the Indigenous community, such as the Methodist Church and the Great Council of Chiefs, a process all the more paradoxical given the traditional chiefly status enjoyed by President

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Iloilo and the history of the Republic of Fiji Military Forces (RFMF) as a predominantly Indigenous Fijian institution.

Between 2009 and 2014, Fiji was ruled by Presidential decree, without parliament or the possibility of judicial review. A raft of decrees was promulgated, including public emergency decrees which were renewed on a monthly basis until 2012. A new constitution was planned (and executed) and a constitutional commission was appointed. In 2014 the country proceeded to the ballot box for the first general election in Fiji’s new legal order. An overwhelming majority voted for the erstwhile military commander, Frank Bainimarama, as Prime Minister. Bainimarama’s success, campaigned for on a platform of multiracialism and economic growth, in a country often riven by racial divisions especially between Indigenous and Indian Fijians, and with half the population living below the poverty line, also won him a new measure of legitimacy.

I am interested in the ways that Fiji’s new legal order has assumed the mantle of legitimacy, not just at election time but from its beginnings; how political power and revolutionary change have been justified as bearers of legality and democracy in the context of local knowledge and particular circumstances, and how such justifications may sit with critical legal theory. Consistent with contemporary critical approaches to qualitative legal research, my project involves an interdisciplinary, multi-pronged strategy of inquiry, interpretation and explication. To some extent this approach is also mandated by circumstance and the particulars of this socio-legal case study with its focus on the new legal order between 2009 when it was declared as such and 2014 when it was carried through in the general election. As the judgments from the relevant constitutional cases show, the question of legitimacy in the extraordinary circumstances of emergency, coups, revolutions or a new legal order, highlights the complexity of the interpretive realm in which law is decided. And since the advent of the Fiji’s new legal order, the Administration of Justice (Amendment) Decree prohibits any challenge to the validity or legality of the revocation of the 1997 Constitution or any other decrees made by the President from 10 April 2009. So in contending with both the jurisprudential void and interpretive complexity, the question of legitimacy is all the more a question reaching beyond black letter law. My analytical strategy therefore integrates key principles, theories and insights generated in legal, political, philosophical and postcolonial studies.
Approaching Legitimacy

Legitimacy, according to western politico-legal traditions, is a ‘virtue’ of political authority, functioning both normatively and descriptively as a justification of authority or the right to rule. The normative concept of legitimacy invokes a standard or criteria by which it may be judged ‘if [a regime or action] is to be regarded as legitimate’, and by whom. The criteria may, in turn, provide the orientation for a description or an explanation of how, why or when legitimacy takes effect. These normative and empirical approaches to legitimacy may provide useful evaluative criteria but when contending with the founding of a new legal order such criteria may also lead to vicious circles and paradoxes. With Fiji’s new legal order this paradox does not come as the mysterious fruit of a tortuous analytics but is immediately apparent at the moment of its annunciation, a moment not shrouded in the mists of time (and therefore more readily subsumed by ancient foundation myths) but barely ten years ago in the full glare of digital media. We are confronted with the problem of beginning or ‘the problem…of an unconnected, new event breaking into the continuous sequence of historical time’, a problem which, as Hannah Arendt illustrates in her treatise on revolution, can be a ‘vicious circle in which all beginning is inevitably caught.’ As a politico-legal problem, the vicious circle is encountered in the search for the fountain of authority or the validity of a founding law when,

those who get together to constitute a new government [or lay down the new law] are themselves unconstitutional, that is, they have no authority to do what they set out to achieve…The trouble … [is] …that to put the law above man and thus to establish the validity of man-made laws, il faudrait des dieux, “one actually would need gods”.

On the other hand, apologists for the new legal order have downplayed its novelty, preferring the language of ‘clean-up campaign’ rather than revolution or coup d’état, and getting on with the business of government rather than allowing the authority to do so, be questioned. While such diverging approaches to legitimacy may present impasses for some lines of inquiry, in this thesis the tensions, contradictions and aporias that arise within and between the different accounts of legitimacy are maintained and ultimately interpreted as vital functions in a dynamics of legitimacy.

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3 Christopher Ansell quoted in Andro Kitus, A Post-Structuralist "Concept" of Legitimacy (Doctor of Philosophy Thesis, University of Tartu, 2014) 12.
4 Hannah Arendt, On Revolution (The Viking Press, 1965) 204.
5 Ibid 183-4.
Giorgio Agamben

The thinker whose work has largely shaped my approach to the question of legitimacy in the thesis, is Giorgio Agamben. Indeed, while I have relied on the work of a number of historians, anthropologists, political scientists and legal commentators to help map out various layers of Fiji’s socio-legal terrain, I am ultimately concerned to interpret these events, themes and perspectives in the light of Agamben’s work on sovereignty and government.

Agamben locates his work ‘in the wake of Michel Foucault’s investigations into the genealogy of governmentality’ but correcting or completing Foucault, Agamben insists on the double structure of the governmental machine – sovereign and governmental or administrative – which he traces back to early Christian theology. However, it is in the contemporary political arena that Agamben’s ideas have most popularly resonated. In his diagnosis of a permanent state of exception or emergency in world politics, Agamben exposes the functional relation between sovereign and governmental power that produces such phenomena as the rise of the Security State and the War on Terror. Foucault too recognises different modes of power and the importance of understanding the effects of changes in the correlation between the different mechanisms of power. According to Foucault, the modern prevalence of technologies of security, for example, can be seen as taking up and ‘multiplying juridical and disciplinary elements and redeploying them within its specific tactic.’ For Agamben, these measures of security that put at issue the very distinction of powers as well as their correlation, ‘require constant reference to a state of exception.’

Agamben’s concept of the exception, and its juridico-political manifestation in the state of exception, is a development of the concept theorised in the work of such luminaries as Walter Benjamin and Carl Schmitt. Schmitt uses the term, ‘state of exception’ to refer to a State crisis or emergency that calls for extraordinary measures. For Schmitt those measures remain part of the law, even while a declaration of the state of exception or emergency involves a suspension of law, because they are measures necessary to create the situation in which the law can have validity. Agamben (following Benjamin) observes, however, that the state of exception as a zone or threshold of indistinction between law and non-law or anomie, between what is inside and what is outside of the law, is now becoming the rule, and thus, ‘the great

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State structures have entered into a process of dissolution’.\textsuperscript{11} And according to Agamben, there is no return to classical politics from here.\textsuperscript{12} This ‘holistic crisis of occidental politics’, as Sergei Prozorov puts it so eloquently in his analysis of Giorgio Agamben’s optimism, ‘reveals the nullity of its foundational distinctions that was there all along but was concealed by the relatively ordered character of political life.’\textsuperscript{13} An important part of Agamben’s œuvre has been the bringing to light of these fractures and their suturing in western thought, legal structures and politics; his most urgent attentions directed towards the double-structured (bipolar) governmental machine that, motivated and legitimated by security concerns, ‘can always be provoked by terrorism to become itself terrorist.’\textsuperscript{14}

The title of my thesis is intended to convey the centrality of the concept of ‘the exception’ in Agamben’s work, in poststructural analysis more generally and in the specific task of this thesis, which is to provide an analysis of Fiji’s new legal order as a particularly Agambenian predicament of exceptionalism. Put to work on the question of legitimacy in Fiji’s new legal order, my analysis entails a close reading of the ‘texts’ of legitimacy. This means taking seriously what the new legal order holds out about itself, not only to catalogue its truths but to critique the conditions of their possibility. I am concerned to elaborate an approach to the conceptualisation of legitimacy that takes account of the multiple levels of meaning-making at stake in this crisis of legitimacy. Thus, various overlapping socio-political and legal contexts are explored throughout the thesis in order to bring an understanding of the specificities of Fiji’s social and political institutions and processes toward critical theory. And conversely, my research also aims to contribute to the body of socio-legal knowledge that emerges from the ethical commitment to the holding open of legal theory to the life it seeks to understand.

\begin{thebibliography}{9}
\bibitem{11} Agamben, above n 7, 12.
\bibitem{12} Ibid 188.
\bibitem{13} Sergei Prozorov, ‘Why Giorgio Agamben is an Optimist’ (2010) 36(9) \textit{Philosophy and Social Criticism} 1053, 1055.
\bibitem{14} Agamben, above n 9.
\end{thebibliography}
Methodology

Most of my research has been conducted in libraries and online, drawing predominately from secondary sources. Significant use has also been made of primary sources such as law reports (and their online repositories such as PacLII), newspaper reports and blogsites. In addition, data collection for part of my project involved face to face interviews with a small cohort of interviewees in Fiji. This range of material and its analysis support a socio-legal approach to the study of legal phenomena and the multidimensional understanding of legitimacy that I seek in my work. The study takes account of the processes of knowledge production and the contexts of such processes, including my own involvement.

Several strategies are used in the project in order to manage its scope and fulfill its aims. The structure of the thesis, discussed in greater detail below, is divided between the historical context of Fiji’s new legal order, prior to its declaration, and the analytical focus on specific aspects of the new legal order in its first five years. The different modes of analysis provide an interpretive grid through which to approach the theory, empirical facts, narratives and legal doctrine involved in the research. This model draws its inspiration primarily from Agamben’s positioning of his work at the intersection between the juridico-institutional and the biopolitical dimensions of power. Two insights in particular, generated by Agamben’s work, help to illuminate the model’s rationale. The first is a ‘matrix of intelligibility’ that Daniel McLoughlin brings to Agamben’s work, which he describes as ‘the intersection between the Foucauldian problem of government and the Schmittian problem of the exception’. The second arises in Mathew Abbott’s emphasis on the importance of ‘recognising the difference between the ontic and ontological levels of Agamben’s discourse … [through which] we can make sense of — or extract any real philosophical or political value from — his philosophy.’ Adapted for this project, those views accommodate discourse analysis and ‘the ontic biopolitical field’ as well as inquiry into states of exception and ‘the historically contingent quasi-transcendental conditions of the biopolitical as such.’

In terms of a qualitative research methodology, the relation between theory and the data analysis indicated above, can be articulated as a ‘plugging in’. This concept, as adopted by Alecia Youngblood Jackson and Lisa Mazzei in their work on qualitative research, expresses

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16 Mathew Abbott, The Figure of the World: Agamben and the Question of Political Ontology, Crosscurrents (Edinburgh University Press, 2014) 23.
17 Ibid.
the process of connecting fields of reality, representation and subjectivity. In the process of being ‘plugged in’, these fields (data, theory, and texts) emerge as assemblages. Ways of reading data across theory or multiple theories may produce complex assemblages. The processes become even more complex when the theoretical nature of a project such as this thesis also involves (poststructural) theory as data. Furthermore, the reflexive nature of the analysis means that data (including personal reflection) and theory can be seen as constituting each other. So the assemblage is one of ‘unstable subjects and concepts-on-the-move’.

One of the methodological devices or manoeuvres involved in the production of assemblages and used throughout the thesis, is the presentation and re-presentation of data (including concepts and events). This is done not only to familiarise the reader with the ‘data’, which may be useful especially in relation to various events in Fiji (where history seems to repeat itself sometimes only with a rearrangement of the names). It is also offers a way, as Jackson and Mazzei point out, to ‘make different sense of the data as it is plugged in again and again with different theorists and their concepts.’ Thus, rather than empirical generalisation or statistical representativeness, this practice ‘evokes a folding — not just of data into theory and vice versa — but also of ourselves as researchers into the theoretical threshold.’ Indeed, the rigour of the study, especially in regard to the interviews, is dependent on a reflexive analysis of these individual accounts.

The inclusion of local perspectives from a group of interviewees and the intermittent use of personal narrative in the thesis allow me to anchor my analysis, at least in part, to individual experience which is both a resource and a way of knowing that is ‘real and important and a significant dimension of culture.’ As cultural studies scholar, Nick Couldry, points out, ‘thinking about the individual story plunges us immediately into the web of relationships out of which we are formed.’ Another way of thinking about the ‘story’ is as part of the theoretical drive of the research, or as a macrostructural model of qualitative design. In regard to the latter, John Silverman, as cited in Svend Brinkmann’s text, refers to three main

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19 Ibid 5.
20 Ibid 10.
21 Ibid.
23 Ibid 7.
25 Ibid 117.
stories: the analytic, the hypothesis and the mystery stories. My apprehension of the new legal order as a mystery that I want to make sense of (discussed in the introductory section of Part Three) would suggest the adoption of ‘the mystery story’ as my model of qualitative design, in that the inquiry proceeds from bewilderment or ‘breakdown’, framed as a mystery or riddle that drives the inquiry forward to some kind of understanding. But given the fact that the thesis does not revolve around the fieldwork which, instead, provides part of the database and a dimension of understanding, the interviews also support the analytic story. Thus, the fieldwork’s findings (which are a ‘function of data, methodology, and theory and never just one of these’) can be seen as throwing their own light on various concepts and topics encountered throughout the thesis (and *vice versa*).

**Fieldwork Methods**

The fieldwork occupied a two week period around Fiji’s general elections in September 2014. The data was collected through semi-structured interviews which took up the thematic concerns of the project through open-ended questions allowing for flexibility and dialogue with the interviewees. The participants were key informants selected on the basis of their expertise in law, politics, media and academia but not on the basis of their political bias, gender, age or ethnicity. While a larger cohort was envisaged, the smaller group of six that agreed to participate, provided a useful purposive sample, consistent with the qualitative research emphasis on the meaning, purpose and value the participants ascribed to law and democratic processes in Fiji. And, as Brinkmann points out, interview studies tend to have a smaller number ‘that makes possible a practical handling of the data’. Although, it must be said that I would have preferred a larger group (for a wider range of opinion) and was disappointed that some very astute commentary had to be abandoned because of the withdrawal of one participant.

I met most of the interviewees prior to the interviews while I was working in Fiji at the University of the South Pacific (USP). However, I had not maintained a regular (if any) correspondence with the interviewees after I left Fiji in 2011, apart from one of the participants (who later withdrew from the research). Despite this familiarity, I was not fully

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26 Ibid.
27 Ibid 118.
28 Ibid 117.
29 Ibid 59.
aware of the political orientation of the individuals and indeed, was surprised at some responses to the questions.

I approached the participants using contact details made publically available by USP and online forums. An email of introduction was sent to prospective participants which included attachments of an information sheet about the research project as well as a consent form (see Ethics Application in Appendix). I followed up with a phone call to organise the time and place of our meeting after I arrived in the country. These communications and subsequent interviews and treatment of the information gathered, conformed to the guidelines and approvals necessary to conduct such research under the imprimatur of my university.

Prior to my departure for Fiji I applied for ethics approval for the research from Southern Cross University’s Human Research Ethics Committee. The application was subject to rigorous review in accordance with the national guidelines on ethical conduct in human research (the application can be viewed in Appendix). The main added concern of the committee was the safety risk posed to the participants and me, given the potential for unrest at election time. I had to provide extra reassurance that the risks were negligible or low and, to that end, ensure that the interviews would be conducted discreetly and informants de-identified so that no link could be made between them and their interviews. This was done with interviews being conducted at a time and place preferred by the participants; by substituting (unrelated) letters and numbers for names on the recordings and field notes; and by storing the data in a secure location. In addition I reassured the committee that my research was not designed to incite, inflame or subvert the politico-legal system in Fiji.

Once I was back in Australia I transcribed the interviews from the digital sound recordings and sent the interviewees a copy of the transcript before I proceeded to incorporate the interviews into the thesis. When I had nearly completed Chapter 7 (the main chapter concerned with the fieldwork), each participant was sent a copy for their approval of the use of their words and ideas. This was by way of what Brinkmann describes as the attempt ‘to achieve a form of interviewee validation in situ.’30 But it was also especially important in regard to one informant whose identity could possibly be ascertained from some of their statements. As I suspected, and as the informant confirmed, they were perfectly happy to be identified with their words, if such circumstances should arise. Indeed, apart from one participant, none of the others expressed any concern about confidentiality or anonymity.

30 Ibid 61.
The interviews proceeded smoothly and enjoyably and provided a generous array of perspectives on many of the issues discussed in the thesis. Given my research focus, the interviews were loosely structured around a series of questions that inquired into the ways that legitimacy could be conceptualised, interpreted or implied.\textsuperscript{31} I began most interviews situating the issue in a legal frame with the Court’s assessment of the legitimacy of a new legal order, according to the doctrine of effectiveness. As discussed in Chapter 3, this doctrine requires the Court’s consideration of evidence indicating that the people have acquiesced in the new governmental arrangements. The concepts of acquiescence as evidence of effectiveness, and effectiveness as a measure of legitimacy, set the tone for the straddling of law and politics that the interviews would take.

The types of questions that were asked obviously had some bearing on the way they would be answered and, as became apparent in the questions and answers, distinct themes emerged. The preparation of the data for its inclusion in the thesis thus involved categorising parts of each interview under points or themes such as legitimacy, authority, the judiciary, identity and security. In that manner the different interviews contributed an individual sense of the legitimacy issue for example, expressed in terms such as a process of consultation and participation; legitimacy vs legality; a result of free and fair elections; in accordance with international law; or as a matter of time and familiarity.

Reflecting on my practice, I understood that the (mutual) trust of my informants, which was partly established because of the years I had spent living and working in Fiji and my familiarity with and respect for cultural protocols, contributed to the ‘success’ of the interviews. The openness of some informants, for example, could be attributed to what they knew about me. And my confidence and general sense of ease with which I engaged with the participants and place during a politically charged time, reflected a level of immersion in the culture that I continued to enjoy in Fiji. This is not to deny the possibility of violence or the very real effects of coup culture on everyday life. The fact that one informant withdrew from the study, for example, was about their fear of recrimination, and not from Bainimarama’s supporters but from those opposed to the new legal order.

\textsuperscript{31} A list of questions that provided a guide rather than a strict format for the interviews is provided in the Appendix.
In my own position as a ‘situated knower’ who is always a participant in the social that I am discovering, my experience, to adapt Aileen Moreton-Robinson’s quote, is always active as a way of knowing, whether or not I make it an explicit resource. At the outset, however, I do wish to acknowledge my cultural ‘situatedness’ and the extent to which I, the researcher and writer, am implicated in structures of power. And while the thesis is not auto-ethnographic, it is driven by my central auto-ethnographic moment — a bewilderment that struck me at the declaration of Fiji’s new legal order — and the reflexive task is an articulation of that mystery. In Fiji, at the University of the South Pacific (USP), I was teaching the law of the South Pacific legal systems that included the laws of the region’s former imperial powers such as English common law. But when the new legal order was declared I found myself in a dilemma, caught between a common law legal system predicated on centuries of legal doctrine and precedent and a new order that decreed a selective embrace of past laws and a compliance with political determinants of the future. Over time I recognised that my personal struggle to articulate the tensions between the old and the new provided a vehicle and a device for a scholarly inquiry into the nature of Fiji’s new legal order.

My personal narrative, as brief as it may be, is also a way that I want to take responsibility for my work. I want to acknowledge my position as a newcomer to Fiji, finding myself - a white Australian woman, schooled in Australian institutions, assuming a privileged teaching position in Fiji - already implicated in a complex, long-unfolding racial predicament. For example, to my disquiet, I was frequently reminded by one of my close Fijian colleagues that my ‘expat whiteness’ confirmed my imperialising tendencies to exploit the job market or any research subjects in Fiji.

I do not enter the fray as an expert or an embodiment of Fijian indigeneity or the Indo-Fijian diaspora, but as engaging in what Spry refers to as ‘a dialectic of a co-presence with others in the field of study’. In the process, my sense of personal exposure and vulnerability to dominant narratives of history, race, gender and class in the social fields of Fiji provides a permanent ethical injunction to be alert to the effects of regimes of power, not only in my own work but in any resource on which I rely. Thus while the thesis may document some of the significant changes in Fiji’s legal history it does not attempt to articulate the subjective

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33 Ibid.
experience of what was actually lost, hidden or silenced, for Indigenous Fijians or indeed, other peoples in Fiji caught up in the changes wrought through processes such as colonisation. This is not to deny the existence of anything outside the framing of Western thought but rather, points to the limitations that my status as a ‘common law’ observer brings to the picture and to the exclusionary ways that the law more generally may have assumed its primacy.

**Getting There**

At the beginning of 2008 I took up a position at USP as lecturer in the School of Law. USP is a regional university supported by twelve Pacific Island countries: Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu. The School of Law is based in Vanuatu and has a large outpost in Fiji, the administrative hub of the university. The legal systems of the USP member countries are largely derived from the British common law system introduced during the colonial past. It was not unusual therefore that many academics in the School of Law were recruited from common law countries further afield such as Australia. Significantly, for my future PhD interests, my appointment was at the Laucaela campus in Suva, the capital of Fiji.

I came to Fiji from Lismore in northern New South Wales, where I had studied for the Bachelor of Laws at Southern Cross University (SCU). The course was punctuated by a series of ethical and sociopolitical insights generated by various politically engaged academics more committed to social justice than a narrow instrumental view of law. Units such as the Philosophy of Law challenged what some have identified as a market driven emphasis on doctrine and its façade of neutrality in legal pedagogy.

The Philosophy of Law unit, written by Anne Schillmoller, opened doors into a cornucopia of legal philosophy that flowed into my understanding of all subsequent studies. The prescribed text for the unit was *Asking the Law Question* by Margaret Davies. In this ‘pedagogical tour de force’, as one reviewer writes, Davies ‘launches border raids on the "isolationist mentality" of the law which mystifies its own specificity and insists on the law's separateness from other forms of knowledge and practices.’

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On a trajectory similar to Davies' text, SCU's legal philosophy unit, took its students through a range of legal knowledge frameworks from 'inside' perspectives such as legal positivism to 'outside' perspectives such as Critical Race Theory. And finally, the endpoint of both texts, towards which this reader at least, raced, in eager anticipation: the postmodern condition, or more specifically, the poststructural insights ‘challenging [the] division between the subject and the system outside.’

Post the Philosophy of Law unit, I launched into an exuberant interrogation of the techniques of law's hegemony. I triumphantly announced my engagement with Foucault, declaring everything to be dangerous while contending with his admonition to cut off the king’s head. But if the Foucauldian insistence on uncovering 'whole series of multiple and indefinite power relations' necessarily extended the analysis of power 'beyond the limits of the State' and juridical sovereignty, the paradigms of sovereignty and juridical power also persisted. And as Davies had entreated, we should ‘not abandon a “juridical” notion of law because it is still normatively influential…[and] legal power provides a mechanism for countering the other less transparent forms of social power.’ With radical instability or rupture in a politico-legal system, an understanding of juridico-institutional models of power becomes an even more urgent task, if not an existential question. My relocation to Fiji in the midst of political turmoil and regime change demanded such responses from me.

From the moment of my arrival, Fiji had me in its thrall. I came with some rather romantic notions about its people and palm fringed beaches and some general knowledge about its politics including the fact that in the year before, the government had been overthrown by a military coup. The political climate did not present an obstacle to the university’s recruitment objectives. I was assured that under the control of the interim government the country was relatively stable and I need not be overly concerned about my safety.

Mo, who picked me up from the airport, was not long back from Iraq where he and many other Fijians worked for private security firms. He was still in the habit of standing beside the car to start it before he got in, as if to anticipate a car bomb. But he too assured me that despite his unconventional driving style and the fact that most dwellings had security bars and

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37 Davies, above n 36, 241.
40 Ibid 122.
41 Margaret Davies, Asking the Law Question (Thomson Lawbook Co, 2008) 364.
dogs (and security guards if households could afford them), security was not really a problem in Fiji.

I was fortunate to find a beautiful house on a hill near the university that looked out to the distant mountains and islands. As fate would have it, the landlady was Nazat Shameem, Fiji’s first female High Court judge. Her sister, Shaista Shameem, had been head of Fiji’s Human Rights Commission. And, as I was to discover, both women had played a part in the unfolding drama of Fiji’s new legal order. My immediate boss, Nainendra Nand, who was the ex-solicitor-general of Fiji, had worked with the Shameem sisters. He, like my student, the ex-assistant police commissioner, had lost his job with the military takeover in 2006.

My encounters with the law and politics of Fiji were often this close and personal, not just because I was teaching law but also because Fiji is a small country (less than a million people) and one very enmeshed in storytelling. Many people were prepared to talk about the state of affairs in Fiji, its myths and legends. My enculturation process over the following three years drew me into a country rich with tradition and its ruptures; a society scattered over many tropical islands and cultural groupings, reverberating with a troubled colonial past and brewing with political intrigue.

Several key politico-legal events punctuated those years but in April 2009 they were eclipsed by the momentous declaration of a new legal order. This happened the day after the Court of Appeal decision was handed down, holding that that the 2006 coup and related activities were unlawful. President Iloilo announced that in view of the successful and publicly endorsed reforms of the military government and after consultation with the Commander of the Republic of Fiji Military Forces (RFMF), he was abrogating the Constitution, appointing himself head of the State of Fiji under a new legal order and revoking the appointments of all judicial officers. The President also stated:

I have in this respect directed the Commander of RFMF and other security agencies to take all reasonable steps to ensure the maintenance of people, law and order. You will agree that this is the best way forward for our beloved Fiji. It not only gives certainty but provides stability and the opportunity to carry out reforms which are crucial before true democratic elections can be held. In this respect I believe that a period of 5 years is necessary for an interim government to put into place the necessary reforms and

42 *Qarase v Bainimarama* [2009] FJCA 9 (9 April 2009).
processes. I shall also direct the soon to be appointed Interim Government to hold true
democratic and parliamentary elections by September 2014 at the latest. I am sure you
will all work together with me and the soon to be appointed interim government to
ensure that the transition to a new legal order is not only smooth but will reap many
benefits for us and the future generations and resolve many of our long outstanding and
systematic problems.\textsuperscript{44}

Between 2009 and 2014, Fiji was ruled by decree and a steadily militarised Government.
However, the new legal order was not installed simply through a process of militarisation.
Coup-supporting, civilian politicians were invited to join the interim government and a new
judiciary included a substantial recruitment of new officers from Sri Lanka as well as the
retention of some of the prominent ‘old guard’ such as Gates J. In 2007 Aiyaz Sayed-
Khaiyum joined the Interim Government as Attorney General as well as becoming Minister
for Justice, Anti-Corruption, Public Enterprises, Communications, Civil Aviation, Tourism,
Industry and Trade and the Minister responsible for Elections. As stated on his own website,
Khaiyum became instrumental in initiating a comprehensive reform of Fiji’s laws including
the criminal code and later, the new \textit{2013 Fiji Government Constitution}.\textsuperscript{45} Under that new
Constitution, Fiji proceeded to a general election in September 2014, which, although
President Iloilo did not live to see it, took place as he had forecast, five years later.

Counting myself among those described by Margaret Davies as ‘dissidents to jurisprudential
tradition’, those, that is, who recognise and seek to expose law’s complicity with systems of
power, the new legal order came as a strange sort of shock to me.\textsuperscript{46} The critical legal studies
catchcry — ‘law is politics’ — that had underpinned so much of my theoretical approach and
contributed to my pedagogical tool bag in Australia, seemed almost superfluous or
anachronistic for my Fiji classroom.\textsuperscript{47} These students did not need me to labour over a
critique of legal doctrine to unmask law’s involvement with politics. The new legal order, in
its early days at least, had clearly revealed its political nature in the sense that law was issued
as political edicts or presidential decrees, and not subject to parliamentary debate, other

\textsuperscript{44} Ibid.
\textsuperscript{46} Davies, above n 42, 115.
\textsuperscript{47} Different uses of the term ‘Fiji’ are discussed in ‘An Explanation of some Names, Times and Expressions’ at
the beginning of the thesis.
legislation or judicial review. Indeed, it seemed that with the new legal order, the event had disrupted the conditions of its (critical legal studies) analysis. 48

Disarmed and disturbed (and unlike some of my students who just days after the abrogation of the Constitution exhorted the class not to cry over spilt milk), I remained concerned with how I would reconcile the new legal order with the old. How was I to apprehend the decreed continuity of law while the new order seemed to mark such a radical discontinuity? How was I to interpret the nature of the power and authority through which the new legal order was being established? These questions were not just relevant to what I would say in class the next day but have come to bear significantly on my thesis.

Fiji’s new legal order provides a unique and compelling opportunity to view the ideological and material struggle that lies at the heart of law’s power and authority. The revolutionary nature of a new legal order foregrounds the question of legitimacy. From a positivist legal perspective the legitimacy question may be sought out in the pedigree of law and the formal way that law takes its place in society as law. In relatively stable countries such as Australia that process of legitimation is routinised and entrenched in a pervasive liberal ideology, and consequently is not so conspicuous. 49 However, the military overthrow of an elected government, the abrogation of a constitution and the creation of a new legal order, almost unthinkable propositions in contemporary Australia’s law and politics, are nonetheless apposite to Australian legal scholarship. Fiji, a former British colony and erstwhile member of the Commonwealth also shares a common law legal tradition, and at times, Australian judicial officers and senior Legal Counsel. Australian law and politics were also given prominent mention in Commodore Bainimarama’s announcement of the military takeover in 2006:

The president has the constitutional and legal option to dismiss the prime minister under … the Constitution in his own judgment should exceptional circumstances exist. These powers are sometimes referred to as reserve powers, which have been exercised in Fiji previously and other common law jurisdiction including Australia by Governor General Kerr. Kerr as you all know sacked Prime Minister Whitlam. 50


49 Questions of legitimacy have, however, also been at the forefront of the work of Aboriginal philosophers such as Irene Watson and in Australian jurisprudence, for example, in relation to Aboriginal land rights and the dismissal of Prime Minister Whitlam.

As in Australia, democracy is the dominant politico-legal aspiration in Fiji. Indeed, persisting throughout the continuities and changes in Fiji’s legal system, the democratic aspiration is taken up emphatically by the new legal order in its stated aims to be the way, the truth and the life of a genuine democracy. However, Fiji’s revolutionary process has not met with unqualified approval, support or legal endorsement in domestic or international arenas.

Among other negative responses to the 2006 coup, the Australian government implemented sanctions and urged passive resistance to the imposition of dictatorship in Fiji, while the United Nations called ‘for the immediate reinstatement of the legitimate authority in Fiji’. In Fiji’s own Court of Appeal, prior to the declaration of the new legal order, the judges pronounced the illegitimacy of several coup related activities and ordered the country back to the ballot box.

Despite serious criticism and condemnation, the new legal order has endured, insisting upon the legality, legitimacy and democracy of its project. Among the many strident assertions there have also been more conciliatory voices that ask if democracy is ‘to be understood only in its narrow western context’ and whether ‘wider considerations such as those of social justice are also relevant…in assessing what has happened.’

I am interested in the deeply contested space that can be opened up in the challenge that Fiji’s new legal order poses for the concept of legitimacy in modernist, liberal, legal thought. That opening can be analysed through critical interventions that interrogate, destabilise and expose the assumptions, conditions and conceptual bases of western legal knowledge. Elaborating on this postmodern approach and its implications for legal thought, Margaret Davies writes:

[i]n terms of jurisprudence it means that the concept of legitimacy itself must be recognised to be a complex one, reliant not only upon a single universal like a grundnorm or natural order, but is instead a product of the intricate relationships which are the law, including community opinion, judicial decisions, legislative and bureaucratic acts, and in general, the stories and narratives which circulate around, and

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55 Ibid.
In a similar vein, my project dwells with the ambiguities and contradictions constituted in the discursive sea that bounds Fiji’s new legal order. The problematic of legitimacy is thus approached as a threshold concept, claimed, contested and realised at the blurry boundaries between Fiji’s law, politics and social life.

**Thesis Structure**

The thesis is made up of four main parts. Part One: The Project Outline sets the stage for the thesis and introduces legitimacy as the conceptual focus. It provides an account of Fiji’s new legal order as key politico-legal phenomenon; the personal and academic perspectives brought to bear on the legitimacy questions the legal order raises; and the rationale, structure and methodology of the thesis. While the critical analysis in the thesis is largely concerned with written texts, part of the research involves fieldwork conducted in Fiji as well as reflections on my personal experience in Fiji. The design of the fieldwork, including the interview process and analysis and connections with the research question, is presented in this part and justified, along with the use of personal reflection, as necessary to the complexity of understanding sought through the project.

Part Two: The Socio-Legal Context consists of three chapters. Chapter 1 — Themes, Ideas and Theoretical Perspectives — presents the theoretical orientation of the thesis and also serves as a literature review of the main theorists and commentators relied upon. While the thesis involves discussion and analysis of multiple and overlaying historical, political, legal and social contexts of Fiji’s new legal order, a large part of which involves analysis of various social and politico-legal precursors of Fiji’s new legal order, the theoretical concerns of the thesis generally fall under the poststructuralist branches of philosophy. Thus while the breadth of historical research required, especially for Chapter 2, necessitates a somewhat empirical mustering of the facts, Chapter 1 focuses more on the poststructural and postcolonial sensibilities that orientate those descriptions. The chapter mediates between theory and context primarily through the concept of the state of exception as developed in the work of Giorgio Agamben. The discussion locates Agamben’s thought in relation to other theorists, particularly his debt to Michel Foucault, Carl Schmitt, Walter Benjamin and Hannah Arendt.

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56 Davies, above n 36, 228.
These theorists provide key theoretical anchors for Agamben’s theories and provide some of the conceptual resources and insights guiding inquiry throughout the thesis. Postcolonial theorists including Achille Mbembe, and themes including racism and hierarchies of power also feature in the chapter. Their discussion forms part of the network of ideas aimed at sensitising the reader to elements of Agamben and the colonial context from which Agamben’s critical attention has been absent. The jurisprudence of emergency, notions of popular sovereignty and mechanisms of security, on the other hand, are familiar Agambenian territory and their discussion in the context of Fiji weaves another contextual and interpretive layer into this chapter. Ultimately the chapter takes us to Agamben’s concept of the bipolar, biopolitical machine of government from which to view the concealed emptiness of the foundations of law and government.

Chapter 2 — A Fiji Story — involves historical enquiry structured around a timeline from before British colonisation in the 1800s to the declaration of Fiji’s new legal order in 2009. The chapter synthesises the work of several key historians, anthropologists and political scientists, drawing chiefly from the extensive historical scholarship of Brij Lal, to accentuate points of instability in the trajectory of power and politics in Fiji, many of which inform or direct the analytical foci in subsequent chapters.

With the electoral outcome of the 2014 elections in mind, this chapter highlights the unsteadiness of the conjunctions between past and present. Nevertheless it is impossible to understand the new legal order without a sense of Fiji’s colonial and post-colonial past. Out of this past came Fiji’s association with Britain through which Fiji adopted the English common law system and the Westminster parliamentary system. Colonisation also introduced the phenomenon of indentured labour and the importation of thousands of Indian labourers, many of whom stayed on in Fiji, to make up what is now nearly half the population. The British fostered a division between the races, which happened partly through a policy of paternalistic protectionism, whereby the Indigenous Fijians were encouraged to retain their traditional arrangements in a separate administration. As a result, a concept of Indigenous paramountcy took root in colonial times that continued to hold sway and influence the course of Fiji’s politics as an independent nation. For the first 20 years after independence, the notion of Indigenous paramountcy was catered for in the constitution and a government dominated by Fiji’s chiefs but when that status quo was upset, as it was with the rise of the labour movement, the first of three racially motivated coups was orchestrated to reinstate Indigenous paramountcy. Fiji’s racial divisions are deeply implicated in all its coups, but the last coup in
2006 was purportedly Commander Bainimarama’s way of eradicating racial division and corruption.

Chapter 3 — Three Parts of the Law — roughly follows the timeline of Chapter 2 to provide a historical overview of Fiji’s law and legal apparatus. The first section focuses mainly on the constituting laws such as Fiji’s various constitutions and some of the main features of the legal system which, since colonisation, is largely based on the English common law system. The other two sections look at three common law doctrines — the doctrine of necessity, the doctrine of effectiveness and the reserve powers or the prerogative — that concern the exercise of extraordinary powers to preserve the law or create a new legal order. The cases in which these doctrines were developed, attracted widespread interest not only because of the matters before the court concerning the lawfulness of coup-related conduct but also because of the part those judgments (and the judiciary) would play in subsequent events. Despite the fact that Fiji’s new legal order protects itself with an armour of ouster clauses this earlier jurisprudence provides rich and relevant pickings for an assessment of Fiji’s current legal order and the relation between common law and a rupture in the legal fabric. The cases provide insights into the difficulties that judges and judicial reasoning face at the limits of law and with the way those limits may be founded. Judges appointed in the ‘old’ regime may recognise the support that the doctrine of necessity and the prerogative may lend to the exercise of extraordinary and transforming powers but, thus far, they have stopped short of acknowledging a new legal order. While the doctrine of effectiveness contains the criteria for a new legal order, the courts have not yet found it in Fiji. This has not prevented at least one court finding that prerogative power could create a new government and initiate (un)constitutinal reform, without recognising a new legal order. The rationale of these doctrines reinforces a schema of understanding law that relies on a pre-supposed transcendent foundation (Law’s claim to authority) and a concealment of the emptiness of that foundation. This means that in the common law system the authority of law appears to remain intact or continuous because it never contends with the rupture between one legal order and another.

Part Three: States of Exception in Fiji’s New Legal Order consists of four chapters which interpret aspects of Fiji’s new legal order primarily in light of Agamben’s thought on the bipolar, biopolitical machine of government. Each chapter focuses on different elements of the apparatus through which the ‘machine’ captures, determines or orientates Fiji’s social and political life in gestures and activities of sovereign governance. Chapter 4 — The Rulers — is an analysis of the authority of the two prominent figures involved in the institution of Fiji’s new legal order. President Iloilo and Commander/Prime Minister Bainimarama are each
considered in relation to the ways they have sustained the dialectic between law and lawlessness in Fiji’s state of exception. This dialectic is explored mainly through the figures of the king (or president) who rules but does not govern and the administrator (or military commander) who governs but does not rule. Neither figure, however, functions without the other, demonstrating how the governmental machine relies on both.

Chapter 5 — Control and Security — looks at the conjunction of sovereignty and governmentality as played out through the judiciary and the media and their dualities as apparatuses of power. The first section of this chapter focuses on the function of judicial independence and how it serves to ensure the sovereignty of law and maintain the sovereign structure of government. A compromised judiciary or judicial responses to a perceived lack of judicial independence exposes the complicity between sovereignty and government whereby the judiciary functions as an apparatus of government. The issue of judicial independence in Fiji, discussed in various contexts such as the limits of jurisdiction, the basis of judicial loyalty and possibilities of Executive interference, demonstrate the tensions between interpretive realms that in the last instance are trumped by real or manufactured security concerns.

The second section of the chapter takes up the problem of the political function of the media as posed by Agamben, to interpret the role and control of Fiji’s media. The spectacular power of the media to concentrate and disseminate public opinion operates not only as the link with democratic sovereignty but as an apparatus of government. The forms of censorship discussed in this chapter highlight the complicity between the governmental security measures particularly in the form of media control and the spectacle of public acclamation particularly as manipulated through the media, which together produce the appearance of legitimate democratic government. In Agamben’s account glory is a foundation and justification of power and the media functions to glorify power. This perception is discussed in terms of a ‘responsible’ media in Fiji which, like an independent judiciary, functions as part of the bipolar machine of democratic (or undemocratic) government.

Chapter 6 — Constitution-Making and the People — analyses the process through which the people of Fiji were involved in constitution-making. While touted as a participatory process reflecting the spirit of democracy, Fiji’s constitution-making dominated by the government, brings a contradictory note to bear on the concept of ‘the people’. Seen through Agamben’s lens, the constitution-making process reveals a fracture in the concepts of ‘the people’ and democracy that governmental power in Fiji can only pretend to mend. At the same time, the
government’s interference and takeover of constitution-making emphasises the difference and the dynamic between ‘the people’ as is and as yet to be realised, and the inclusive exclusions involved. Similarly, democracy is marked by a separation and a suturing of its two faces — a form of legitimation and a technique of government — whereby popular sovereignty and government appear knotted together in mutual legitimation.

Chapter 7 — Election Time with the People — is positioned as the last chapter in the substantive analysis of Part Three. The Chapter 7 interviews give voice to different aspects of the juridico-political structure that coincide in Agamben’s state of exception. The various opinions on the legitimacy of Fiji’s new legal order were mostly canvassed in the days after the election in 2014. This timing may have been significant for the general sense of acceptance (or resignation for some) that the interviewees expressed about the political realities at the time. Rather than providing a synthesis of Agamben’s theory these views are presented as poignant reminders of that which may be included and excluded in the state of exception. As such they provide a lived and immediate sense of what is at stake in the question of legitimacy.

The final section of the commentary can also be (tentatively) seen as approaching or at least readying for a coming politics beyond the sovereign bequeathments and security measures of legitimacy. Although beyond the main theoretical concern of thesis, Agamben’s wider political project on the anarchist potentiality for ‘sweet liberty’ implicit within the state of exception,57 is touched on here. This reference flags a possibility for future investigation.

Part Four is the conclusion of the thesis and provides a general summing up of the analysis. While Agamben may be better understood and appreciated as a political ontologist, this thesis folds an attention to particular histories and details of concrete realities into an interpretive grid that approaches Fiji’s new legal order as an Agambenian paradigm and as a discursive analysis of legitimacy. Tracing Fiji’s own unique path to a new legal order, the thesis finds that there is little to distinguish between legitimacies however democratically, oppressively or fraudulently legitimacy may be claimed. Rather than conclude on a dark or nihilistic note, however, the discussion flags the impetus towards ‘truth and reconciliation’, evident in the statements of the interviewees, as an area of future research, with Agamben’s optimism in mind. Despite or because of the fact that the bipolar, biopolitical machine of government

leaves us no political task that does not reproduce or reset its apparatuses. Agamben, like Guy Debord and Marx before him, finds hope for a coming politics in ‘the desperate situation of society’. Whether it can be argued that truth and reconciliation could approach something like the hopeful deactivation of the dispositif of the exception as Agamben discusses in his theory of destituent power, is a possibility that must be left for another (happy) day.

58 Sergei Prozorov, ‘Living a la Mode: Form-of-life and Democratic Biopolitics in Giogio Agamben’s The Use of Bodies’ (2017) 43(2) Philosophy and Social Criticism 144, 146.
59 Marx quoted by Agamben in Jason Smith, ”I am sure you are more pessimistic than I am...”: An Interview with Giorgio Agamben’ (2004) 16(2) Rethinking Marxism 115, 123.
PART TWO:
THE SOCIO-LEGAL CONTEXT
Chapter 1
THEMES, IDEAS and THEORETICAL PERSPECTIVES

Introduction
The abrogation of the 1997 Constitution and the declaration of a new legal order in 2009, and the various processes of making and executing the law over the ensuing five years, raise complex existential questions about law and society, in Fiji and beyond. While such questions may always be asked, even during the most routine governance, the extraordinary circumstances of a new legal order draw attention to the authority with which law proclaims itself (or is proclaimed) as law.

When President Iloilo declared that Fiji had a new legal order, there were reasons given, assurances made and requests for peaceful co-operation and patience with the changes taking place. This announcement, effecting immediate and projected changes, was reliant on several presumptions (such as the President’s authority to declare a new legal order) and indeed, the command for such presumptions to be so. As a fairly recent arrival in Fiji at the time, I was struck by the level of assumption I needed in order to suspend my disbelief. This has been useful for the purposes of my critical legal analysis to interrogate the (usually) more hidden relation between law and politics. But my scepticism has further implications. I simply did not believe the rhetoric, in fact, I believed that the chief protagonist, Bainimarama, was a dictator, intent on controlling law, politics and the society. Thus, my ‘predisposition’ asks more of various theories of law and legitimacy than their conceptual coherence or convergence with particular practices. It works with theory and an interpretation of the new legal order as it holds itself out to be, but also tests theory against the various authoritarian and oppressive measures relied on - secretly, silently, dismissively, justifiably or deceptively so - by the instigators of Fiji’s new legal order. However, there is more to the ‘success’ of the new legal order (if longevity and stability, at least, are markers of success) and much more to be said about the President’s (and Bainimarama’s) presumptions than simply blaming the oppressors,
or focusing on coercion. Fiji’s new legal order involved a relatively bloodless change, publically endorsed by many, and ultimately by 2014 and the general election, adopted by a majority of the people. My theoretical orientation is, therefore, inclined towards a radical critique of law and democracy rather than an exclusive focus on a Fijian-style despotism. Indeed, the thrust of the inquiry is driven by European philosophical concerns and towards making my contribution to critical legal theory, Continental philosophy and Agamben studies in particular. This is not to deny the significance of the Fijian context for my work which obviously hinges on an interpretation of events in Fiji. But as a form of postcolonial thinking, that interpretation places great weight on cultural and epistemological pluralism and the possibility of countering epistemic imperialism.

This chapter presents the theoretical orientation of the thesis and also serves as a review of the main theorists and commentators relied upon. The thesis involves discussion and analysis of multiple and overlaying historical, political, legal and social contexts of Fiji’s new legal order. Rather than foreclosed as hard and fast categories, these contexts emerge in the course of a critical inquiry that recognises the contingent nature of social and political structures and processes: they may be historically possible but not necessary. This sense of contingency is also implicated in a nonessentialist view that questions absolute foundations and claims of a pre-given, objectively defined world. Formulated as an approach to research, these views largely lie within the analytics and strategies of poststructuralism.

**Slippage in/with Poststructuralism**

Poststructuralism, as discussed in the *Edinburgh Companion to Poststructuralism*, ‘is a relentless attempt to contest limits’ that involves, in general, ‘the uncovering of fixed structures of knowledge, truths and values that belong to certain classical and traditional forms of philosophical and political inquiry’.

The poststructural approach is not a unified critique or critical method, indeed, as Susanne Gannon and Bronwyn Davies write, poststructuralism is better understood as ‘strategies, approaches, and tactics that defy definition or closure.’ This restlessness of poststructuralism is not only apparent in its ‘nomadic tendencies’ that see it ‘cross over disciplinary boundaries’ but is also a feature of

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poststructuralism’s label which makes it hard to pin to particular theorists. Giorgio Agamben, whose work is central to this thesis, is a case in point. In many texts devoted to poststructuralism and its associated thinkers, Agamben, if he appears at all, is a brief note. And yet the concept of ‘the exception’ or the inclusive exclusion, crucial to Agamben’s work, is a limit concept and very much (but not only) a poststructural intuition.

James Williams points out the special significance of ‘the limit’ for postructuralism as that which

poststructuralism folds … back on to the core of knowledge and on to our settled understanding of the true and the good. It does this in a very radical way. That is, the limit is not compared with the core, or balanced with it, or given some kind of tempering role … Rather, the claim is that the limit is the core."4

Where various poststructuralists may differ however, is in their ‘account of the play of the limit at the core’.

For Agamben the limit of the juridical order is played out in the paradox of sovereignty, the structure of which accords with concept of an exception.

While much will be made of Agamben’s concept of the exception and the philosophical direction in which he takes it, a large part of the thesis is concerned to provide an account of uniquely Fijian constellations of power and regimes of truth and some of the ways they have shifted to make way for Fiji’s new legal order. The poststructural approach in this thesis thus also draws attention to the constitutive power of the terms and categories and the very language through which these constellations and regimes are discursively produced. This poststructural turn to the discourse as a primary site of analysis owes much to the work of Michel Foucault who recognises the discourse as bearer of specific effects of power:

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3 Ibid.
4 James Williams, Understanding Poststructuralism, Understanding Movements in Modern Thought (Routledge, 2014) 3.
5 Ibid 4.
basically in any society, there are manifold relations of power which permeate, characterise and constitute the social body, and these relations of power cannot themselves be established, consolidated nor implemented without the production, accumulation, circulation and functioning of a discourse. There can be no possible exercise of power without a certain economy of discourses of truth which operates through and on the basis of this association.\(^6\)

As well as his more general influence on discourse analysis as taken up in this thesis, Foucault-directed insights into the nature of modern mechanisms of power, which he refers to as bio-power, have specific relevance for an analysis of Fiji’s new legal order as a modern security state. In this thesis, however, Foucault’s conception of bio-power and its mechanisms of security or the ‘new governmentality’ is relevant primarily because of its place in Agamben’s work, specifically, its relation to the state of exception.

**Introducing Agamben with Foucault**

My earlier research interests, provoked by the Bush Administration’s ‘war on terror’, led me into theoretical engagements with terrorism, particularly the politico-legal constructs of Australia’s David Hicks and Mamdouh Habib as terrorists. I became one of the many who recognised the work of Italian philosopher, Giorgio Agamben, as ‘spectacularly anticipat[ing]’ the ‘war on terror’ and what it revealed about the structure of law and sovereignty.\(^7\) Part of Agamben’s oeuvre is the (re)conceptualisation of the state of exception, through which he ‘diagnoses “the state in which we live”’.\(^8\) The state of exception is, at first blush, a politico-legal solution to a situation that threatens the life of the state. It involves the sovereign’s decision to suspend the law in the face of present or imminent disruption of the conditions for order, as perceived by the sovereign decision-maker. Such crises may include natural disasters or wars or, in the case of the September 11 attacks, something that, in the eyes of the Bush Administration, defied legal recognition.

In Agamben’s work the concept of the exception is elaborated as the paradigmatic structure of sovereignty. For Agamben, sovereignty is the mode through which law is realised, created or


renewed. The exception in law involves a suspension or a withdrawal of law that at the same time creates a zone of indistinguishability between law and non-law. As Agamben puts it:

The exception is a kind of exclusion. What is excluded from the general rule is an individual case. But the most proper characteristic of the exception is that what is excluded in it is not, on account of being excluded, absolutely without relation to the rule. On the contrary, what is excluded in the exception maintains itself in relation to the rule in the form of the rule’s suspension. The rule applies to the exception in no longer applying, in withdrawing from it. The state of exception is thus not the chaos that precedes order but rather the situation that results from its suspension. In this sense, the exception is truly, according to its etymological root, taken outside (ex-capere), and not simply excluded.⁹

In the state of exception, without law but exposed to the force of law, life is precarious. Agamben refers to this condition as ‘bare life’, configured in archaic Roman law as *homo sacer*, or the man who can be killed without sanction or sanctification. In its most abject localisation, the state of exception is the Nazi concentration camp, or the more recent camps at Guantanamo Bay, within which internees can be treated with impunity. Such, as it seemed, was the lot of David Hicks and Mamdouh Habib.

While a discursus on the legitimacy of a new legal order may seem somewhat removed from a study of terrorism, both arenas raise questions concerning sovereignty and the justifications of authority and the crucible in which such questions and answers are forged. Agamben’s work on the dark and ambiguous dimension of law’s sovereignty sheds light on ‘the point of indistinction between violence and law, the threshold on which violence passes over into law and law passes over into violence’,¹⁰ from whence Hicks and Habib emerged from captivity sullied as terrorists, while the instigators of Fiji’s new legal order emerge, maybe less than heroes, but not generally perceived as traitors or terrorists.

As Sergei Prozorov notes, ‘the “zone of indistinction” … is the privileged *topos* of Agamben’s writings’ and, according to Agamben, has become more apparent in recent times as distinctions such as those between law and violence or democracy and totalitarianism, collapse or are dissolved in the global state of exception.¹¹ What this dissolution also reveals to Agamben is the nature of governance and its functional relation with the structure of

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¹⁰ Ibid 32.
sovereignty. Here Agamben’s project overlaps and differs from Michel Foucault’s work on bio-power and governmentality. Foucault uses the term ‘bio-power’ to refer to:

the set of mechanisms through which the basic biological features of the human species became the object of a political strategy, of a general strategy of power, or, in other words, how, starting from the eighteenth century, modern western societies took on board the fundamental biological fact that human beings are a species.\(^{12}\)

But while Foucault urges a liberation from the theoretical privilege of sovereignty which for too long had masked the technologies of bio-power or failed to comprehend them, Agamben warns that the neglect of the juridical in relation to the bio-political means that sovereignty can continue its project in the bio-political realm without being fully understood.\(^{13}\)

The separation of the juridical from the bio-political or the privileging of either has had profound implications, including its play into the hand of all sorts of pretenders. Agamben’s work has been directed towards the theoretical recognition of the convergence of sovereignty and the bio-political, which he sees in the sovereign production of ‘bare life’. Kalyvas’s term ‘bio-sovereign’ encapsulates well Agamben’s thought here.\(^{14}\) Through his analysis of the state of exception, Agamben is able to show that the ‘juridico-institutional and the biopolitical models of power … cannot be separated’ and it was ever so,\(^{15}\) only it is more apparent now that the state of exception has come more and more to the foreground.\(^{16}\) As Agamben writes:

Placing biological life at the center of its calculations, the modern State … does nothing other than bring to light the secret tie uniting power and bare life … In this sense, biopolitics is at least as old as the sovereign exception.\(^{17}\)

What characterises the ‘modern’ state of exception and realm of bare life for Agamben is its zone of indistinction between inside and outside, inclusion and exclusion, right and fact.\(^{18}\)

Thus, what is at stake for Agamben, as Sergei Prozorov puts it, is ‘the specific mode of the implication of zoe [the fact of living] in bios [a particular way of living], which in times of


\(^{13}\) Agamben, above n 9, 12.


\(^{15}\) Agamben, above n 9, 6.

\(^{16}\) Ibid 20.

\(^{17}\) Ibid 6.

\(^{18}\) Ibid 9.
Aristotle (and subsequent dozen centuries) was that of exclusion but in modernity becomes indistinction.¹⁹

In the modern state of exception the juridical and biopolitical powers of the state are blurred in the use and logic of security apparatuses which regulate the emergency and justify or legitimise the exceptional measures. With Walter Benjamin’s insight that the state of exception would more and more become the rule, Agamben sees that the state of exception, as a regular technique of government and a juridical apparatus of biopower, has a corrosive rather than a protective or restorative effect on the rule of law. In Agamben’s depiction of the crisis of law, as Daniel McLoughlin points out:

the sense of emergency and the curtailment of liberties are now both integrated into the continuum of governmental apparatuses deployed for the management of populations. The use of the state of exception is no longer guided by the attempt to eliminate the emergency and restore law and order, but rather the governmental purpose of guiding the development of a problem and "securing" its consequences.²⁰

This is not to suggest that for Agamben, juridical or sovereign power is superseded by governmental power but rather that both are caught up in a complex entanglement or a functional relation. And it could even be said that governmentality and security have shifted the functioning of the state of exception. This is what Agamben seeks to expose in his focus on the ‘intersection between the juridico-institutional and biopolitical models of power’ that he perceives as a ‘vanishing point’ in Foucault’s lines of inquiry.²¹ And while Foucault sees sovereignty and juridical power in terms of particular historical rationalities of a power (including their transformation in modernity by bio-power),²² Agamben sees that ‘the inclusion of bare life in the political realm constitutes the original nucleus of sovereign power … [and] the production of the biopolitical body is the original activity of sovereign power.’²³

The overlap in the work of Foucault and Agamben directs much of the historical analysis in this thesis. In other words, part of the thesis is concerned with the development of governmental power and various forms and conditions of the state of exception in Fiji that have emerged mainly with the advent of colonisation. Agamben, however, is also concerned

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²¹ Agamben, above n 9, 6.
²³ Agamben, above n 9, 6.
with the ontological implications of biopolitical sovereignty. Indeed, as Mathew Abbott comments, ‘the work of Agamben … is impossible to understand except as a form of political ontology … [and] that turns upon a question of being.’

For Agamben, following his teacher, Martin Heidegger, the question of being cannot even be asked as a question of western metaphysics because of a problematic blind spot, one that is also inherited by political thought. Agamben sees the problem in the division made by the ancient Greeks, as referred to earlier, between the simple fact of living (zoe) and a particular way of living (bios) because of the way the division also functions in relation to a mode of inclusive exclusion, apparent in both political thought and metaphysics. The separability and relation between zoe and bios proceed according to a presuppositional logic whereby one term is presupposed as a foundation for the other but is simultaneously excluded from it. As Sergei Prozorov writes, Agamben sees that ‘[t]his negative foundation becomes essential for the constitution of the positive part’, and is never successfully shaken off such that bare life and politically qualified life, animal and human, anomie and law, for example, always function in relation to each other. Agamben describes the double structure of this functionality as bipolar, which, in the context of governmental power, becomes the bipolar machine of transcendence and immanence, a transcendent god, monarch, sovereign, Law of law, entangled with an immanent, effective management, administration.

In this thesis Agamben’s work is used to expose some of the ways that Fiji’s new legal order assumes the bipolarity of the governmental machine, and indeed relies on its presuppositional structure to produce legitimacy. In this sense, the thesis explores the extent to which Agamben’s concept of sovereign structure (the exception), like any structure, is susceptible to highjack, lies or manipulation, thereby becoming the mask and appearance of sovereignty, itself a mask, a possibility well-rehearsed in Agamben’s work. However, this is not an attempt to restore a lost liberal status quo, as some critics of Agamben’s work might argue. Nor is it an attempt to deny the very real danger, as Agamben apprehends, that sovereignty poses for

24 Mathew Abbott, *The Figure of the World: Agamben and the Question of Political Ontology*, Crosscurrents (Edinburgh University Press, 2014) 17.
25 Ibid.
26 Sergei Prozorov, ‘Living a la Mode: Form-of-life and Democratic Biopolitics in Giogio Agamben’s The Use of Bodies’ (2017) 43(2) *Philosophy and Social Criticism* 144, 145.
27 Ibid 146.
28 McLoughlin, above n 20, 681.
political life, or to discredit the state of exception as a fiction or apocalyptic hyperbole, as theorists such as Peter Fitzpatrick argue.\textsuperscript{29}

For Fitzpatrick the state of exception is much less catastrophic. Instead he sees the exception as part of the interplay between the determinate and responsive dimensions of law, and the concentration camp as ‘paradigmatic of law in the…sense of sharply manifesting what could be called the stages of any legal decision.’\textsuperscript{30} Fitzpatrick sees the law in the camp as,

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\begin{center}
filled with a pre-existent content that so comprehensively contains and so pervasively dominates it that it could be seen as indistinguishable from the “fact” of that content, although it could be more accurately described as instrumentally subordinated to such a fact.\textsuperscript{31}
\end{center}
\end{quote}

Similarly Fleur Johns argues that,

\begin{quote}
the plight of the Guantánamo Bay detainees is less an outcome of law’s suspension or evisceration than of elaborate regulatory efforts by a range of legal authorities. The detention camps of Guantánamo Bay are above all works of legal representation and classification. They are spaces where law and liberal proceduralism speak and operate in excess.\textsuperscript{32}
\end{quote}

But as Clement Fatovic notes in his analysis of prerogative power (operating outside the bounds of law) and executive power (operating within the bounds of law),\textsuperscript{33} proliferations in law, as have attended the ‘war on terror’, for example, tend to increase the discretion of the executive and other government actors.\textsuperscript{34} And in Fatovic’s words, this discretion blurs the line between rule-bound authority and exercises of extra-legal power:

\begin{quote}
the sweeping grants of authority to the executive branch [since 11 September 2001] confer so much discretion on the Executive that the practical differences (if not the legal status) between Lockean prerogative and action taken in accordance with these laws are difficult to discern.\textsuperscript{35}
\end{quote}

\begin{flushright}
\textsuperscript{29} Peter Fitzpatrick, 'Bare Sovereignty: Homo Sacer and the Insistence of Law' (2001) 5(2) Theory & Event 249.
\textsuperscript{30} Ibid 267.
\textsuperscript{31} Ibid 268.
\textsuperscript{34} Ibid 21.
\textsuperscript{35} Ibid 22.
\end{flushright}
Indeed, since all law is susceptible to a degree of discretion in its interpretation and enforcement, it appears to Fatovic that ‘discretion is not the exception, but the rule, so to speak’. Similarly, Thomas Poole argues that when ‘normal and exceptional powers … [become] products of the same legislative process … the traditional formal separation between norm and exception no longer pertains.’ And in Poole’s opinion, common law constitutionalism (which locates the distinction between norm and exception on the juridical plane rather than in the legislative/political sphere) fares no better. The point I wish to make here is that Agamben’s conceptualisation and critique of the state of exception does not rely on the constructs of a particular legal or political system but the rather more ontological proposition of the relation of law to life: ‘the originary structure in which law refers to life and includes it in itself by suspending it.’

Whether Fiji’s new legal order is viewed as an over-determined phenomenon, constituted amidst a profusion of laws and regulations, or sweeping exercises of extra-legal discretion or prerogative, these perspectives still avoid the problem of foundation that the newness (or the deceit) of Fiji’s new legal order poses. And this is especially so when such views conceal or fail to recognise the implications of the presuppositional logic that gives law or the legal order its conceptual structure and its legitimacy. Agamben’s work on the state of exception and many other forms of presuppositional thinking, exposes the logic of a relation between a constituting or founding power and a constituted or founded power, between inside and outside law, between violence and right, in the structure of sovereignty. Sovereignty marks ‘the point of indifference’ or an ‘undecideable nexus between violence and right’ and is ‘the guardian who prevents the undecidable threshold … from coming to light.’

At Agamben’s urging, the task is not only the exposition of the presuppositional structure wherever it can be found (for example, in ontology, language, law, government) but a call to exit its logic. As Prozorov points out, it is, therefore, not a matter of privileging one of the elements of these bipolar structures or seeking a better articulation of the two, since that would ‘inevitably end up reproducing the apparatus in question.’ And that may never be so

36 Ibid.
38 Ibid 258.
39 Agamben, above n 9, 28.
41 Prozorov, above n 26, 146.
clearly demonstrated as it is in the political realm of a revolution or a usurpation of government.

**Connecting with Carl Schmitt**

The primacy of the state of exception in Agamben’s work owes much to its earlier exposition in the work of Carl Schmitt. Unlike Agamben whose work is ultimately directed towards a dismantling of sovereignty, Schmitt’s work on the state of exception, is, in Agamben’s words, dedicated to the ‘consistency of the juridico-political order and whose relation to the law is exactly what Schmitt sought to preserve at all costs.’\(^{42}\) That consistency and relation is what remains to be tested in the context of an analysis of Fiji’s new legal order, ergo the importance of Schmitt.

For Schmitt the concept of the (sovereign) exception carries the weight of a persistent sovereignty that endures throughout revolutions or usurpations of power, provided order is eventually restored. In Schmitt’s analysis, the (desired) unity of the State and existence of the legal order is not destroyed by the decision to suspend the law if the suspension of law is instrumentally related to legal ends. Indeed, as Agamben comments, ‘from Schmitt’s perspective, the functioning of the juridical order ultimately rests on an apparatus – the state of exception – whose purpose is to make the norm applicable by temporarily suspending its efficacy.’\(^{43}\)

Schmitt refers to the state of exception as a ‘dictatorship’, a term that accommodates the decisionistic nature of the situation whereby a decision is made and acted upon, ‘dictated’ in contrast to deliberated and consulted.\(^{44}\) Schmitt distinguishes between two types of dictatorship - commissary and sovereign dictatorship - that he also interprets in relation to the historical process of secularisation. In its appeal to an existing constitution, commissary dictatorship reflects a theologically derived structure of power. As Schmitt observes, for the medieval mind, ‘God, the ultimate source of all earthly power, only operates through [a]

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\(^{43}\) Ibid 58.

medium’ and whether it was the church, the pope or later, the lord, ‘the source of all earthly power was still bound up with the idea of a constituted organ.’

With the emergence of the modern state and the concept of a sovereign people, however, theorists such as Emmanuel-Joseph Sieyes and Schmitt saw that only a new concept of power — constituent power or *pouvoir constituant* — could appeal to the notion of an assumed power that, ‘without being itself constitutionally established, nevertheless is associated with any existing constitution in such a way that it appears to be foundational to it.’ Sovereign dictatorship derives directly from this *pouvoir constituant*:

It is truly a commission, not a refusal to pass it on to earthly representatives, as the appeal to the mission of a transcendent God would be. It appeals to the ever present people, who can take action at any time and therefore have immediate legal significance. A ‘minimum of constitution’ still remains as long as the *pouvoir constituant* is recognised. But because the external conditions have yet to be created in order for the constituent power of this same people to come into effect, in the specific circumstances that justify dictatorship on its own premises, the content of the constituting will, in itself problematic, is not actually available. Consequently this dictatorial power is sovereign, but only as a ‘transition’; and, because of its dependence on the task to be accomplished, this power is sovereign in a completely different sense from that in which the absolute monarch or a sovereign aristocracy can be said to be ‘sovereign’. The commissary dictator is the unconditional commissar of action of a *pouvoir constitue*, and sovereign dictatorship is the unconditional commission of action of a *pouvoir constituant*.

While Schmitt recognised that from the nineteenth century ‘the people’ became the bearer of constituent power in the ‘triumphal march of democracy’, the ‘victory’ of democracy did not preclude the possibility of a juridically based ‘intervention’. At times the decision on the exception would be necessary to preserve the democratic principle in a legal order. According to this logic, the problem for democratic legitimacy then, lies not in the decision per se, nor in the type of democracy. As Schmitt notes, ‘[a] democracy can be militarist or pacifist, absolutist or liberal, centralized or decentralized, progressive or reactionary, and again different at different times without ceasing to be a democracy.’ Rather, the question of democratic legitimacy emerges from the democratic principle of ‘the assertion of an identity

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46 Ibid 119.
49 Ibid 31.
50 Ibid 25.
between law and the people’s will’. For Schmitt that identification is specifically concerned with ‘the question of who has control over the means with which the will of the people is to be constructed.’ Schmitt, of course, was not the first to articulate what he himself referred to as the ancient unresolved dialectic of democracy, as old as democracy itself, concerning how the will of the people is formed. Nor, indeed, does he necessarily provide the last word on the formulation of ‘the people’, that he endows with a concrete existence and political unity ‘prior to every norm.’

**Beginning with Hannah Arendt**

While Schmitt’s thought accommodates the possibility of revolution (without upsetting the sovereign structure of authority) the notion of a successful modern revolution, as theorised by Hannah Arendt, presents a different conjunction of possibilities. Arendt saw that, in contradistinction to the French Revolution, the American Revolution and the act of republican founding that followed, solved ‘the problem of the beginning, of an unconnected, new event breaking into the continuous sequence of historical time.’ Rather than finding a decisionistic or an absolute or transcendent source of the fountain of authority in the new body politic, the ‘men of the American Revolution’, according to Arendt, stumbled across that which ‘saves the act of beginning from its own arbitrariness’, the relation between beginning and the principle inherent in all beginnings: ‘The way a beginner starts whatever he intends to do lays down the law of action for those who have joined him in order to partake of the enterprise and to bring about its accomplishment.’ Thus, for Arendt, the principle which came to light during America’s foundation years,

not by the strength of one architect but the combined power of the many – was the interconnected principle of mutual promise and common deliberation; and the event itself decided indeed, as Hamilton had insisted, that men "are really capable ...of establishing good government from reflection and choice", that they are not "forever destined to depend for their political constitutions on accident and force."  

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52 Ibid 29.
53 Ibid 27.
56 Ibid 212.
57 Ibid 213.
58 Ibid 214.
However, while Arendt sees the foundation of America’s new republic as an emancipation of the secular world from the influences of the churches and the need for a transcendent source of authority, she also laments the withering of the revolutionary spirit and the lost or squandered foundational promise of political freedom. The revolution failed to provide a lasting institution: ‘in this republic…there was no space reserved, no room left for the exercise of precisely those qualities which had been instrumental in building it.’

Thus, while Arendt draws attention to the possibilities of thinking foundation beyond infinite regressions or vicious circles often generated in the search for legitimacy of a new power and legality of new laws, she links those possibilities to the concomitant necessity of finding an appropriate, lasting space for political freedom, which is staked on the possibilities of people ‘participating, and having a share in public power.’

**Democracy with the Radical Intent of Andreas Kalyvas**

Arendt’s work, especially its development in *On Revolution*, provides strategies for critical analysis of the revolutionary features of a new legal order as well as its democratic possibilities. While Arendt may not have been as committed to democratic politics as she was to republicanism, Andreas Kalyvas engages her ideas and those of Schmitt and Max Weber (who, like Arendt, were also critical of democratic politics and liberalism) to develop a democratic theory of extraordinary politics that ‘brings the politics of beginnings and foundings to the center of the study of democracy.’

In his book *Democracy and the Politics of the Extraordinary*, Kalyvas’s comparative reading of the three theorists yields a theory that ‘represents the abstract norm of democratic founding, in accordance with which we can recognise, measure, and assess the legitimacy of existing practices of political and legal new beginnings in relation to how much they approximate or depart from its participatory and inclusive attributes.’ As Kalyvas notes, a study of democracy limited to ‘free electoral procedures of elite circulation and the study of public opinion’ or which focuses on established democratic governments - ‘permanently disciplined and perennially tamed’ -

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59 Ibid 232.
60 Ibid 255.
62 Ibid 296.
misses the ‘normative significance and critical ramifications’ of founding moments and new beginnings, to which his work attends. But he is also mindful that:

A democratic theory of the extraordinary suggests that not any act can claim to be constituent and not any actor can contend to be a founder, even if the actor and the act have been successful, that is, effective in creating a new constitutional document. Should a person or group appropriate the power to constitute a legal order at the exclusion of all those who will be its addressees, the ensuing constitutional law should be regarded as invalid, the result of an act of usurpation.

While the legitimacy of Fiji’s new legal order may be (and in this thesis, will be) assessed in terms of its participatory and inclusive attributes, the concept of popular sovereignty or sovereignty more generally, may play out (or be played out) in far more nuanced terms and complexity. Here I am gesturing towards Fiji’s colonial legacy, which includes not only very British impositions of law and politics but also the distinct social fabric that accommodated, transformed and was transformed by the colonial process.

**Negotiating with Postcolonialism**

Postcolonialism, as a theoretical and political approach, draws on the legacies of colonialism as resources to supplement a critique of contemporary power structures. This approach does not entail a privileging of the colonial, as Robert Young points out, but ‘is concerned with colonial history … to the extent that much of the world still lives in violent disruptions of its wake’. He writes:

Postcolonial cultural critique involves the reconsideration of [colonial history] particularly from the perspectives of those who suffered its effects, together with the defining of its contemporary social and cultural impact. This is why postcolonial theory always intermingles the past with the present, why it is directed towards the active transformations of the present out of the clutches of the past.

Every colonial context yields its own unique process of decolonisation and distinct narratives, as well as ‘comparable political and theoretical accounts’ (which Young attributes to ‘the

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63 Ibid 295; 296.
64 Ibid.
67 Ibid.
structural homology of domination by an exotic power’). Yet the form and effects of British rule in Fiji, drawn to the present, have taken often strange or counter-intuitive turns, which, among other things, do not altogether fall along the more familiar contours of anti-colonial resistance that inspire postcolonial thought. It is necessary to negotiate the meaning and significance of these contradictions and ironies in Fiji’s emergence as an independent nation, in order to critique the contemporary structure of power in Fiji’s new legal order.

While Fiji (and indeed, the South Pacific more generally) has not attracted the same academic attention as African ex-colonies or India, for example, there is, nonetheless, a large and growing body of work by historians, anthropologists and political scientists that engages situated local knowledges of Fiji in tandem with their different disciplines. The work I rely on comes mainly from those who recognise the significance, but resist the totalising or essentialising tendencies, of romanticising British colonisation, fetishising Indigenous culture, sentimentalising Indian diaspora or provincialising Fiji’s nationalism. They include: historians such as Peter France who challenges assumptions concerning customary communal land holding in Fiji’s colonial and pre-colonial past and Brij Lal who retrieves the complexity of Fiji’s Indian diaspora; anthropologists such as Rusiate Nayacakalou who unsettles traditional notions of chiefly authority and Martha Kaplan and John Kelly who question the possibilities or relevance of nationhood in Fiji’s colonially riven society; and political scientists such as Jon Fraenkel and Stewart Firth who as writers and editors present an array of critical responses to Fiji’s contemporary politics. These thinkers (and a host of others) deepen the significance of the paradoxes, contradictions and ironies that attend Fiji’s post-colonial struggle towards democracy and nationhood.

However, as indicated earlier, as well as involving specific local knowledge, postcolonial critique also shares comparable politics and theories amongst the wider field of its exponents. Thus insights directed by scholars of other postcolonial experiences also offer important analytical resources for post-colonial Fiji. Mahmood Mamdani’s study of contemporary Africa and its colonial legacy develops the concept of a ‘bifurcated state’ that was created through the direct and indirect rule of colonial administration:

Debated as alternative modes of controlling natives in the early colonial period, direct and indirect rule actually evolved into complementary ways of native control. Direct rule was the form of urban civil power. It was about the exclusion of natives from civil freedoms guaranteed to citizens in civil society. Indirect rule, however, signified a rural

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68 Ibid. 10.
tribal authority. It was about incorporating natives into a state-enforced customary order. Reformulated, direct and indirect rule are better understood as variants of despotism: the former centralised, the latter decentralized.  

For Mamdani, the bifurcated nature of this state power had implications for the struggles against it, since ‘the form of rule shaped the form of revolt’, and also bequeathed ‘inherited impediments to democratization’. Mamdani argues that the failure to grasp the specificity of the mode of indirect rule and its reiteration in the moves towards independence in Africa, thwarted the democratisation process. According to Mamdani, sustainable, democratic reform of colonial power structures therefore required not only the deracialisation of civil society but also the detrivalisation of Native Authority in the local state. But he held that ultimately both processes should not be kept separate nor imposed from above, lest they recreate the bifurcated state, or a see-sawing between centralised and decentralised despotism. 

Transposed to Fiji’s experiences, this reading of colonial and post-colonial power structures sheds light on the struggles around indirect rule and the ‘decentralised despotism’ of its colonialism, including the ‘explosions’ from indirect rule that saw the rise of Indigenous ethno-nationalism as well as the tendency in independence towards the centralisation of customary power. In Fiji, however, the colonial practice of indentured Indian labour added another significant dimension to bifurcated rule and the processes of decolonisation. Fiji’s sizeable Indian population (which at times has outnumbered the Indigenous Fijians) was not the subject of indirect rule and hardly the beneficiary of direct rule. Yet, with decolonisation and what Mamdani describes as the first moment in the politics of (Indigenous) affirmative action - ‘the dismantling of racially inherited privilege’ - it was the Indians towards whom the dismantling was directed. And the Indians’ defence against racial barriers of colonial civil society, articulated in the language of individual rights, equality and democracy, became a 

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70 Ibid 24.
71 Ibid 25.
72 Ibid 288.
73 Ibid 296.
74 Ibid 300.
75 Ibid291.
76 Ibid 20.
reef on which the possibilities of national unity and solidarity with their Indigenous compatriots in a post-colonial Fiji foundered.\textsuperscript{77}

**Postcolonial Entanglements with Achille Mbembe**

Rather than focusing on post-colonial relationships in terms of ‘the binary categories used in standard interpretations of domination, such as resistance vs. passivity, autonomy vs. subjection, state vs. civil society, hegemony vs. counter-hegemony’,\textsuperscript{78} Achille Mbembe approaches the complexity of African social formations through a sophisticated and nuanced reading of what he coins the ‘postcolony’ of Africa. Not content with simply recognising that the postcolonial state broadly perpetuated relations of subjection that the colonial state had initiated,\textsuperscript{79} Mbembe urges us to also think the domination of the ‘postcolonial potentate’ in relation to ‘its own internal coherence and rationality’.\textsuperscript{80} This means we must ask questions about ‘specific relations of subjection’ and the ‘relationships between subjection, the distribution of wealth and tribute, and the more general problem of the constitution of the postcolonial subject.’\textsuperscript{81} Mbembe takes a Foucauldian approach, using terms such as ‘entanglement’ to express the way that the postcolony, indeed every age, ‘encloses multiple durees made up of discontinuities, reversals, inertias, and swings that overlay one another, interpenetrate one another, and envelope one another’.\textsuperscript{82} In terms of entanglement, the knowledge of post-colonial regimes is thus:

> the product of several cultures, heritages, and traditions of which the features have become entangled over time, to the point where something has emerged that has the look of “custom” without being reducible to it, and partakes of “modernity” without being wholly included in it.\textsuperscript{83}

Part of the ‘entanglement’ is colonial rationality and its mode of exercising power. Expanding the concept of indirect rule, Mbembe develops the idea of *commandement* to articulate the ‘specific imaginary of state sovereignty’ in the colony’.\textsuperscript{84} Mbembe describes *commandement*
as involving four main properties or characteristics: a régime d’exception;\textsuperscript{85} a regime of privileges and immunities;\textsuperscript{86} a lack of distinction between ruling and civilising;\textsuperscript{87} and the circularity of these features.\textsuperscript{88} While Mbembe’s explication of the régime d’exception in \textit{On the Postcolony} is not directly aligned with or attributed to Agamben’s conceptualisation of the state of exception (not least because colonialism does not feature in Agamben’s work), Mbembe’s analysis nonetheless provides ways of thinking the exception, not just as a form of colonial rule but as implicated or entangled in the process of decolonisation and the ‘extension of the role of the state’ in the postcolony.\textsuperscript{89}

According to Mbembe the régime d’exception was the exercise of colonial power over a territory and its inhabitants as a right of command which departed from common law.\textsuperscript{90} It was founded on a violence bent on the control of something perceived as less than full human. This was not a contractual encounter that would establish reciprocal obligations but a form of domination that cast right only on the side of the coloniser on a mission to order what was chaotic, civilise what was savage.\textsuperscript{91} In this realm the colonised subject — the native — was constituted as a cluster of the dark forces in nature, in the context of which, justice of means or legitimacy of ends could not be thought.\textsuperscript{92} Instead the coloniser proceeded with impunity, quelling unruliness and taming the wildness as so many skirmishes rather than massacres, the battles not qualifying as war since between enemies there was at least some equivalence. Against this form of domination the native had no legal redress. Civil society, which had developed in the west as the private rights of individuals against the tyrannical tendencies of absolute monarchs, that eventually became juridicalised in the institutions of state and internalised as the sense of common good shared by ruler and ruled, did not extend to the realm of heathen savages. At best, the native was an infant that only the patient, benevolent rule of the more educated, Christian, civilised coloniser could teach, groom, coax and domesticate into a distant or unreachable adulthood and civility.\textsuperscript{93}

\textsuperscript{85} Ibid 29.
\textsuperscript{86} Ibid 30.
\textsuperscript{87} Ibid 31.
\textsuperscript{88} Ibid 32.
\textsuperscript{89} Ibid.
\textsuperscript{90} Ibid 29.
\textsuperscript{91} Ibid 34.
\textsuperscript{92} Ibid 26.
\textsuperscript{93} See ‘An Explanation of some Names, Times and Expressions’ at the beginning of the thesis for discussion of the use of the term ‘native’.
As Mbembe states elsewhere, he is mindful that ‘colonial forms of sovereignty were always fragmented’ and complex, and certainly not identical with state sovereignty. Nonetheless, the concept of the state of exception remains relevant for Mbembe’s scholarship, and the work of other postcolonial theorists. Indeed, as Stephen Morton points out, Agamben’s concept of the state of exception was never ‘reducible to official declarations and temporary suspensions of ‘existing rights, rules and regulations, but also involves multiple actors, institutions and techniques of power to sustain this state of emergency’. Thus Mbembe can assert:

colonies are zones in which war and disorder, internal and external figures of the political, stand side by side or alternate with each other. As such, the colonies are the location par excellence where the controls and guarantees of judicial order can be suspended — the zone where the violence of the state of exception is deemed to operate in the service of “civilization.”

Rather than a prior or intrinsic “good of the people”, on which account law may be suspended in order to preserve itself and the norms of the people, civilisation (of the “uncivilised” native) lay in a future, far from the present and the past. Constituted in the colonial zone of exception, the native embodied the disorder and chaos from which (common) law was withheld while the force of law and dominion “laboured” over the long conversion to civilisation and more immediate conversions of wealth, through a profusion of decrees and regulations. From the standpoint of the colonised, as Morton observes, ‘colonial sovereignty was experienced as a permanent state of emergency’.

Viewed in the context of colonialism these permanent but also ad hoc instances of the exception (such as the exercise of specific emergency powers during particular times of unrest) enrich the conceptualisation of the state of exception, not only as layers of complexity but as historical connections between the colony and contemporary states of emergency overlooked in Agamben’s work. Thus while Agamben’s ‘concepts, frameworks and methods of philosophical analysis undoubtedly offer valuable resources for thinking critically about the political exclusions and abandonments characteristic of colonial situations’, as Marcelo Svirsky and Simone Bignall demonstrate in their edited book, Agamben and

96 Mbembe, above n 94, 24.
97 Morton, above n 95, 46.
98 Ibid.
Colonialism, Agamben’s thought has a wider relevance. It may be read into ‘the ways colonial relations have permeated the formation of political subjects’ which in turn may ‘open perspectives of escape from subjection and of collective renewal.’

In this thesis the postcolonial reading of the exception contends with the familiar yet distinctive form of Fiji’s colonisation and the subjects it produced, both then and now, particularly in relation to the authoritarianism entangled in the postcolony. Colonial rule in Fiji shared many features typical of colonial rule throughout the colonies of the 19th century but there were also important differences that have impacted on the trajectories of power in Fiji. Mbembe speaks of the colonial conquest of Africa, for example, while the British colonisation of Fiji was accomplished through an act of cession. In fact, prior to cession, an embattled pre-colonial Fijian government asked Britain to take over its administration. This might seem to imply that the colony was created on a contractual basis, and indeed, the nature of the arrangement, to the extent that it was consensual, did have implications for the meaning of British takeover in Fiji, as discussed below. But the society, no less than the territory delivered over to the British, was by no means united as a nation, many tribal groups were not consulted or did not agree to the ceding of their land. And despite the petition from Fijians to retain a significant measure of control of their land and traditions, only a complete and unconditional transfer of sovereignty was acceptable to the British.

Once the Governor arrived, the colonial form of rule in Fiji assumed what may now be interpreted as the familiar mode of domination that operated in the indirect rule of other colonies: a separate administration of Indigenous affairs under the control of the coloniser. And yet in Fiji, under the governorship of Sir Arthur Gordon, the system of indirect rule was instituted according to more complex and contradictory divisions (and motives) than simply the division between coloniser and colonised. Gordon’s sympathies toward the Indigenous Fijians and his distaste towards the European (including Australian and New Zealand) settlers in Fiji, for example, were played out at multiple levels, institutional as well as in the social imaginary.

100 Ibid 7.
Colonising Race in Fiji

As Lorenzo Veracini observes in his astute analysis of the construction of colonial Fiji, Gordon’s governorship ‘establish[ed] an unprecedented example of cooperation between a selection of officially endorsed Indigenous interests and colonial bureaucratic interests’ that sublated what was construed as the avaricious interests of a ‘semi-civilised purse-poor’ white settler population. This particular conjunction of interests underpinned Gordon’s Indigenous protection policy and its necessary supports which included the importation of Indian labour, a practice familiar to Gordon through his previous postings in Trinidad and Mauritius.

The Indian workers came to Fiji contracted as indentured labour. However, as critics have contended, the arrangement scarcely qualified as a contract either, since the girmitiyas (contracted labourers) were not fully appraised of what was in store for them and therefore could not be considered as voluntarily entering into a contract. As discussed in Chapter 2 and examined in Brij Lal’s work on the Indian diaspora in Fiji, the conditions of indenture were harsh and exploitative. Nevertheless, thousands of girmitiyas migrated to Fiji during the indenture period and many stayed on after their individual indenture period was complete and also after indenture was abolished.

The girmitiyas were subjects of their colonial masters, like other inhabitants of the colonies, but they too, were subject to a type of separate administration. Indenture was regulated through an extensive regime of ordinances under the administration of the colonial governments of India and Fiji. Also, the Colonial Sugar Refinery Company’s monopolistic control of the sugar industry in Fiji assured its strong influence in the control of indentured labour and colonial affairs more generally.

Plantation management, geared towards plantation owner interests, exercised a tight control over this labour force, which involved, among other things, policing the severe restrictions placed on worker mobility. These restrictions served to keep the Indian population dispersed and also separate from the Indigenous community that was similarly immobilised under protectionist practices.

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Separation was accomplished as so many exclusions that, for the Indians, extended to those who settled in Fiji after indenture or came to Fiji as free migrants and were excluded from ‘the basic entitlements of settlerhood’. These exclusions tangled with the Indigenous protectionism and white settler preclusions to mark Fiji’s distinctive form of exceptionalism. In Veracini’s analysis, Gordon’s version of Indigenous protectionism in Fiji was born out of ‘a long tradition of anti-settler discourse’, but was also ‘designed as a “remarkable” exception’ to other settler colonial establishments where ‘settlers are seen as exercising a sovereign right to self-governance’:

Although elsewhere, again and again, settlers and their ideas about colonial settlement prevailed, in Fiji white residents were denied ultimate self-government while Indo-Fijian ‘settlers’ who were residing in their farms, opening up an agricultural frontier, and integrating Fiji in the world markets – were denied franchise.

However, as limited as Fiji’s political arena may have been for settlers, still it was dominated by Europeans, not only in the wider narratives of white superiority but in the structure of governance. Under a common roll system political representation on Fiji’s Legislative Council was divided along racial lines, whereby each racial group elected (or in the case of Indigenous Fijians, nominated) members from among their own communities to seats pre-allocated on the base of race. The number of seats for each group as well as the size of each communal roll was vastly disproportionate to the population of each racial group. By 1937 adjustments had been made so that communal seats were shared equally between Fijians, Indians and Europeans, despite the latter comprising less than 10% of the population. The rest of the Legislative Council, holding the majority of seats, consisted of ‘official’ members, while the Executive Council consisted of the Governor and his official advisors. As Brij Lal notes, under this system, which was to last until the 1960s:

the official members had a permanent majority so that any policy the government proposed was assured of a successful passage through the Legislative Council. The Governor, of course, retained the veto power over everything, which he exercised with the consent and authorisation of the Secretary of State for the Colonies.

While sovereign power was clearly vested in the Governor and indeed, made manifest in practices of inclusive exclusion such as a separate native administration or a disenfranchised

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104 Veracini, above n 102, 198.
105 Ibid.
106 Ibid 199.
Indian population, life captured in the sovereign sphere of colonial Fiji was not necessarily, or not only, rendered ‘bare’. Strategic alliances and identifications between sovereign subjects and between sovereign and subject produced political outcomes that both challenged and transformed the reach of British sovereignty. Two examples of this political agency are discernible in the relations forged between Fijians and European settlers and between the Imperial Government and the Fijians, such as played out in the constitutional debates of the 1960s.

By the 1960s Britain had begun preparing Fiji for some kind of self-government. Despite resistance from the Great Council of Chiefs, who preferred to keep control of the political selection process, the colonial administration pushed for the franchise of all Fijians and encouraged the creation of political parties. In 1965 Britain proposed to host a constitutional conference for Fiji’s political leaders but without a shared vision of Fiji’s political future the debates around constitutional changes were strongly polarised. Spokesmen for the Fijian people and Fiji’s Europeans were strongly (almost ‘viscerally’) opposed to a common roll and independence.\(^{108}\) For the Fijians, the communal roll protected the notion of Indigenous paramountcy, for the Europeans, the communal roll protected their privileged constitutional position.\(^{109}\) In this arena of racialised politics, Indigenous and European interests positioned themselves on a hierarchy, at the bottom of which were the Indians whose demands for equal franchise and independent nationhood threatened anarchy, or worse, Indian domination. For Indian spokesmen such as A.D Patel, the exclusivity of the alliance between the Fijians and Europeans was perplexing. ‘Why’, he asked, ‘should only the Europeans be regarded as the protectors of the Fijian interest, who had used their access to the Fijian people to divide the two races for their own interest?’\(^{110}\) Many Fijian leaders never disguised their admiration of English culture. Ratu Mara (Fiji’s first Prime Minister) said that Western culture was the only culture ‘to which we will submit, as Fijians, and to no other culture’ and that without the buffer of European culture and presence there would be ‘a conflagration in the country’ that would erupt in the battle for domination between Fijian and Indian cultures.\(^{111}\) European leaders from Fiji, such as John Falvey, did not mince his words, ‘of course we all hate the Indians.’\(^{112}\)

\(^{108}\) Ibid 194.
\(^{109}\) Ibid 192.
\(^{110}\) Ibid 128.
\(^{111}\) Ibid 205.
\(^{112}\) Ibid 267.
At the London end of Fiji’s constitutional debates, as Lal notes, it was common knowledge that ‘official sympathy lay with the Fijians’, and ‘[i]n the 1965 conference, London actively sought to engineer an outcome that would put Fijians in control, within the overarching ambit of Westminster-style parliamentary democracy.’ Of course this approach to Fiji’s politics was in keeping with earlier colonial experience. Assumed as a burden of humanitarian dimensions no less than of sovereign proportions, British colonisation of Fiji, as elsewhere, was largely effected through forms of personal and traditional domination. The loyalty of the Fijians was the correlative. For Fijians, the chiefs had ceded Fiji to Queen Victoria ‘in loving trust’ that she, as paramount chief, would respect, protect and ‘maintain the interests of Fijian society as paramount.’ That colonial rule was founded on and exercised according to a prerogative power, did not diminish the apparent warmth of its reception amongst many Fijians, even as the processes of decolonisation accelerated throughout the world in the 1960s. Fijian leaders such as Ratu Mara rejected the idea of breaking away from Britain. As Lal documents, at the 1965 London constitutional conference Ratu Mara spoke of ‘mutual trust and abiding loyalty’ and an ‘enduring faith and loyalty in the British Crown and in British institutions’ and declared, ‘independence is not our goal because we have never found any sound or valid reason to attenuate, let alone abandon, our historical and happy association with the United Kingdom.’ But, whether or not this was a matter of being truly convinced of the superior wisdom and humanity of their British colonisers (an outcome through which, Gauri Viswanathan suggests, ‘the material reality of [the English coloniser] as subjugator and alien was dissolved’), the dominant chiefs in Fiji also utilised the strategic value of their being beholden.

**Chains of Command**

This thesis is generally of the view that the exercise of prerogative power (or emergency powers), whether in Britain or the common law countries, marks the appearance of the exception. Yet it is important, as indicated above, to distinguish the forms of exception, not only as marked by colonialism more generally, but also in terms of relations of subjection.

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113 Ibid 265.
114 Ibid 266.
117 Lal, above n 107, 197.
specific to a particular colony or postcolony. The prerogative power of Western monarchs, eventually (somewhat) reined in by parliament or at least presumed to be exercised for the good of the people, was not so ‘encumbered’ in its exercise in the colonies. The colony was the exception whereby prerogative power was unleashed according to the whims of colonial bureaucrats and officials of companies working the colonies, in confident assertions of British sovereignty. But, in Fiji, the subjection of its prominent chiefs was maintained more as a delegation or an endowment of privilege, in the same order as the prerogative power of the Governor, which drew from traditions dating back to the Middle Ages and the feudal bonds between vassal and lord, or later, ‘the attribution of almost royal rights and prerogatives to, and enjoyment of sovereign privileges by, companies of ordinary traders’.

This is not to suggest that the Governor was anything other than omnipotent in the colony or that, in the eyes of the colonial masters and so many of the settlers aligned with them on a colour bar, those aristocratic features of chiefliness could ever bridge the racial divide. Indeed, as postcolonial theorists such as Nasser Hussain and Partha Chatterjee argue, ‘racial hierarchy was the raison of colonial rule [and] any rationalist effort to remove such distinctions would go toward removing what made such a government “colonial” in the first place.’ But whether viewed as attributions of prerogative or what Mbembe characterises as ‘reappropriations’ of commandement by the Indigenous people who kept reinventing and reinvesting ‘legitimacies and lower-order institutions …with new significations and new functions’, the modes of power through which the state was extended in the postcolony ‘followed directly from the colonial political culture’.

With independence in 1970 Fiji inherited the basic structures of colonial governance (civil service, police, military, judiciary etc) but now accommodating the new conditions of sovereignty. The ‘tutelary justification of colonial rule’ which had fed on the ‘grand evolutionary narrative of civilisation’ gave way to the narratives of the new nation-state, often extensions of the old ethno-nationalist trope. For the first seventeen years, the country was governed by the Alliance Party. Under the leadership of Ratu Mara, the Alliance Party, which was largely a chiefly oligarchy (in coalition with a European elite and a political wing of an Indo-Fijian cane-workers union) maintained a form of chiefly rule through tactics

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119 Mbembe, above n 78, 29.
121 Mbembe, above n 78, 32, 42.
122 Hussain, above n 120, 136.
described by critics as ‘patronage and intimidation’.

In Michael Howard’s account, the Alliance Party ‘sought to divide native Fijians from Indo-Fijians, while trying to cover over differences among native Fijians themselves and they sought to divide the Indo-Fijian community internally.’

In Ratu Mara’s parlance, however, it was the ‘Pacific Way’ with its emphasis on ‘stability and tradition and, by implication, adherence to chiefly rule’ that guided Fiji’s peaceful transition to independence.

As an appeal to nation-building, however, the Alliance Party ideology failed to take account of various other political currents that were swelling the resistance to chiefly power. With the rise of the labour movement that cut across much racial division, the forces of opposition found the political vehicle that would unseat the chiefly elite in the 1987 elections.

The military coups led by Sitiveni Rabuka in 1987, aimed at reinstating chiefly rule, were the first of several explicit crises that forced the nation-state to confront its operational logic and the intimate connection between the rule of law and emergency. Rabuka’s coups succeeded in overthrowing the government and the Constitution and ultimately paved the way for his election in 1992 as Prime Minister under a new Constitution. Despite the attempt of the ousted Prime Minister, Timoci Bavadra, to mount a legal challenge to coup-related activities, it was not until the cases concerning the coups of 2000 and 2006 were heard that a jurisprudence of emergency came to light in Fiji.

Judging Emergencies

The judgments concerning emergency powers and successful revolutions form part of the terrain in and against which the legitimacy of Fiji’s new legal order takes shape. The last of these judgments in 2009 precipitated the abrogation of the Constitution and the declaration of a new legal order. While Fiji’s courts have since been denied jurisdiction to hear matters bearing on the lawfulness of the new legal order or the culpability of its instigators, the judgments focused on in this thesis are analysed not only in relation to their specific content but also in relation to their place as part of Fiji’s common law. The silencing of the courts in this regard focuses attention on the new legal order as a site that explicitly manifests the paradox of founding that is embedded in law whereby ‘the moment of foundation is

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123 Howard, above n 101, 53.
124 Ibid.
125 Ibid 7.
undecidable, neither legal nor illegal.' More pertinently, the silence can be read as the silence at the limit of law and the impossibility of deciding the inside and outside of law, or it can be read as the silencing of that paradox that haunts positive law.

These ideas form part of the deconstructive strategy that Agamben, Jacques Derrida and others bring to the study of law and legitimacy. In relation to Derrida’s thought Margaret Davies explains,

Derrida’s work in relation to law allows us to see the contradictions and paradoxes of legal thought not as conceptual failures…but rather as systemic philosophical matters which go to the heart of any question of meaning (and thus normality, authority, and understanding).

In relation to the judgements considered in the thesis such an approach exposes the legal aporias or the unresolvable contradictions that have nevertheless had to be resolved (although some courts have declared the legitimacy of coups a non-justiciable question). Indeed, scholars such as Tayyab Mahmud argue that ‘the doctrine of nonjusticiability of political questions [is] the only feasible option for courts when confronted with successful coups d'état.’ The four main Fiji cases concerning emergency powers, however, are demonstrative of the allure that these issues hold, not only for judges but for a range of legal commentators and philosophers (and obviously this thesis). These cases document the struggle between the rule of law and sovereign power, between law-preserving violence and law-founding violence, and with echoes from the dusty archives of law as resonant as the more contemporary interpretations of emergency powers in Fiji.

Three common law doctrines or principles (necessity, prerogative and effectiveness) were invoked by the courts in these cases, each of which were concerned with justification of emergency powers or the regulation of an exception. To validate what would otherwise be an unlawful or arbitrary exercise of power, the courts attempt to locate the claims of necessity (prerogative or revolution) within the framework of a normative legality, each time attempting to draw on and enlarge or finesse the provisions for law’s suspension within the discourse of the rule of law itself.

127 Ibid 214.
In his survey of ‘all known judicial responses to coups d’état in post-colonial common law settings’ (until 1994), Mahmud observes that it has been ‘Hans Kelsen’s theory of revolutionary legality [that has] furnished the primary doctrinal vehicle’ for courts to ‘validate incumbent usurper regimes’.\(^{129}\) The Prasad judgment in Fiji’s Court of Appeal, while referring to the ‘over-influence’ of Kelsen, ‘whose theories on one view, might too readily reward a usurper’,\(^{130}\) also bears the marks of Kelsen’s theory, particularly as adopted in Granada’s Mitchell case and taken up in Prasad.

Kelsen theorises that the existence of a legal order presupposes the existence of a *grundnorm*, the validity of which is subject to the conditions that is posited and that it is effective.\(^{131}\) As adapted by the courts, the existence and validity of a legal order is measured according to whether the new order is effective. But in his critique of Kelsen’s theory and its misinterpretation and misapplication in the courts,\(^{132}\) Mahmud argues that the judicial practice of ‘first mak[ing] a factual finding of efficacy and then bas[ing] validity upon such a finding’,\(^{133}\) is to make a prescriptive principle of law out of Kelsen’s descriptive theory\(^{134}\) which instead, ‘aims to describe the post-decision situation and thus cannot take part in the making of that decision.’\(^{135}\) Kelsen himself emphatically rejects any causal relationship between validity and efficacy or the sense of ‘validity’ as meaning ‘effectiveness’ stating ‘the efficacy of the legal order is only the condition of validity, not the validity itself.’\(^{136}\)

In the cases of Prasad and Mitchell the judges were concerned to qualify the concept of efficacy in order to distinguish the effectiveness of a legal order from the effects of the violence, coercion or force of a usurper regime, since, for the judges, as Mahmud observes, Kelsen’s theory of validity and his fusion of the concepts of state, legal order and constitution,\(^{137}\) ‘would qualify any effective regime as a valid legal order’\(^{138}\).

In the Mitchell case the judges stated that the principles of revolutionary legality, as distilled from other cases, had to be made consistent with Granada’s political democratic ideology. Similarly, in the Prasad case, Fiji’s Court of Appeal adopted nearly the same socio-political

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\(^{129}\) Ibid 53.


\(^{132}\) Mahmud, above n 128, 107.

\(^{133}\) Ibid 113.

\(^{134}\) Ibid 111.

\(^{135}\) Ibid 112.

\(^{136}\) Ibid 113.

\(^{137}\) Ibid 107.

\(^{138}\) Ibid 136.
criteria in the ‘efficacy test’ under the requirements for evidence of control and acquiescence. According to Mahmud, however, this consideration of sociological factors:

go[es] towards the moral content of the right of a regime to govern and the obligation of fidelity of the governed. As such, these issues are political/moral in nature and go to the question of legitimacy, which remains beyond the purview of judiciaries and belongs in the political processes of the society at large. Since legitimacy of a revolutionary regime is not a legal issue susceptible to adjudication, … the modified conditions of efficacy cannot be considered questions of fact to be pleaded and proven by the parties to the case. The error is to see the issue of legitimacy as a legal issue, hence the search for a rule of law to resolve the question. The modified conditions are not legal standards; rather, they are standards of political discourse for evaluating the legitimacy of an extra-constitutional order.  

However, the problem as Mahmud sees it, not only concerns the failure of the courts to distinguish between validity and legitimacy. Courts should not entertain questions concerning the validity of a coup d’état either, according to Mahmud, since such questions involve meta-legal assumptions about the relationship of law with social reality’, an inquiry best left to legal theorists.  

Mahmud’s concern to keep law out of the politics of coups d’état recognises the powerful part that law may play in the discourse of legitimacy. However, his insistence on law’s separation from non-law (into which he folds morality and politics), even if it takes the shape of avoidance such as in the doctrine of non-justiciability, cannot ultimately help law avoid what a coup d’état or a revolution exposes about the legal order itself: the founding moments of law or a legal system are neither legal nor illegal.

Walter Benjamin and Jacques Derrida (and Giorgio Agamben, as discussed earlier) each has contended with the structure and implications of this paradox. In Force of Law: The “Mystical Foundation of Authority” Derrida’s famous engagement with Benjamin’s Critique of Violence, Derrida suggests that the distinction Benjamin makes between law-making violence and law-preserving violence be interpreted as a ‘differantielle contamination’, something rotten ‘at the very heart of law … which condemns it or ruins it in advance’. Derrida here is referring to the rupture that something like a coup d’état or a revolution may

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139 Ibid 77; 116.
140 Ibid 138.
141 Jacques Derrida, ‘Force of Law: The Mystical foundation of Authority’ in Drucilla Cornell, Michel Rosenfield and David Carlson (eds), Deconstruction and the Possibility of Justice (Routledge, 1992) 38.
142 Ibid 39.
create that at the same time ‘plays … on … an anterior law that it extends, radicalizes, deforms, metaphorises or metonymizes’,\textsuperscript{143} while effac[ing] or blur[ring] the distinction, pure and simple, between foundation and conservation.\textsuperscript{144} In Kelsen’s realm of positivism, this ‘ungraspable revolutionary instant’\textsuperscript{145} is that which law must claim as its ‘legitimate fiction’,\textsuperscript{146} on which the integrity of the legal order is based. For critical theory, however, the founding moment of law is, ‘in law, an instance of non-law. But it is also the whole history of law…it is the moment in which foundation of law remains suspended in the void or over the abyss, suspended by a pure performative act’.\textsuperscript{147}

Such is the nature of any decision in law, ‘a madness’, between the normative and the responsive dimensions of law where ‘each law and each moment of application or decision of law, must come up against this [undecidable] limit.\textsuperscript{148} In the case of Fiji’s new legal order, the task is thus to interpret not just ‘the madness’ of the undecidable limit but the ‘order of intelligibility’ that the successful revolution produces \textit{après coup},\textsuperscript{149} which Derrida points out is,

what it was destined in advance to produce, namely, proper interpretive models to read in return, to give sense, necessity and above all legitimacy to the violence that has produced, among others, the interpretive model in question, that is, the discourse of its self-legitimation.\textsuperscript{150}

In Agamben’s work, the discourse of self-legitimation may be discerned in his explication of the governmental machine at the centre of which is an empty throne.\textsuperscript{151} For Agamben, the messengers and governmental functionaries may be the only ones who can claim legitimacy because of the way the foundations of law or a legal order are concealed but in exposing those ways the critical task does not stop there. As Agamben writes in \textit{The Idea of Language}:

\textsuperscript{143} Ibid 41.
\textsuperscript{144} Ibid.
\textsuperscript{145} Ibid.
\textsuperscript{146} Davies, above n 126, 225.
\textsuperscript{147} Derrida, above n 141, 36.
\textsuperscript{148} Davies, above n 126, 228.
\textsuperscript{149} Derrida, above n 141, 36.
\textsuperscript{150} Ibid.
\textsuperscript{151} Giorgio Agamben, \textit{The Kingdom and the Glory} (Stanford University Press, 2011).
But if the foundation is unsayable and irreducible, if it always already anticipates speaking beings, throwing them into history and epochal destiny, then a thought that records and shelters this presupposition seems ethically equivalent to one that fully experiences the violence and bottomless of its own destiny.\footnote{Giorgio Agamben quoted in Zartaloudis, above n 8, 245.}

And Agamben points to ways that such quandaries can be renegotiated. For the purposes of this thesis however, the focus of the critique is on the governmental machine, and the way that its apparatus is made useful in a new legal order founded on a usurpation of law and government.

\textit{Troubling the People}

One of the dominant features of the discourse of democracy in Fiji is the welfare of the people or the nation, in whose interests the President and the military commander claim to have acted. As Commander Voreqe (Frank) Bainimarama announced in his press statement on the day of his \textit{coup d'état}: ‘[w]e consider that Fiji has reached a crossroads and that the government and all those empowered to make decisions in our constitutional democracy are unable to make these decisions to save our people from destruction.’\footnote{Voreqe Bainimarama's Press Statement', \textit{Fiji Times} (online), 5 December 2006 <www.fijitimes.com/ectras/TakeOverAddress.pdf>.} This statement has a performative quality that joins various aspects of the statement to crucial presumptions. The concepts of ‘we’ and ‘our people’ for example, invoke or enforce both an authority and an entity (or a unity) on whose behalf the authority can decide to declare an exception. And this relation is the presumption that forces his interpretation of destruction.

Bainimarama staged the military coup in December 2006, only six months after general elections had been held in Fiji. In so doing, Bainimarama, whose decisions were ratified by President Iloilo, was in effect asserting his guardianship over ‘the people’ who he did not believe could be represented through their votes or the elected Prime Minister Qarase. Three years later, when President Iloilo abrogated the constitution and declared the new legal order, he did so the day after the Court of Appeal had delivered its judgment on the unlawfulness of the coup and the interim regime. Here again, the President’s decision appealed to “the people” whose well-being or needs could not be met by the law. An exception was made, not only in the law, but in the people and in the presidency itself.
On one reading it is arguable that these events fall neatly into the realm of Schmitt’s sovereign dictatorship, and especially after Schmitt’s turn to what he called ‘concrete-order thinking’. With this ‘institutional turn’, as Mariano Croce comments, Schmitt saw that ‘the sovereign is necessarily required to take into account the social fabric which is the genuine addressee of her/his indications.’\footnote{154} Thus when ‘looked at normatively’, the sovereign decision on the exception may be ‘borne out of nothingness’ but then Schmitt also saw that ‘every norm must be anchored to “the normality of the concrete situation”’ and therefore ‘the people’, whose substance and social order, whether as historical fact or a future projection, is prior to the decision on the exception.

However, as Illan rua Wall points out, while Schmitt’s work ‘recovers the primacy of the constituent over the constituted, of politics over law,’\footnote{155} he struggles to account for ‘the “state” of the people that allows their political unification’,\footnote{156} and admits that ‘their expressions of will are easily mistaken, misinterpreted, or falsified.’\footnote{157} Such dilemmas may be resolved retrospectively, that is, from within the constituted order but, as Wall argues, that ‘does not provide the essence of the constituent moment itself.’\footnote{158}

In his deconstruction of ‘the people’, Wall works with theorists such as Derrida, Ranciere and Lindahl to destabilise certain concepts of ‘the people’. He challenges notions of a stable, given, fully present, self-aware collectivity, as impossible to maintain, especially in relation to authorising a constitution or the declaration of a new legal order, except, in Derrida’s words, as ‘fabulous retroactivity’. That is to say, ‘the people is called forth by the declaration’ that founds a new legal order in their name but at that moment only as a ‘futural possibility’.\footnote{159} As Wall comments,

Derrida’s retroactivity does not deny a revolutionary subject before the signature [on a declaration of independence] but rather rejects that it should be “enclosed” as the people. The assertion of the people in the Declaration is an open call. As such, the people is never present to itself.\footnote{160}

\footnote{155} Wall, above n 54.
\footnote{156} Ibid.
\footnote{157} Ibid.
\footnote{158} Ibid 84.
\footnote{159} Ibid 90.
\footnote{160} Ibid 91.
Similarly Agamben sees the concept of ‘the people’ as ‘always already contain[ing] within itself the fundamental biopolitical fracture.’\(^{161}\) That fracture is constitutive of a ‘dialectical oscillation’ between two poles of the people: ‘the People as a whole and as an integral body politic and, on the other hand, the people as a subset and as fragmentary multiplicity of needy and excluded bodies.’\(^{162}\) In Agamben’s reading of ‘the people’ concept, an aporia arises whenever it enters the political stage:

> It is what always already is, as well as what has yet to be realized; it is the pure source of identity and yet it has to redefine and purify itself continuously according to exclusion, language, blood, and territory. It is what has in its opposite pole the very essence that it itself lacks; its realization therefore coincides with its own abolition; it must negate itself through its opposite in order to be.\(^{163}\)

However, an invocation of ‘the People’ may still perform some kind of rally cry, and in that regard demonstrate the sovereign nature and function of the concept. As discussed earlier, in Agamben’s work the structure of sovereignty is defined by the exception or a ‘relation of exception’ whereby ‘something is included solely through its exclusion’.\(^{164}\) According to Agamben, ‘the situation created in the exception’ not only highlights the split between inclusion and exclusion but traces ‘a paradoxical threshold of indistinction between the two.’\(^{165}\) Sovereignty functions to conceal the splits, fractures and indistinctions, and the sovereign principle at work in ‘the People’ prompts ill-fated, futile or sometimes extremely dangerous attempts to cover over, fill up or otherwise remove the gaps between the included and excluded. Or, as Agamben notes, some may ‘attempt to fill the split that divides the people by radically eliminating the people of the excluded.’\(^{166}\)

While the excluded in Fiji have not been subject to the type of radical elimination that took place with the Final Solution, for example, elaborate and sometimes facile attempts have been made in Fiji’s new legal order to disguise the fracture in Fiji’s sovereign democratic people. As Agamben observes in relation to the French Revolution (and beyond), when ‘sovereignty is entrusted solely to the people, the people become an embarrassing presence, and poverty and exclusion appear for the first time as an intolerable scandal in every sense.’\(^{167}\) Chapter 6

\(^{161}\) Agamben, above n 40, 32.

\(^{162}\) Ibid 31.

\(^{163}\) Ibid 32.

\(^{164}\) Agamben, above n 9, 18.

\(^{165}\) Ibid.

\(^{166}\) Agamben, above n 40, 32.

\(^{167}\) Ibid.
is basically an account of the disguises vested in the constitution-making process through which a sovereign people appeared to act, until pretences were suddenly dropped or exposed and once again the gap between ‘the People’ and ‘the people’ became visible. In Fiji, however, this was not such an intolerable scandal, except perhaps for Bainimarama and supporters.

Agamben’s work on sovereignty and the state of exception is not only useful for discerning and understanding the contradictions in the concept of “the people” more generally and in Fiji more specifically but also for understanding the significance of the people as population. Agamben’s concern with a permanent state of exception, a condition that he sees afflicting contemporary society particularly after World War I, links his work with Foucault’s in contemplating the rise of biopolitics and the Security State, and the management of populations.

As discussed below in relation to Fiji’s military, Agamben’s account of the normalisation of the state of exception and the profusion of regulations and emergency (security) measures through which it is effected (and hidden), brings his work into conjunction with the Foucauldian analysis of biopower. The blurring of roles of the military and police is one of the more obvious manifestations of the security state and ‘an unprecedented paradigm of security the paradigm of security as the normal technique of government’ that in Agamben’s reckoning has gradually replaced the declaration of the state of exception.168

**Managing the Milieu: Security Mechanisms and the Military**

Jone Butadrokatdroka’s assessment of the enhanced political role of Fiji’s military (taken up in Chapter 2) lays the blame at the feet of the international ‘peace-keeping’ activities undertaken by the military.169 But while there may be a causal relation, the significance of military ‘peace-keeping’ operations also needs to be understood in the global context of military activity in the post-World War II, UN era. This is not to deny the significance of the cultural and political milieu in which the military and the authority of its leaders have gained currency but rather points to ways that systems of meaning-making and representation in Fiji also

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168 Agamben, above n 42, 14.
involve their ‘renegotiation…under the pressures and within the limits of the new globally imposed model of nation-state.’\textsuperscript{170}

As Kelly and Kaplan point out, the ‘nation-state utopia’ of the UN era invites denial of the connection of sovereignty to military control, recasting standing armies as merely matters of “defence”. If the world has a general plan for military intervention, especially post-Cold War, it is to enter only when it is too late and always to call it “peacekeeping,” as if sovereign powers always already lie somewhere else.\textsuperscript{171}

Coinciding with the emergence of ‘peace-keeping’ and the end of the classical form of war between sovereign states came a renewed sense of the political notion of ‘security’. Especially since 2001 and the attacks on the World Trade Centre, security has become a global political concern, in relation to which Agamben’s diagnosis of a permanent state of exception or emergency seems borne out. The extended reach of security measures, as an instrument of governance, has continued the transformation of power that Foucault identifies as the shift to biopower by the eighteenth century.\textsuperscript{172} The Foucauldian realm of biopolitics, is that in which the population, as ‘a multiplicity of individuals who are and fundamentally and essentially only exist biologically bound to the materiality within which they live’,\textsuperscript{173} is the target of governmental management. Security measures, according to Foucault, are the means whereby the ends of government are met, as distinct from the juridico-political means and ends (law and obedience to law) of sovereignty. Security mechanisms manage the ‘milieu’ or the ‘field of intervention’ that affects a population,\textsuperscript{174} and that includes natural and artificial givens (rivers and houses for example) and ‘a certain number of combined overall effects bearing on those who live in it.’\textsuperscript{175}

According to Foucault, at different times different mechanisms of power or the system of correlation between them have changed,\textsuperscript{176} and as Agamben keenly observes, ‘Foucault can show that the development of security and the development of liberalism coincide.’\textsuperscript{177} The different mechanisms of power relate to the three main modalities of power which Foucault

\textsuperscript{171} Ibid 192.
\textsuperscript{172} Senellart, above n 13.
\textsuperscript{173} Ibid 37.
\textsuperscript{174} Ibid.
\textsuperscript{175} Ibid 36.
\textsuperscript{176} Ibid 22.
\textsuperscript{177} Giorgio Agamben, ‘Security and Terror’ (2001) 5(4) \textit{Theory & Event} 23.
identifies as the juridical, disciplinary and biopower, and mechanisms of security are a feature of the latter. The technology of biopower has ‘population’ as its object, in contrast to the classical mechanisms of juridical power, for example, which involve ‘the safety (surete) of the territory or the safety of the sovereign who rules over the territory’. According to Foucault, ‘the population’ as a new collective political subject, augers in the mechanisms of security, which,

unlike those of law or discipline, do not tend to convey the exercise of will over others in the most homogenous, continuous and exhaustive way possible. It is a matter rather of revealing a level of the necessary and sufficient action of those who govern. This pertinent level of government action is not the actual totality of the subjects in every single detail, but the population with its specific phenomena and processes.

Drawing on Foucault’s work to distinguish between security and discipline and law as instruments of governance, Agamben writes:

[whereas disciplinary power isolates and closes off territories, measures of security lead to an opening and to globalisation; whereas the law wants to prevent and prescribe, security wants to intervene in ongoing processes to direct them. In short discipline wants to produce order, security wants to govern disorder.]

Agamben sees that security has now become, ‘the basic principle of state activity [and]... the sole criterion of political legitimation’, (the implications of which are expanded upon in Chapter 5) but at this stage it is important to recognise that security mechanisms have long played a part in Fiji’s administration.

Armed forces in pre-colonial and colonial Fiji (King Cakobau’s Royal Army and Governor Gordon’s Armed Native Constabulary) were used to control anti-Christian and anti-colonial rebellion, marking not only the rise of policing technologies more generally but also their specific employment in Fiji enforcing the colonial state of exception, (and including ad hoc instances of emergency). Of course neither Foucault nor Agamben suggest that security mechanisms are a strictly contemporary phenomenon, nor that juridical, disciplinary or security technologies are mutually exclusive, but Agamben’s focus on Nazi Germany (and the more recent war on terror) tends to ‘elide[…] the concatenation of civil, military and police

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178 Senellart, above n 12, 92.
179 Ibid 65.
180 Ibid 93.
181 Agamben, above n 177.
182 Ibid.
powers specific to political sovereignty in the European colony."\textsuperscript{183} These powers, as exercised in the colony, can be recognised in Agamben’s account of police operations in the Gulf War as

not merely an administrative function of law enforcement; rather … the place where the proximity and almost constitutive exchange between violence and the right that characterizes the figure of the sovereign is shown more nakedly and clearly than anywhere else."\textsuperscript{184}

The point is that in the colony where ‘colonial sovereignty was experienced as a permanent state of emergency from the standpoint of the colonised’,\textsuperscript{185} the military/police powers did not simply involve law-making or law-preserving violence but an authority in which ‘the separation of law-making and law-preserving violence is suspended.’\textsuperscript{186} Agamben describes that power as discretionary power,

which still today defines the action of the police officer, who, in a concrete situation of danger for the public security, acts so to speak as a sovereign. But, even when he exerts this discretionary power, he does not really take a decision, nor prepares, as is usually stated, the judge’s decision. Every decision concerns the causes, while the police acts on effects, which are by definition undecidable.\textsuperscript{187}

Clearly, conjunctions of sovereign and bio-power have long been exercised by Fiji’s constabulary and military, separately or together, from colonisation to the blurring of their roles in Bainimarama’s military takeover.

**Conclusion**

Rather than proffering a uniform theoretical framework or even a series of disparate theories, this chapter’s literature review reflects the restless and sometimes unrequited search for legitimacy engaged in the thesis, from Fiji’s historical roots to its legal principles and political practices. The strategy in this chapter mirrors the larger analytical process at work in the

\textsuperscript{183} Morton, above n 95.
\textsuperscript{184} Agamben, above n 40, 103.
\textsuperscript{185} Morton, above n 95, 113.
thesis: the setting out and interspersal of ideas to create a Fijian-Agamben network, drawn together in the quest for understanding the nature and conditions of legitimacy.

Each of the themes, ideas and theoretical perspectives discussed in the chapter draws attention to the problems of sovereignty, foundational authority and exceptionality and the conditions of legitimacy able to sustain and consolidate Fiji’s new legal order. Thus, rather than dwelling with abstractions and legal principles, the chapter also establishes their Fijian praxis. This is approached through the lense of postcolonial scholarship, chiefly the work of Mbembe, whose focus on the ‘postcolony’ exposes the exception or departure from common law (commandement) at the heart of colonial sovereignty. Mbembe’s work also stresses the importance of entanglement and concatenation in postcolonial thinking which enlivens multiple dimensions of identity as may be formed between coloniser and colonised. Brought to bear on on a selection of distinctly Fijian themes and practices, such postcolonial perspectives show how the state of exception can be traced in the new legal order, not only as a contemporary political apparatus but also as an historical, oppressive legacy of colonisation.

Agamben’s state of exception that largely shapes the theoretical framework discussed in this chapter, has a structure that Agamben develops throughout the many years of his inquiry into the nature of power. In the last part of his trilogy on the genealogy of Western political power, *The Kingdom and the Glory*, Agamben shows how the paradigm of the state of exception and the paradigm of government ‘coincide in the idea of oikonomia, an administrative praxis that governs the course of things’.\(^{188}\) Agamben’s focus is on the relationship ‘between *oikonomia* and Glory, between power as government and effective management, and power as ceremonial and liturgical regality’.\(^{189}\) These notions of power are used in the thesis to analyse the relation between security measures such as media control and the ‘glorification’ of power that such interventions produce or at least facilitate. While this relationship can be seen as self-serving for government in the new legal order, with the glorification of government producing or enhancing its sovereign pretensions, the point that Agamben’s work helps to make in the thesis is that the place of sovereignty (the throne) in the governmental machine is empty. Usurpation or seizure of power merely amplifies the silent echo chamber.

Poststructural scholarship, particularly Agamben’s, offers the main interpretive/diagnostic lens in the thesis but the story of Fiji’s law and society in the next two chapters is told through

\(^{188}\) Agamben, above n 151, 50.
\(^{189}\) Ibid xii.
the work of an interdisciplinary array of scholars, many of whom engage in critical analysis of Fiji’s past. Their work is thus not only a valuable source of empirical data but it also feeds into the critical orientation of the thesis. While none of these scholars reference an engagement with the work of Agamben, it would not be an exaggeration to state that all their work, as relied upon in the thesis, is concerned in different ways with the complexities of power and with forms of subjection, such as Foucault exhorts us to think:

how it is that subjects are gradually, progressively, really and materially constituted through a multiplicity of organisms, forces, energies, materials, desires, thoughts, etc. 
We should try to grasp subjection in its material instance as a constitution of subjects.190

For Foucault bio-power is a question of government in the broad sense of government that refers not only to state structures, management and control but also to the guidance and direction of conduct of individuals and groups, ‘the government of children, of souls, of communities, of families, of the sick.’191 Agamben complements this approach with his development of the concept of oikonomic government which structures the administration of power in immanent, autonomous or ‘Earthly Kingdom’ terms that also have a functional relation to a sovereign or transcendental source of power.192 Speaking to this sense in which Agamben supplements Foucault, Zartaloudis states:

From the inception of neoliberalism to the current dissolution of the nation-state, what takes place is not a mere retreat of the State or of sovereignty but the assumption [of] oikonomic practices and techniques of the whole of political life while maintaining a functional relation to a transcendental righteousness which, however, appears now as the very spectacular reality that the oikonomia of capitalist-produced and media-produced power manages.193

The following chapters trace the contours of legitimacy and the conditions of authority in the changing contexts of sovereignty in Fiji. Seen in terms of the exception that defines the structure of sovereignty, legitimacy embraces the situation created in the exception and the (exceptional) creating of it. Following Agamben, the interpretation of legitimacy in this thesis is thus directed towards the ‘paradoxical threshold of indistinction’194 created in the exception

192 Zartaloudis, above n 8, 167.
193 Ibid 168.
194 Agamben, above n 9, 18.
and its implications for a foundational relation between a series of distinctions such as between law and violence, law and non-law, law-making violence and law-preserving violence, inside and outside.
Chapter 2
A FIJI STORY

**Introduction**

This chapter is structured around a timeline from before British colonisation in the 1800s to the declaration of Fiji’s new legal order in 2009. The discussion contextualises the thesis in terms of its place in a fraught political terrain and points to some of the main socio-political issues informing or directing analysis in subsequent chapters. The different parts create a narrative of the flows and changes in Fiji’s law and society that ultimately, but not exhaustively or causally, gave rise to the new legal order. Indeed, the electoral victory of the FijiFirst Party in 2014 confirms the multiplicity and mobility of power relations, no matter how strongly the currents may flow through the years, or from what primordial sources. After all, as will be laid out in this chapter, who would have dreamed that Fiji would have produced the kind of new legal order that emerged in 2009 to claim the hearts and minds of its voting citizenry in 2014?

The legacies of certain historical events and issues discussed in this chapter that are important for later analysis of contemporary events include a questionable communalism associated with Indigenous Fijian culture and colonialism, a political preponderance of people of east Fiji and their arrangements of chiefly power, a racially divided society and strategically marginalised Indian population, and a structure of governance shaped by British colonial power. From a postcolonial perspective these legacies reflect, among other things, a problematic seepage of the values of colonialism.¹ Rearticulating the aim of postcolonial critique, Robert Young refers to historical retrieval as part of the political and theoretical practices of postcolonialism, “which seek to contest the legacies of that [colonial] past as well

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as to challenge the priorities and assumptions of its political heirs.' In this chapter the contests and challenges are raised up in four divisions of Fiji’s past and a section focusing on Fiji’s military that ranges across the timeline.

In his work on the ‘postcolony’ of Africa, Achille Mbembe refers to the ‘geographical accident’ of Africa, ‘that we subsequently invest with a multitude of significations, diverse imaginary contents, or even fantasies, which, by force of repetition, end up becoming authoritative narratives.’ Of course the processes of framing and reframing geography and society are not unique to Africa. In relation to Fiji, in terms of its historiography, to even speak of a country called Fiji, already assumes a type of unity that prior to colonisation did not exist. The people inhabiting the area we now know as Fiji were organised in diverse, fluid and flexible societies. Aubrey Park, whose work largely relies on oral accounts to investigate ‘how Fijians currently understand and explain pre-Colonial Fijian society’, observes that ‘it is highly unlikely that there had ever been a golden age of homogeneity’ in Fiji’s pre-colonial polities. There were, however, some ‘golden threads running through Fijian society’, which are also interesting for the differences they mark between pre-colonial and colonial society. These threads, as identified by Park, are related to the Fijian concept of vanua, which Unaisi Nabobo-Baba explains, is an ‘inclusive term embrac[ing] a people, their defined territory, their waterways or fishing grounds, their environment, their spirituality, their history, epistemology and culture.’ The golden threads concern the more ideological or abstract nature of the vanua that connects people and ‘others … the land, spirits, resources and environment’, to concepts of unity, forms of identification, and the sense of belonging, hierarchy and leadership.

With these ‘golden threads’ in mind, Part A: Pre-colonial Fiji discusses pre-colonial Fijian society and its early encounters with a wider world making its presence felt on Fiji’s doorstep in the 1800s. The political ascendancy of tribes from the eastern parts of Fiji was significant.

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4 Aubrey Parke, Degei’s Descendants: Spirits, Place and People in Pre-cession Fiji, Terra Australis; 41 (ANU Press, 2014) 17.
5 Ibid 40.
6 Ibid 44.
8 Ibid 78.
9 Parke, above n 4, 43.
in how it influenced a sense of Fijian identity that was emerging in relation to the colonising interests and values of ex-patriot Europeans, particularly those vesting in the institutions of capitalism and Christianity.

**Part B: Colonisation** looks at some of the practices of colonisation beginning in Fiji in the nineteenth century, including indirect rule over Indigenous Fijians and the large-scale importation of indentured labour from India. Colonial practices such as the characterisation of Indigenous traditions of land tenure or the less solicitous treatment of Indians, had far-reaching institutional and social effects, not only in relation to contemporary polities but also to the possibilities of their postcolonial critique. The racialised divisions and alliances that were instituted during British colonisation, set the tone for both colonial and post-colonial rule and the sorts of exclusion constituted in Fiji’s states of exception.

In **Part C: Nation-Making** some of the key transitional moments and themes in the emergence of the nation and the constitution of Fiji’s socio-political identity are retraced through Fiji’s pre- and post-independence history, which, as Dominik Schieder (among others) points out, must ‘be taken into account if we wish to understand the interconnected nature of its coups, and especially coups as potential strategies for the future of Fiji’s political elites.’ Shifting alliances and conjunctions between colonial and chiefly power, ethno-nationalism and class interests, or commerce and party politics, for example, intersected with the exclusions and inclusions of law and governance to dominate and resist or shape the deliverance of nationhood. The most ‘spectacular’ of these politics were the two military coups of 1987 which cemented the military ethos to the nation.

**Part D: Crises of the 1997 Constitution** focuses on crises in governments formed under the 1997 Constitution. During this period (2000–2009) Fiji’s politics, like a Wagnerian symphony, underwent even more dramatic dissolutions, ruptures and reversals as the interests coalescing under Indigenous ethno-nationalism moved from (Speight’s) coup to (Bainimarama’s first) military coup, slightly subdued under Qarase’s civilian government then built up to the major inversion that went with Bainimarama’s second coup in 2006. Instead of paramountcy of Indigenous interests, the political landscape was dominated by the rhetoric of equality and multiculturalism, and the more humdrum language of ‘clean-up’, and the inexorable militarisation of government and public service.

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Part E: The Rise of the Military looks at the changing ethos of Fiji’s military that reflects enduring links with Fiji’s pre-colonial past as well as more novel alignments of power and interests. The relation between the traditional concept of *vanua* (or interconnectedness of spirit land and people) and the military, for example, can be interpreted in a patriotic adage that sustains the military as well as in the military ranking of traditional chiefly positions. Or, in relation to the most recent military coup, the military can itself can be seen as the new *vanua*.

**Part A: Pre-colonial Fiji**

**Early Days**

Lying in a 570,000 sq. km area of the central Pacific Ocean, Fiji is comprised of over three hundred islands of great geographical complexity, only about one hundred of which are inhabited.\(^1\) Viti Levu, is the largest and oldest island and has been ‘continuously present’ for about 16 million years.\(^2\) Human presence is much shorter, beginning with Lapita migrations probably from eastern Indonesia or southern Philippines and estimated at between three and four thousand years ago, ‘in historical and ecological terms, a momentous event in Pacific prehistory’,\(^3\) after which, ‘in ways very poorly understood, there were changes that resulted in the Fijian people and culture encountered by Europeans.’\(^4\)

Some of those changes have been accounted for in terms of Melanesian and Polynesian influences and the intermittent migrations between neighbouring islands in the Pacific.\(^5\) In more recent pre-colonial history, contact between Fiji and Tonga and Samoa resulted not only in mixing of populations but polities as well. Parke attributes variations between Fiji’s polities to a range of internal and external factors. Internal factors relating to spirits, places and people, include the relationship between a group’s geographical location and ‘spirit centres’, and rivalries within or between groups. External factors include the introduction of

\(^1\) See Map at the beginning of the thesis.
\(^2\) Geoffrey Clark and Athol Anderson (eds), *The Early Prehistory of Fiji*, Terra Australis; 31 (ANU E Press, 2009) 2.
\(^3\) Ibid 407.
\(^4\) Ibid.
\(^5\) Ibid 4.
Christianity and the influence of Tongan ideologies of authority and paramountcy on the people of Fiji’s eastern regions.\textsuperscript{16}

Pre-colonial Fijian society was based on the concept of \textit{vanua} which, as previously outlined, is a word that names both a socio-political grouping and also an ideology of belonging and identity in which spirit, place and people are entwined. People were connected to a place through their belonging to a \textit{yavusa} (large clan or descent group) which was rooted to a place through a founding ancestor. The spirit of the ancestor continued to be associated with that place and also manifested in objects such as fish or whirlwinds\textsuperscript{17} and was protected by other spirits such as the spirit dog. ‘One of the most striking things about Fijian cosmology’, Park observes, ‘was that there was no disjunction between the realm of people and the realm of spirits. Spirits and people shared a common world, of which the geographical component included places with which both people and spirits were closely and directly associated.’\textsuperscript{18} Even now, as Nabobo-Baba explains in relation to life in her district of Vugalei, Fijians ‘do not separate the world and the heavens and the afterlife.’\textsuperscript{19} This relationship did not, however, preclude the possibilities of people’s mobility or indeed their different material or spiritual attachments (and detachment) from the land.\textsuperscript{20}

The bonds between people and \textit{yavusa} or between different federations of \textit{yavusa} were formed or changed not simply through lines of descent, but through different modes of spiritual and secular power (based on political and military strength) in combination with various other factors such as geography or natural flux in population. Across the Fiji islands, these dynamics produced complexity and variety in social groupings that resisted any easy classification, at least for colonisers or anthropologists. Rusiate Nayacakalou, for example, points out the difficulty of arriving at a definitive concept of \textit{yavusa} since ‘\textit{yavusa}, \textit{mataqali} and \textit{i tokatoka}, which are supposed to be units of patrilineal descent, often appear to contain persons whose descent is from a different source.’\textsuperscript{21} The variations and divisions between regional traditions are notable because of both the dynamic interplay between them in pre-colonial times and also because of their impact on the form that colonialism took in Fiji and subsequently the shape of Fiji’s postcolonial politics. Michael Howard notes, for example,

\textsuperscript{16} Parke, above n 4, 276.
\textsuperscript{17} Ibid 29.
\textsuperscript{18} Ibid 65.
\textsuperscript{19} Nabobo-Baba, above n 7, 39.
\textsuperscript{20} Stephanie Lawson, \textit{Tradition Versus Democracy in the South Pacific: Fiji, Tonga and Western Samoa} (Cambridge University Press, 1996) 49.
\textsuperscript{21} Rusiate Nayacakalou, \textit{Leadership in Fiji} (University of the South Pacific, 1985) 16.
that ‘communal divisions, rather than being a natural response among culturally distinct peoples, were a central feature of colonial rule and they were consciously promoted as a means of retaining the hierarchical structure of colonial society.’

Another significant feature of historical change in the political landscape was the rise of powerful chiefs in the eastern part of Fiji, such as Ratu Seru Epanisa Cakobau. This ascendency influenced both the manner of encounter between Europeans and Fijians and the nature of an emerging sense of Fijian identity. By the early nineteenth century, different groups in the east of Fiji which had formed into confederations, joined into larger matanitu or chiefdoms, heralding the rise of the Bauan chiefs in particular. Under the leadership of Cakobau, who was a powerful war chief of the Bau region, substantial tracts of land and trade monopolies became part of the Bauan fortune. Cakobau assumed a potent but contested authority, fired by ‘the Tongan political ideology of paramountcy and achievement of monarchy’, and his sometime alliance with the Tongan émigré, Ma’afu, who wielded significant influence as head of the Tongan community in Fiji. Cakobau’s power was further consolidated through his affiliation with the European designs on the land and souls of Fiji.

**European Contacts and Forming Fiji**

European presence became established in Fiji during the 1800s, initially with the beachcombers, who were survivors of shipwrecks and deserters of trading vessels, and then by traders attracted to supplies of sandalwood and beche-de-mer. Permanent settlers — resident traders, missionaries, and planters — followed. Unlike their European successors, the beachcombers lived in Fijian villages and entered into many of the local protocols. However, as Peter France notes, the beachcombers’ lack of regard for the traditional Indigenous priests, unlike their deference to the chiefs, encouraged a similar scepticism on the part of the Fijians, in effect ‘prepar[ing] them for the missionaries’ open attack on the old gods.’ Beachcombers also played a part in interpreting the economic practices and values of the early traders who traded mainly with tools and weapons and like the beachcombers, generally supported the local authority structures.

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23 Parke, above n 4, 47.
25 Ibid 27.
While the missionaries arrived with the intention to change the local customs, they, too, recognised the importance of chiefly power which not only afforded protection but, after chiefs’ conversion, served to influence society, ‘securing a position for the church in the highest stratum.’ Amongst their activities, the missionaries engaged in linguistic work and installed the first printing press, learning the languages and spreading literacy as well as the Gospel. The problem of having to learn and translate in so many dialects led to the adoption of the Bauan language as the lingua franca, which also contributed to the general ascendancy of Bauan culture.

In Parke’s assessment, the spread of Christianity was significantly implicated in local struggles and political upheaval and ‘influenced the Fijian community by splitting it.’ The first Wesleyan missionaries who had come from Tonga and settled in the eastern part of Fiji were associated not only with the chiefs of that area but also with the Tongans and their ‘expansionist ambitions in Fiji’. Thus, for many people of western Fiji the expansion of the Wesleyan Church (or Methodist Church), especially after Cakobau’s conversion, was synonymous with Cakobau’s (often unwelcome) attempts to extend his own authority. Prior to his conversion, however, Cakobau believed that ‘his authority was diminished among those of his subjects who had converted.’

Chiefly authority was challenged by the missionaries’ commitment to pacifism and attempts to introduce a code of civil regulations based on Christian principles. But as Parke argues, Christianity, and in particular, the Wesleyan Church, exerted a profoundly disturbing influence over the entire social structure:

Christianity propounded a form of spiritual paramountcy running contrary to the principles of the spiritual element of the ideological concept of vanua … In so far as they understood them, the missionaries, especially the Wesleyans, denigrated beliefs and sites associated with the Fijian spirit world. … They challenged the spiritual basis of chiefly leadership and the spiritual powers or mana which validated and supported the chiefs. In so doing, they challenged the very validity of those spirits which, first, provided an ideological basis for the unity of a polity; secondly, ensured the continuing prosperity of

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26 Ibid 31.
28 Parke, above n 4, 52.
29 Ibid.
30 Ibid.
the polity and of its natural food sources based on agriculture, hunting and fishing; and, thirdly, provided a control over unacceptable social behaviour and dissent within a polity as well as a spiritual backing to defence against outside attack. … the missionaries were striking at important elements at the very basis of traditional politico-spiritual Fijian society.32

Another significant missionary introduction, in terms of effecting social change, was the concept of exclusive rights to land:

Here was a situation for which no precedent was provided by Fijian custom: the white men came as friends and were given a piece of land and a house according to the customary treatment of strangers who brought gifts. But instead of living in the village and making their house generally available for casual callers to take a meal, exchange gossip, or merely indulge their curiosity, the missionaries selected a site outside the village and built a fence around it to keep out intruders. They declared the village to be unhealthy and overcrowded, and refused [the chief] Tui Nayau’s offer of one of his own large houses.33

The advent of commercial agriculture and an influx of planters with their demands for land, brought more challenges and changes to the concept of land ownership. Many commentators argue that it was the introduction of the alienation of land that dominated those changes since alienation or the right to alienate was not part of Fijian tradition, or only part of a communal right rather than a chiefly right. But as Peter France points out, the chief had always possessed the lewa or the right to control the use of the land:

It was a right which, in the context of his own society, was encumbered. The chief had the authority to remove cultivators from the land he controlled, but it would not have occurred to him to do so, as long as they recognised his power by an occasional presentation of crops. There was no virtue in his eyes, in the vacant possession of uncultivated land.’34

Thus, France argues that it was more the usufructuary relationship to the land rather than its ownership that was displaced by the absolute possession sought by the planters.35 This is not to deny that ‘[i]n the total confusion of land rights which resulted from European purchases, traditional practices were abandoned, modified or replaced by European usages.’36 Indeed,
much land was sold by chiefs with little claim to it, rival tribes often sold each other’s land and land was often recklessly alienated by chiefs. But European notions of exclusive or absolute possession, underpinned by racism and competitive business attitudes, sowed particular seeds of social upheaval.

By the 1860s as more foreign countries began to take a rivalrous interest in Fiji and land speculation increased, government representatives from the United States and Britain were appointed to serve in Fiji. The process of foreign occupation was by no means uniform and met with different responses and resistances in different parts of the country. The western parts of Fiji, for example, had not been exposed to the business of sandalwood traders, nor the proselytising of missionaries, and European settlers in these regions lacked awareness ‘about traditional land tenure and the right of chiefs to dispose of land.’ But an ‘unholy alliance’ between Christianity, capitalism and eastern chiefdoms was being forged, often in hostile and violent encounters between different stakeholder groups. And with the addition of firearms and axes to Fijian arsenals as well as political opportunism on the part of Europeans and others, conflict between local rival groups, between Fijians and Europeans, between settler groups and between the rulers and the ruled, entered a new phase.

To settle unrest some eastern chiefs took up the suggestion of the British consul to form a government in 1865 and appointed the chief, Ratu Cakobau, as President. But despite his influence in the eastern parts of Fiji, Cakobau did not have the same authority in the western parts, among Fijians or Europeans. Ineffective and lacking adequate representation and support from amongst the broader Fijian and European communities, this government was short-lived. In 1871 a new government was formed and Cakobau, who assumed the title of King or Chief of Fiji, was once again made head of government. While enjoying the support of the eastern chiefs and a large section of the settler population, this government was by no means stable either, sinking deep into debt and contending with strained opposition. To meet the financial demands of government, Cakobau pursued a violent and initially successful programme of invasion and confiscation of land, selling both land and people to any person willing to buy them. Despite often violent measures taken on Cakobau’s part to raise capital as well as laws appeasing merchant planters, the embattled government floundered. And while incessant warfare may have been a feature of most areas of Fiji prior to the time of

37 Parke, above n 4, 51.
38 Howard, above n 22, 22.
39 Ibid 23.
Cakobau’s government, the stakes were shifting with the advent of a central government, capitalism and a growing, avaricious European presence. Cakobau was thus contending with settler discontent and the probability of an uprising as well as intense rivalry with chiefs such as Ma’afu. As a way out of his problems in 1874 Cakobau was prompted to ask the British for help, not for the first time.

**Part B: Colonisation**

**Founding the Colony**

Some European settlers and Fijians had long entertained the possibility of British annexation as a way of establishing control and protecting their interests in Fiji. Cakobau had attempted to cede Fiji to Britain as early as 1858 in an effort to fund a debt to the United States Government. However, while the British Government (and indeed many Fijian chiefs) rejected the idea earlier, as debt and unrest intensified, annexation became a more entertainable proposition. In early 1874 an offer of cession was made to the British Government. Article 15 of the offer stated that ‘the Fijian chiefs and people, in changing their allegiance retain all existing private rights real and personal’ and that ‘the ruling chief of every tribe [is] to be recognised as the owner of the lands of his tribe, and guardian of their rights and interests’.

In reaching the final agreement, however, the British Government insisted that only a complete and unconditional transfer of sovereignty would be acceptable. Nevertheless Cakobau was assured that chiefly status would be respected and maintained, and on October 10, 1874 Cakobau and twelve other chiefs signed the Deed of Cession, and the Islands of Fiji became a Crown Colony of Queen Victoria. It would be a mistake, however, to regard the decision to annex Fiji as taken lightly or to signal a new period of British expansion. As Ethel Drus argues in her essay, the main reason for annexation was probably the anarchy in Fiji and the British assumption of ‘moral responsibility for the welfare of Fiji, since the settlers were largely of British origin.’ And Drus goes on to say that since there

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40 Nayacakalou, above n 21, 41.
41 Howard, above n 22, 24.
43 Quoted in Spurway, above n 31, 398.
44 Drus, above n 42, 108.
46 Ibid 106.
was ‘no longer any hope that a government “sprung out of the soil” could command sufficient respect … [o]nly the assumption of full responsibility by Britain could end factional strife and avert racial war.’

Sir Arthur Gordon, who became the first resident Governor of the new colony, undertook his mission with zeal. An aristocratic Englishman with experience in the colonies of Mauritius and Trinidad, Gordon was committed to a policy of Indigenous protection, which he sought to reconcile with the requirements of a developing colonial economy and the claims of European settlers (despite his disdain for the settler ‘riff-raff’). In this endeavour, Gordon relied heavily on the advice of the cotton planter, John Thurston, who held the senior position in Cakobau’s government and had extensive knowledge of traditional Fijian society, as well as sharing some of Gordon’s views on colonisation.

Given the British intentions to preserve Fijian traditions among peoples uniform in neither cultural practices nor politics, colonisation was an ambitious project. And since many local independent chiefs (in central Viti Levu for example) had not been consulted and did not recognise Cession, the colonising process involved pacification of local polities as well as ‘stabilisation’ of local knowledges. Gordon had indeed set himself a ‘demiurgic’ task. When he began his social ‘experiment’, Fiji was in the grip of a measles epidemic after Cakobau and his sons had returned from a visit to Sydney where they contracted the disease. Over 40,000 people — more than 25 per cent of the Fijian population — perished, which resulted in the British Government cutting a third of the funding to the colony. However, as Governor vested with an exclusive executive power and ultimately answerable only to cabinet in London, Gordon embarked on his plan with a large personal salary and carte blanche in social capital.

**Indirect Rule**

The colonial system of governance in Fiji incorporated English law and native law and continued with the previous government’s separate administrations for Europeans and Indigenous Fijians. Instituting a principle of indirect rule (according to some commentators

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47 Ibid.
49 Parke, above n 4, 5.
Governor Gordon is considered the father of this policy, a system of separate native administration was adopted to provide stability and control through the preservation of native tradition. While this system was geared toward Indigenous practices, and as such accorded with many traditional arrangements, it was also a very British intervention that marshalled information and information-gathering along European lines. The bureaucratisation of tradition geared toward the efficiency and convenience of its administration demanded a revision of the complexity and diversity of Fiji’s traditional societies. Nayacakalou’s observation of the traditional ‘application of different principles: patrilineal descent, kinship affiliation, and political attachment or subjection, [which] gave considerable flexibility and enabled people to deal with routine situations as well as emergencies’, met with a new rigidity and new modes of authority.

Michael Howard describes the policy underpinning indirect rule in Fiji as:

promoting cultural social and linguistic hegemony among native Fijians throughout the colony. Bauan language and social structure, in no small part because of its strongly hierarchical nature, provided the model for the rest of Fiji. This represented a major change in more egalitarian societies such as those in western Fiji and assured the eastern chiefs a position at the top of the native administration.

The aristocratic nature of chiefly power also appealed to Gordon’s sensibilities and he brought together an advisory body of ‘collaborator chiefs’ to form the Council of Chiefs, a body that would come to wield significant political power in the future. Gordon’s use of chiefly authority helped ‘legitimate his efforts to create a stable and uniform colonial state’, but as Howard notes, the consolidation and expansion of chiefly control was also especially relevant to economic aspects of native Fijian life since economic activities had traditionally been centred on the individual household. Now more of economic life fell within the domain of chiefly rule, allowing chiefs to orient production to help fill the colonial government’s coffers and to augment their own incomes.

Indeed, as discussed more fully later in the chapter, the reach of chiefly control had significant implications for the wider realm of labour and production in Fiji.

52 Ibid 203.
53 Nayacakalou, above n 21, 23.
54 Howard, above n 22, 25.
55 Ibid 27.
56 Ibid.
57 Ibid 25.
Colonial Land

One of the colonial government’s most immediate and pressing of issues was the question of land and its classification and the need to establish land titles. As John Spurway notes:  

In pre-Cession Fiji, there was no equivalent of Crown land, which could be defined as land at the disposal of the government in the name of the nominal king, Cakobau. Most land was vested in a local mataqali, while some holdings had been “sold” to Europeans who would be averse to any administration that did not recognise their tenure.\(^{58}\)

Under colonial authority, Crown land was land deemed necessary for public purposes or was land vacant at the time of Cession,\(^{59}\) although it was later argued that vacancy should not imply a lack of title but rather the necessity of proving it. Foreigner or settler claims to freehold land ownership had to demonstrate *bona fide* title, that is, evidence of land being purchased at a fair price from the natives, while provisions for native customary tenure required a demonstrated understanding of Indigenous traditions as well as provision for their administration.

Some reliance was placed on arrangements made under Cakobau’s Government where land was divided into twelve *yasana* or provinces which, in turn, were divided into eighty six *tikina* or districts to include over a thousand villages.\(^{60}\) Over time these administrative divisions increased as the complexity of customary arrangements emerged. Gordon decided on the official titles for the administrative heads of divisions as well as appointing the person to head each *yasana*. While those chosen were often traditional leaders in the community, the mixing of bureaucratic and traditional roles led to problems later identified by Nayacakalou, as linked to obstacles facing Fijians today; what he refers to as the ‘monstrous nonsense’ of choosing ‘between preserving and changing their way of life.’\(^{61}\)

The process of establishing just what the traditional system of land tenure was, at least to the satisfaction of a British understanding of it, took years of confusion and disagreement and often hilarity in what was lost and gained in translation. But, of course, there were serious implications in what would be established as tradition. The Native Lands Commission, set up to investigate and interpret all land claims, was guided in its work on traditional land tenure particularly by the opinion of Wesleyan missionary and anthropologist, Lorimer Fison, who

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\(^{58}\) Spurway, above n 31, 419.  
\(^{59}\) Parke, above n 4, 8.  
\(^{60}\) Ibid 6.  
\(^{61}\) Nayacakalou, above n 21, 135.
concurred with a pronouncement of the Council of Chiefs (‘surprisingly at variance with previous discussions’) that ‘all land in Fiji was traditionally owned by mataqali [sub-clan] and that all land was, according to the immemorial customs of Fiji, inalienable.’

In his withering critique of western hubris and colonial paternalism in Fiji, Peter France points to a myriad of discrepancies between pre-Cession practices and the so-called, orthodox traditional system of Fijian land tenure unfolding under colonial control. The inalienability of native land, its communal ownership and the hierarchical control of Fijian society, from the Council of Chiefs to the village, became the pillars of that orthodoxy producing radical changes in Indigenous culture. France laments:

To have preserved the actual institutions of native society might have stemmed the rapid decrease in Fijian population; to have encouraged the adoption of European institutions might have enabled the survivors to adjust themselves to the changing world introduced by the white man. The establishment of the communal system throughout Fiji did neither.

After years of investigations and variations in policy, the Native Lands Commission was swamped by the complexity of its findings and the difficulties in reconciling them with the ‘orthodoxy’. Thus by 1918 the colonial government was ready to adopt Commissioner Maxwell’s accessible model of Fijian social structure, which meant that rather than establishing units of ownership, the Native Lands Commission focused on recording the mataqali boundaries, ‘the social unit most remote from the exercise of land rights’ which ‘was gradually transformed through a number of causes unconnected with Fijian custom, into the legally registered owner.’

The traditional Fijian group (rather than individual) affiliation with the land, as perceived by the colonial authorities, meant that the various Commissions set up to process the Indigenous land claims would investigate land claims in terms of the nature of group membership, including members rights, title to customary office and links to specific geographic areas, all of which had to be defined and codified. The complex process was often simplified with the Commission, for example, ‘us[ing] the law to posit simple patrilineal descent groups in a

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62 France, above n 24, 113.
63 Ibid 117.
64 Ibid 128.
65 Ibid 173.
situation where the reality did not warrant it.” As Nayacakalou observes, this produced parallel sets of classification, ‘one based on the Commission’s records and the other on the socio-political organization of the village as it is known to the people.’

Among other effects, the resultant problems with the classification of land and its ownership tainted the growing demands for agricultural leases and security of tenure. It was not until significant reform of the legislation and administration in 1940 that some of the problems were alleviated through the development of the Native Lands Trust Board. This body was made responsible for administering native lands, including the granting of leases, for the benefit of its traditional owners. Similar reforms ensued over the next decade which promoted some stability in land dealings, ‘consolidat[ing] chiefly hegemony within the indigenous Fijian sphere, at the same time acting as leverage for communal segregation.’

**Indian Indenture**

Initially, Indigenous Fijians were recruited to work as waged labour on the copra, cotton, sugar and banana plantations and as shipping crew. However, many chiefs opposed this arrangement. They considered that the absence of the workers from the villages as well as the low and quickly dissipating payments left ‘everything in their homes in a most bitter and pitiable condition.’ The higher chiefs considered that their authority was undermined by native Fijian ‘commoners’ working for wages, preferring people to work communally, under their control. Gordon, too, supported communalism, not just because it accorded with his understanding of Fijian traditions and chiefly power but also because he had, as Lorenzo Veracini puts it, ‘an aristocratic repugnance for hired labour … [and] agricultural servitude’.

To discourage such activities, Gordon’s protectionist policy saw that Fijians were levied with a produce rather than cash tax and their movements outside their villages and districts were restricted. However, for the colony to be economically viable, extra plantation labour was required.

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66 Nayacakalou, above n 21, 14.
67 Ibid.
71 Howard, above n 22, 28.
72 Veracini, above n 51, 194.
From 1864 labourers had been imported from other Pacific islands such as the Solomon and Gilbert Islands but this labour trade (blackbirding) was rife with abuse, the curtailment of which had also been a motivating factor in Britain’s annexation of Fiji. And while over 27,000 of these labourers had been imported by 1911, with the sugar industry set to expand in the late 1800s under the large Australian Colonial Sugar Refining Company (CSR), more labour was required. Gordon therefore agreed to the importation of cheap indentured labour from India.

The Indian Government had refused earlier labour requests from Fiji but once the new British colony was founded, Indian emigration became a possibility and recruiting began in 1878. Over the next forty years more than 60,000 girmitiyas (indentured labourers) came to Fiji. The terms of indenture allowed the girmitiyas to pay for their own return to India after five years or after ten years they were given free return passage. Many did return to India but by 1916, when indentured labour was abolished, the majority stayed on.

The girmitiyas came from diverse social backgrounds, as described by Brij Lal:

More than 300 different castes were represented in the emigrating population who originated from more than 250 districts in Northern India alone. Speaking a host of different tongues, worshipping a multitude of different gods, and occupying widely varying positions in the Indian social structure … [e]migration across the seas was a traumatic experience for a primarily inland people and destabilized the values of the “old world”, especially those that emphasized adhering to tradition and maintaining group solidarity.

Life for the girmitiyas working on the plantations was harsh. The provisions for indenture were laid out in the Form of Agreement for Intending Emigrants, a contract which has been criticised as a deception rather than voluntary agreement since it did not prepare the workers for the conditions they were about to encounter. The Indenture Ordinance, an ordinance to amend and consolidate the ad hoc legislation that governed Indians’ lives in Fiji, though comprehensive, was similarly inadequate in terms of its application. The legislation, as interpreted by the magistrates, worked to the advantage of the planters who exploited the

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73 Lal, above n 68, 70.
75 Lal, above n 68, 169.
76 Ibid 175.
77 *Indenture Ordinance (No I) 1891* (Fiji).
labour. Low wages, brutal working conditions, movement restrictions and severe penalties contributed to an indentured life often referred to as *Narak* or hell.\textsuperscript{78}

The Indian migrants were kept segregated from Indigenous Fijians and despite their growing presence and participation in the commerce of the colony, Indians were relegated to the bottom of the social hierarchy. Nevertheless, as Lal comments, ‘[t]he indenture system spawned a new [Indian] society in Fiji, more egalitarian, more isolated, speaking a Hindi based lingua franca cobbled together from the dialects and languages which the migrants had brought with them.’\textsuperscript{79}

**After Indenture**

From the 1920s Indians began to migrate freely to Fiji. Most were agriculturalists from Punjab and traders and artisans from Gujarat. With these arrivals ‘new dimensions of social connection and difference from the experience of indenture itself’ were forged.\textsuperscript{80} Indeed, the profusion of identifications including North Indian, South Indian, Hindu Sanatanis, Hindu Arya Samajis, Shia Muslims, Sunni Muslims, indentured or free, presented difficulties for uniting any Indian political organisation, a process that the racialising tendencies of the colony were provoking. But as Martha Kaplan and John Kelly argue, it is a grave error to presume ‘that the goal of these freshly minted “Indians” must be to represent themselves in the symbolic, semiotic sense, to constitute an identity for themselves, rather than, for example, to seek leverage and varieties of alternative, the paths that really scared the “Europeans”.’\textsuperscript{81}

However, with the end of the indenture system and an increasing political assertiveness, Indo-Fijians gained actual but limited representation in the colonial legislature as representatives of their ethnic grouping. The concept of a communal roll (a constituency reserved by ethnicity), from which the Indo-Fijian members of the Legislative Council could be elected, was particularly repugnant to politically-active Indo-Fijians. But the British colonial authorities as well as the Europeans in Fiji and the Indigenous Fijians opposed the notion of a common roll (open constituency) as advocated by the Indo-Fijians:

\textsuperscript{78} Lal, above n 68, 334.  
\textsuperscript{79} Ibid 243.  
\textsuperscript{80} Kelly and Kaplan, above n 48, 87.  
\textsuperscript{81} Ibid 97.
London refused consistently to sanction common roll, citing as its reason the need to uphold pledges given to the Fijian people in the Deed of Cession. Europeans and Fijians opposed common roll, which they saw as the thin end of the wedge for Indian domination, and both opposed the system of election, at least in part because they saw this as threatening their particular interests. The Europeans feared competition from the part-Europeans (as they were called) because the latter were greater — and rapidly increasing — in number, and Fijian chiefs opposed election because they saw it as a threat to their traditional way of life and because their key concern was the economic betterment of the Fijians, not national constitutional advancement.\textsuperscript{82}

These groups of competing interests, which Lal summarises as ‘paramountcy for Fijians, parity for Indians, and privilege for Europeans’ continued to exert a profound influence over Fiji’s socio-political trajectories into the future.\textsuperscript{83}

After their indenture ended many Indo-Fijians took up agricultural leaseholds or, if they could afford it, ownership of small parcels of land, mainly distributed by CSR, the large Australian sugar company. By the 1930s more land was being leased directly from Indigenous Fijians but, as indicated earlier, the terms and conditions of these leases were often unstable, chaotic and corrupt.\textsuperscript{84} For the Indo-Fijians, the limitations on land — limited availability of freehold land and limited or insecure tenure of leases — in combination with limited political franchise, made for bleak prospects.

Education was seen as one of the vital instruments of liberation for the community and was encouraged by Indo-Fijian leaders such as AD Patel whose vision of social and political equality for all in Fiji provided hope and possibility for a way forward. With the rapid increase of the Indo-Fijian population from the 1930s and their strong presence perceivable in education, the professions and business, the political arena became charged with renewed force for change and unrest.

After 1937, when the structure of the legislature was set, featuring representation for the three main ethnic groups (Indigenous Fijians, Europeans and Indo-Fijians), dominated by a permanent official majority and a Governor with power of veto, Indo-Fijian agitation for constitutional reform subsided. However, political energies found expression in the labour movements forming initially in the sugar industry. Seeking better working conditions and


\textsuperscript{83} Ibid 13.

fairer prices for their cane, cane growers formed into two main rival associations or unions. Their industrial action, including protracted strikes and the burning of tons of sugar cane, sent a strong message to CSR and the Government although, the during the war years, this became entwined with events and attitudes that would recast Indian growers’ demands for rights as cowardice and self-interest.\textsuperscript{85}

AD Patel was one of the chief negotiators during the cane growers’ unrest. His insights into the cane industry’s problems, and Fiji’s politics more generally, highlighted possibilities for change and accommodation that the different polities in Fiji could have embraced but failed to do at the time. In relation to the sugar industry crisis, Patel sought the intervention of the Government to take responsibility for setting and paying a fair price for cane to the growers. When the Governor rejected this request Patel offered the cane as a gift to the government if the government would only pay the cutters’ wages. Kaplan and Kelly suggest that in rejecting this gift, the Governor with the support of the leading chief, (scholar soldier and statesman) Ratu Lala Sukuna, missed an opportunity to render

an incipient “Indian” submission to government sovereignty, the beginning of a new cycle explicitly requiring and, with proper returns, engendering trust before calculation … Instead … Sukuna allowed to pass the chance to create a binding tie of submission, in favor of more total humiliation and exclusion.\textsuperscript{86}

\textbf{Part C: Nation-making}

\textit{Resistance, Race and the Road to Independence}

In his work on the history and nature of resistance in colonial Fiji, Robert Nicole draws attention to the fact that there was no continuous line of resistance to colonisation in Fiji but multiple, widely spread points of resistance and deployments of power.\textsuperscript{87} From this perspective, colonisation itself can be seen as an uneven process:

The idea… that colonialism succeeded in imposing itself as a panoptic monolith, stamping out opposition and establishing a long and prosperous period of peace, order and stability, is a fallacy. Colonialism never was a formidable autonomous and

\textsuperscript{85} Howard, above n 22, 50.
\textsuperscript{86} Kelly and Kaplan, above n 48, 108.
impervious force that spread itself completely over subordinate groups. Neither were
other large systems of power such as the state, capitalist relations, or patriarchy.\textsuperscript{88}

Even with what could be construed as the coloniser’s more benign efforts to avoid the worst
aspects of domination, resistance could not be uniformly lulled. For example, not all Fijians
embraced the long and fraught colonial process of fixing tradition to the lives and lands of
Indigenous Fijians as either traditional or desirable. In the early 1900s, Apolosi Nawai, a
charismatic leader and visionary, rose to prominence challenging ‘basic assumptions of the
colonizing project.’\textsuperscript{89} He was particularly concerned with the constrictions of paternalistic
communalism that prevented Fijian commoners from entering the free market. In 1912 he
launched the Viti Company to promote Fijian commoner interests in the banana and copra
trade, cutting out the European and Chinese middlemen. More than an economic concern,
Nawai’s venture became a novel ‘vehicle for the expression of a wide range of grievances and
political discontent.’\textsuperscript{90} As Timothy MacNaught observes, ‘when Apolosi said “We Fijians” to
the people with whom he had no connection or status, he was speaking a new language that
cut across the intense parochial bonds that kept constituent groups at every level of Fijian
society and administration dependent on chiefs for leadership and initiative.’\textsuperscript{91} Nawai and his
ideas clearly posed a threat to the chiefly oligarchy, business community and colonial
officials. And for this, Nawai was imprisoned and later exiled to the island of Rotuma on the
Governor’s executive authority and finally banished to the remote island of Yacata.

One of those urging Nawai’s banishment was Ratu Sukuna, whose loyalties to the Fijian
people were staked upon the dominance of a chiefly elite and high regard for the British
colonial system. Sukuna believed that colonialism had given Fijians unity through a common
loyalty to the Crown.\textsuperscript{92} But even Sukuna’s support of the colonial system was not
unconditional. To the extent that he resisted the racialism and inequality of a colour divide in
institutions such as the civil service (modeled on the structure in Kenya), he shared the
political discontent of activists such as Nawai and the Indian leaders agitating for agricultural
reform and political franchise. Indeed, for a brief time the anti-Government sentiment shared
between Fijians and Indians caused some concern in the colonial office. But Sukuna’s
grievances were somewhat allayed by a sympathetic response in London removing the colour

\textsuperscript{88} Ibid 221.
\textsuperscript{89} Martha Kaplan and John D. Kelly, ‘Rethinking Resistance: Dialogics of “Disaffection” in Colonial Fiji’ (1994)
\textit{21(1) American Ethnologist} 137.
\textsuperscript{90} Howard, above n 22, 39.
\textsuperscript{91} Timothy J Macnaught, \textit{The Fijian Colonial Experience} (Australian National University, 1982)115, 79.
\textsuperscript{92} Lal, above n 84, xiii.
divide in the civil service. And with the arrival in 1942 of a new Governor, Sir Philip Mitchell, a renewed symbiosis between colonialism and tradition was at hand. Sukuna had been instrumental in the land reforms leading up to and subsequent to the 1940 Native Lands Ordinance and, as the dominant chief in the Great Council of Chiefs, was clearly an important and influential ally for the colonial authorities and CSR. His position was further enhanced by his contribution to the British war effort.

With World War II and the Pacific War in particular on Fiji’s doorstep, the Fijian community’s enthusiastic support for the war effort was channelled through the military induction of thousands of Fijians and nearly two and a half million pounds raised in Fiji towards the war coffers. The Indo-Fijian community’s response to the war, on the other hand, appeared lukewarm and conditional. For those Indo-Fijians seeking enlistment, the Central Indian War Committee sought assurances of equal pay and non-discrimination, requests that were interpreted as money-driven, bloody-mindedness rather than the demand for recognition of the equal value of lives and services. But, as Lal concedes, ‘it is true that Fiji Indians were on the whole reluctant to become cannon fodder in the defence of a “white race empire”’ even if ‘there was no question of [Fiji Indians] not defending Fiji if it were attacked.’

Besides reluctance on the part of the Indo-Fijians, the government preferred Indo-Fijians as food producers rather than soldiers, a view that was shared by CSR. But for the Indo-Fijian cane growers this arena was also tainted. With the 1943 cane-growers strike, the Government, working closely with CSR, responded using the war as part of their tactics. Defence regulations were created to make sugar an essential war commodity and to criminalise any interruption to its production (such as a strike). On their part, the cane-growers demanded an increased but modest price for their cane (while CSR was profiting enormously). But this action only contributed to the sense that Indo-Fijians, unlike Indigenous Fijians, were not patriotic.

Sukuna’s part in advising Mitchell and mobilising labour and military recruitment from the villages, recommended him for a knighthood and also his appointment as the first non-European on the Executive Council. During those same years Mitchell and Sukuna set about

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93 Ibid 81; 83.
94 Ibid 83.
95 Ibid 85.
96 Ibid 84.
constructing a new Fijian Administration system to regulate village life more strictly than it had been for decades. Sukuna strongly endorsed the separate communalism that Nawai and others resisted, and as Secretary of the Fijian Affairs Board (FAB) which administered the new system, maintained communal cohesion through a consolidation of chiefly control. Under chiefly control, the FAB shifted the balance of power such that ‘[t]he British district administrators, previously in authority over the chiefs, were now to defer to them in most Fijian matters.’

Robert Norton suggests that the colonial policy underpinning the establishment of the Fijian Administration and the development of Indigenous Fijian leadership should also be understood as being directed towards ‘an institutionalised expression and containment of a Fijian nationalist potential’. As Governor Mitchell had remarked to his London superiors, ‘there was a potential for “irresponsible nationalism or racialism” in the diminished status of chiefs in the old Native Administration.’

Mitchell and Sukuna shared a vision for the new administration as empowering traditional leadership and enhancing economic development among Fijians in preparation for self-government. And indeed, ‘the new structure affirmed ethnic Fijian identity and solidarity and gave its leaders a strong position in the colonial state.’ But it did not enhance economic development for Fijians outside communalism, nor the commercial development of Fijian reserve lands which had also been envisaged as a way of meeting the leasing needs of Indo-Fijians. As Norton observes, these impediments to economic advancement intensified ethnic anxieties that at the same time were feeding into a sense of racial pride already heightened by Fijians’ wartime experiences.

The Fiji Defence Force, recommended by the British for its loyalty and military skill, remained in force after the war (despite London’s discouragement). Comprised exclusively of Indigenous Fijians, and most of the leading chiefs its officers, the Defence Force was a symbol and expression of Indigenous unity, pride and loyalty to the Crown and, in

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98 Ibid 421.
99 Ibid 409.
101 Ibid.
102 Norton, above n 97, 426.
combination with a predominantly Fijian police force, presented a force to be reckoned with. And colonial officials were reluctant to challenge that status quo.

With this conjunction of chiefly and colonial power, the process of European decolonisation, accelerating throughout the world after the end of the Second World War and the inception of the United Nations, was not taken up in Fiji with a fervent sense of liberation from the shackles of colonialism, at least, not by many Fijians. Indeed, as Kaplan and Kelly comment, ‘independence itself was dramatized – not as egalitarian overthrow of monarch or colonial hierarchy, but as an enduring hierarchical relationship between royalty and the people.’ The process of decolonisation was thus neither homogenising nor unambiguous, demonstrating the limitations of any binary model of interpretation that may presumptuously valorise resistance or ‘sanitise the internal politics of the dominated.’ In his analysis of resistances in colonial Fiji, Nicole points to the importance of understanding the internal complexities of resistance (and domination) in Fiji rather than thinking in terms of ‘overarching understructures’ or ‘overarching superstructures’. Or else one might miss how ‘ordinary people fought oppressive authority irrespective of its ethnicity … [y]et also formed complex alliances with those in power.’ Or one might mistakenly regard resistance as separate or distinct from accommodation, when actually the distinction is blurred or an outcome may be a ‘hybrid that fit[s] neither the category of accommodation nor resistance.’

This is not to deny that colonisation in Fiji was also a violent, segregating and hierarchising process. Indeed, for the Indians, independence and the dismantling of colonialism could not come soon enough. In the perceptions of Patel, colonialism had been an ‘unmitigated evil’. In his biography of Patel, Lal writes:

At the heart of his political philosophy was a repudiation of colonialism, and thus of the colonial state’s image of itself as a benevolent, neutral entity, above politics, an impartial referee between competing ethnic groups and economic interests. The colonial state, Patel argued throughout his political life, was not the solution to Fiji’s problems; it was instead the cause of those problems. Colonialism, Patel believed, was inherently racist,
oppressive, divisive and elitist, the enemy of ordinary Fijians of all races in the colony.109

But Patel, no less than his Fijian counterparts, also appreciated that once independence or at least self-government became an inevitability, attention had to turn to the terms on which that would be achieved. Sukuna had never disguised his distrust of democracy which for him, and indeed many other Fijians and Europeans, meant an Indian takeover. The concept of Fijian paramountcy could not be reconciled to the type of liberal democracy that Patel, among others, had so long campaigned for.

While Sukuna used his now well-known metaphor of a three-legged stool to symbolize the interdependence of Fijian, Indian and European communities, as Kelly and Kaplan observe, the principle of paramountcy of Indigenous interests and its chiefly guardianship, also ensured that this was ‘the seat of power of ethnic Fijian chiefs.’110 Among colonial authorities, opinion was mixed about the desirability or possibilities of this form of power controlling government in post-colony Fiji. Governor Garvey, for example, saw a need for economic stimulus and social and constitutional reform. His view was supported by commissions of inquiry in the mid-1950s that, among other things, recommended changes to traditional structures and regulations, ‘not as an extraneous, unwelcome extension to them [but]… within the overarching ambience of village communities.’111 Contrary to views of many Fijians, Garvey saw the concepts of gradualism and permanent paramountcy of Indigenous interests as anachronisms rather than timeless shibboleths contained in the Deed of Cession:

Surely the intention of this Deed, acknowledged and accepted by chiefs who were parties to it, was that Fiji should be developed so as to take a significant place in the affairs of the world but that, in the process, the rights and interests of the Fijian people should be respected. To read into the Deed more than that, to suggest for instance, that the rights and interests of the Fijians should predominate over everything else, does no service either to the Fijian people or their country. The view, for the Fijians, would mean complete protection and no self-respecting individual race wants that because, ultimately, it means that those subject to it will end up as museum pieces. The Indians are equally eligible to have their interests respected. By their work and enterprise, the Indians in Fiji have made a great contribution to the development and prosperity of their country, and to the welfare of its people. They are an essential part of the community and

109 Ibid xvi.
110 Kelly and Kaplan, above n 48, 133.
111 Lal, above n 82, 17.
it is unrealistic to suppose that they are not or to imagine the position of Fijians in the world today would benefit by their absence.\(^{112}\)

But other colonial authorities, including Julian Amery, rejected Garvey’s vision of a more multiracial system of government or ultimately a common Fijian citizenship. In his report to the Colonial Office in 1960, Amery remonstrated, ‘[t]he Fijians will no longer accept this; and the more we lay the emphasis on multi-racialism, the more suspicious they will become that we plan to sell them out to the Indo-Fijians.’\(^{113}\) On the other hand, the permanent undersecretary, Sir Hilton Poynton, argued that, ‘to decide now that we should abandon the attempt [towards non-racialism] and base all our future policy on a constitutional and racial partition (even though not a geographical one) seems to me to be a counsel of despair’.\(^{114}\)

Throughout the 1950s and 1960s then, political debate polarised along lines such as liberal democracy/Indigenous paramountcy, equality/communalism and economic liberalism/protectionism. But the general consensus in the colonial office was that the strength of the Fijian position had to be recognised and respected. And this included reassurances of a continuing link or at least a very measured delinking with the United Kingdom.\(^{115}\)

For Fijians, the fear of dispossession of their land tainted the prospect of decolonisation. As Lal observes, this fear and suspicion was directed at the Indo-Fijians despite the fact that ‘Indo-Fijian leaders had repeatedly stated since the 1940s that the ownership of land was not at issue; the terms and conditions on which it was leased were.’\(^{116}\) Indeed, as Patel reminded Indo-Fijian detractors:

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\text{when they [those ‘on whom the White Man’s burden sits heavy indeed’] talk of “land grabbers,” the Fijians very well know who have completely gobbled up half a million acres of the best Fijian lands for almost a song. They know who fooled their fathers into selling hundreds of acres of their very best lands in return for a box of matches, a bottle of liquor, a musket or a piece of cloth. If the Fijians have only second best lands left for their own use, they know very well who licked the cream off their milk. From this leftover of their ancestral inheritance they have reserved first rate land for their own use.}
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\(^{112}\) Sir Ronald Garvey quoted in ibid 20.
\(^{113}\) Ibid 29.
\(^{114}\) Sir Hilton Poynton quoted in ibid.
\(^{115}\) Lal, above n 82, 30.
\(^{116}\) Ibid 34.
and rented out the surplus to the Indians through a board of trustees, of which the Governor himself is the President. ¹¹⁷

But this fine rhetoric could not shift the perception or construction of Indo-Fijians as threatening nor the sense that land divided Fijians and Indo-Fijians, ‘not just as a material resource, and a spiritual value’, as Margaret Jolly points out, ‘but as an icon of ethnic difference’.¹¹⁸ Various narratives supported the insecurities generated around ethnic divisions but, in Jolly’s words, ‘British discourses of race were foundational in persisting ethnic images, of Fijians as collectivist, hierarchical and materially generous, [and] of Indians as individualist, egalitarian and acquisitive.’¹¹⁹ And these features fed into other racialised distinctions. As discussed earlier, Indo-Fijians, could not lay claim to the honour accorded to Fijians for their support of the war effort, and indeed, were frequently denigrated because of that, even if Indians were not encouraged to join the military.¹²⁰ This was partly because Indo-Fijians were needed to work for the sugar industry but also because India’s nationalist movement made Indo-Fijians’ loyalty to the colony suspect. And this was despite what Jolly refers to as the ‘cruel paradox [of] British typifications of diasporic Indians as being antithetical to collectivist, zealously hierarchical and intensely spiritual … Indians in India’.¹²¹ Nevertheless, in later rhetoric of colonial authorities and others, the loyalty owed to Fijians on account of their war efforts contributed to the sense of recognition that the colonial authorities afforded to the rights of Fijians as distinguished from the Indo-Fijians.¹²²

The anxieties generated around race were also internalised in Indigenous circles as narratives of racial infantility, waywardness or savagery, especially in relation to Fijian commoners and the mooted changes toward democracy. Ratu George Tuisawau, for example, spoke of universal franchise as ‘open to abuse and corruption because there is nothing to prevent undesirable members of my race from standing for election and, when they succeed, playing fast and loose with Fijian politics to the detriment of my race.’¹²³ While this statement was clearly also an expression of his vested interest in maintaining the status quo of Fijian hierarchy it resonated with the hierarchical assumptions of the British colonial project. The superiority with which the British had instituted the paternalism of a separate native

¹¹⁷ AD Patel quoted in Lal, above n 84, 127.
¹¹⁸ Margaret Jolly, ‘Epilogue: Multicultural Relations in Fiji - Between Despair and Hope’ (2005) 75(4) Oceania 418, 423.
¹¹⁹ Ibid 422.
¹²⁰ Lal, above n 84, 85.
¹²¹ Jolly, above n 118, 422.
¹²² Lal, above n 68, 87.
¹²³ Ratu George Tuisawau quoted in Lal, above n 84, 98.
administration and the racial segregation in public and private spheres was tied to hierarchical notions of civilisation and progress that chiefs such as Sukuna and Tuisawau appeared to embrace. As Sukuna said, the British approach based on ‘the humanities, refined by Christianity, steeled by economic and political encounters, tempered by defeats and victories … [was] the only effective approach to life.’ And even if loyalty to that approach may have reinforced racist categories (savage, heathen, useless), it appealed more weightily to a shared sense of hierarchy and authority that upheld and legitimised that categorisation.

However, in 1963, Fijians were, for the first time, given adult franchise, which until then had been blocked by the Council of Chiefs who preferred instead to nominate the Fijian representatives in the Legislative Council. While this change evidenced further democratisation, the communal or racial structure of voting and representation was maintained. The fierce resistance to a common roll and complete independence held sway as the 1965 constitutional conference got underway, the upshot of which was an enlarged Legislative Council elected through a mixture of communal rolls and a cross-voting roll, as well as nomination of two Fijian members by the Council of Chiefs. The racial groupings of members in Legislative Council was not proportionally representative of the population at this time, the majority of which was Indo-Fijian, but served to entrench Fijian paramountcy, over-represent Europeans (now amalgamated with newly enfranchised Chinese voters as General Electors) and reduce Indo-Fijians to a minority.

**Party Politics**

The years after the constitutional conference in 1965 saw the emergence of party politics, a ministerial system of government and a government-versus-opposition system. The two main political parties in contention were the Federation Party, led by AD Patel, representing mainly Indo-Fijian interests, and the Alliance Party composed of different organisations, including Kisan Sangh (an Indo-Fijian cane growers union), the General Electors Association and predominantly the Fijian Association advocating chiefly control of the Fijian community. The Alliance Party was founded and led by the Lauan chief, Ratu Kamisese Mara, the protégé of Ratu Sukuna, who would go on to be Fiji’s president and longest serving prime minister.

Jon Fraenkel argues that while an ‘ethnically bipolar Fiji’ may have sometimes provided an exception, generally in South Pacific nations:

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124 Ratu Lala Sukuna quoted in ibid 92.
political parties remain either non-existent or they comprise only fleeting and regularly changing assembly groupings, commanding little loyalty or popular respect. ‘Party politics’, to the extent that it exists, is frequently viewed with disdain, and charged with aggravating social tensions that run counter to Pacific traditions of consensus and compromise.¹²⁵

In Fiji, the party system had to contend with a political space dominated by communal loyalties and inter-communal hostilities, readily co-opted by different interest groups and power brokers. Initially the introduction of party politics promised more inter-racial co-operation and indeed, not only the multiethnic interests represented in the Alliance Party but also the coalition between the Federation Party and the National Democratic Party that created the National Federation Party (NFP) indicated potentialities for new alliances across ethnic divides. One of the leaders of the National Democratic Party, the ‘mercurial’ Apisai Tora,¹²⁶ was an Indigenous militant trade unionist from the west who opposed the oligarchy of the eastern chiefs. Despite his earlier cries for the deportation of Indians, Tora found the alliance with the Federation Party and its stand along class lines against the colonial elite,¹²⁷ a useful vehicle to promote Fijian commoner interests, at least for a while.

But, as expected, it was the Alliance Party that won the 1966 election (and subsequently most elections until 1987). Over those years and vulnerable to the growing appeal of regionalism and class ‘warfare’, the Alliance Party Government relied on control (or inflaming and placating) of communal hostilities as well as a pragmatic diplomacy. However the weight of incumbency also lent time and opportunity to Mara to proceed towards independence before further constitutional reform and another election which might undermine his constitutional agenda for chiefly paramountcy.

With the death of Patel in 1969 and his replacement by Siddiq Koya, who enjoyed a much more conciliatory relationship with Mara, the negotiations concerning the manner in which independence would be granted proceeded quickly. The agreement was that Fiji would have a bicameral parliament with a Senate made up of twenty two nominated members and a House of Representatives comprised of twenty seven communal seats and twenty five national seats. A new method of election would be worked out after independence and after a royal

¹²⁶ Lal, above n 82, 49.
¹²⁷ Howard, above n 22, 69.
commission made its recommendations. Elections would be held within six months of independence.

**Independence**

After ninety six years as a Crown Colony, Fiji became independent on 10 October 1970, with Ratu George Cakobau (great grandson of Ratu Seru Cakobau) serving as the first Governor General. The first few years of independence, referred to as the ‘honeymoon’ years, largely because of the good relationship between Mara and Koya, came to an end by the time the Street Commission began its inquiry into the electoral system in 1975. Mara denounced the commission’s recommendations (including a compromise between communal and common roll voting for the national seats) as a recipe for bloodshed. Koya was accused of betraying Patel’s vision and the NFP’s commitment to a common roll by giving in too much to Mara to reach agreement at independence.

Mara’s hold on the reins of government and control of his Alliance Party may have meant that he could ignore some recommendations for democratic reform but some demands emanating from both Indigenous and Indo-Fijian sectors were not so easily dismissed as the country headed for the 1977 elections. The NFP, too, had its troubles, particularly with its leadership, that profoundly impacted on its electoral victory in 1977.

The Alliance Party’s defeat plunged the nation into a constitutional crisis, elements of which are recognisable in more recent events, with the Governor General Ratu Sir George Cakobau making an executive decision to reappoint Ratu Mara as Prime Minister, despite his defeat in the polls. In Howard’s assessment this amounted to the chiefly oligarchy closing ranks in the face of losing control of government, or described by others as a ‘palace coup’. Over-riding the electoral success of the NFP and its choice of leader, the Governor General claimed to carry out his duty under the Constitution to ‘appoint as Prime Minister the member of the House of Representatives who appeared to him best able to command the support of the majority of the members of the House.’ And Mara stated that he accepted the offer ‘in the

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128 Ibid 78.
129 Ibid 98.
130 Jai Ram Reddy quoted in Lal, above n 68, 170.
131 Ratu Cakobau quoted in ibid 158.
same manner that thousands of Fijians obeyed their chiefs when they were called to arms — without question and with the will to sacrifice and serve.'

The Alliance Party, however, was now a minority government, its declining popularity partly a reflection of the disgruntlement of commoners and western region Fijians. The voicing of their interests, such as taken up by Tora and the Western United Front (WUF), signalled the emergence of a differently contested political space according to class, region and right/left divide. But the NFP failed to capitalise on this disaffection because of factional trouble in its ranks, all the worse after the elections and the Governor General’s ‘intervention’.

Amidst this trouble, however, a new leader arose to unite the NFP which was split by factionalism. Jai Ram Reddy, described by Brij Lal as ‘the most significant Indo-Fijian leader of post-colonial Fiji until his departure from the political stage in 1999’, was committed to multiracial politics which he pursued with middle-of-the-road liberal policies rather than a strong left or right wing agenda. But, addressing discrimination against Indo-Fijians in various sectors such as education and the public service, even if articulated as issues of fairness and justice, Reddy could not dispel perceptions of a racial slant. And in the heating of the political cauldron, especially in the lead up to an election (in this case the 1982 election), appeals to multiracialism were readily hijacked by suspicion and ‘the worst appeals to communalism since independence.’ Mara was particularly adept at recognising opportunities to attack Reddy as racist and anti-chief, generating political capital in what many saw as completely unjustified or exaggerated claims on Mara’s part. As well as characterising Reddy and the NFP coalition (with the WUF) as pro-Indian and anti-Fijian, Mara and the Alliance Party also sought to link it with communism and the Soviet Union. But most importantly, Mara, chief and leader of the Alliance Party, promoted himself, ‘as the man who alone could hold back the forces of racism and instability.’

The Rise of Labour

After the Alliance Party’s (slim) victory in the 1982 elections, the NFP, once again, became embroiled in leadership disputes and internal squabbles. The political landscape was ripe for the emergence of new players, not only because of the NFP’s diminishing relevance but also

\[132\] Ratu Mara quoted in ibid.
\[133\] Howard, above n 22, 100.
\[134\] Lal, above n 68, xiii.
\[135\] Howard, above n 22, 107.
\[136\] Ibid 118.
because the Alliance Government was clearly exhibiting ‘[t]he signs of a party entrenched in
government and unheeding of public opinion.’ Against this background the ‘presence of an
exceptionally strong, dynamic and well-organised labour movement that was more in tune
with the goals and views of Fijians’, gave rise to the Fiji Labour Party (FLP).

Launching the new party, Doctor Timothy Bavadra, the party president and Indigenous
communer from western Fiji, outlined the goals of democratic socialism that his party would
pursue, including multiracialism, nationalisation of some industries, free education and
improved workers’ conditions. And while recognising ‘the importance of “tradition” in Fiji …
the FLP] sought to place this within a progressive framework.’ However, despite or
possibly because of, the class rather than communal perspective of its strong union backing,
the FLP recognised that if it was to defeat the Alliance Party in the next election it needed a
coalition partner. Through a coalition with the NFP, the FLP could reach some of the
otherwise ‘impregnable Indian communal constituencies’, and for its part, through a
coalition with the FLP, the NFP could avoid fading into obscurity.

Bavadra was a popular and well-loved leader among Fijians and Indo-Fijians alike and
although sometimes accused of breaching traditional etiquette, as an Indigenous Fijian he
could challenge the chiefly oligarchy without the sort of racially oriented counter-attacks that
Indo-Fijians incurred. He was, however, targeted as an ‘Indian-lover’ because of his political
associations and was ‘forced … frequently to defend his “Fijianness” as well as his party’s
platform.’ Bavadra had been involved in the union movement and, as president of the
Confederation of Public Sector Unions, had worked to shift union policy from the more
apolitical ideology of earlier leaders to active political engagement. Once the FLP was
launched and with the support of a now more politically-conscious union base, and coalition
with the NFP, the Alliance Party faced its nemesis.

Leading up to the elections in 1987, Bavadra and the FLP targeted Fijian institutions such as
the Native Lands Trust Board for their inequities and inefficiencies, proposing reforms
designed to better meet the needs of all Fijians and Indo-Fijians. These criticisms ‘sent waves

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137 Lal, above n 68, 306.
138 Howard, above n 22, 147.
139 Ibid 161.
140 Ibid 162.
141 Lal, above n 68, 315.
142 Ibid 333.
of fear and concern among the hereditary chiefly classes’, and Prime Minister Mara responded with tactics designed to provoke fear along racial lines, warning that the country would be ‘torn apart by racial strife’ without the stabilising influence of chiefly leadership and a politically experienced Alliance Party.

However, as Bavadra’s slogan had indicated, it was indeed ‘Time for Change’ and the Labour Coalition was elected into government, campaigning on issues such as poverty and corruption. Commenting on that political arena, Steven Ratuva stated,

The utopian ideology was that class consciousness had at last caught up with ethnic consciousness as a natural reaction to what was seen to be the Alliance Party’s elitist, bourgeois, chiefly interests. While the Alliance emphasised the indigenous Fijian/Indo-Fijian dichotomy, the Fiji Labour Party attempted to downplay ethnicity altogether and emphasised the ‘rich versus poor’ dichotomy. Both views were shown to have their own limitations as historical developments began to unfold.

**Rabuka’s Coup**

Six weeks after the Coalition victory in 1987, Lieutenant Colonel Sitiveni Rabuka instigated a military coup, anxious to see power restored to the chiefly elite and the Alliance Party, as well as combating what he saw as the ‘Indian design for political domination.’ Rabuka was riding on a wave of protest against the new government that gained momentum rapidly after the elections mostly due to the influence of the Taukei Movement, ‘a shadowy extremist group of Fijian nationalists’. This group, with the tacit support of Mara and the Alliance Party, engaged in a series of destabilising activities designed to create chaos and distrust of the Government. Rabuka, who at the time was a member of the Taukei Movement, was driven by (among other things) the Taukeist concern to reject democracy as “demon-crazy”, unFijian, a conspiracy to deprive Fijians of the leadership of their own country, and … driv[ing] a wedge between commoners and chiefs.

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143 Ibid 325.
144 Prime Minister Mara quoted in ibid 332.
145 Ratuva, above n 68, 63-4.
On the 14th of May 1987 Rabuka and his troops stormed the Fiji Parliament and marched the sitting politicians out at gunpoint into detention. Rabuka portrayed his coup as necessary to uphold law and order and protect the people from both ‘the madness and mayhem planned by the Taukei Movement’ and the ‘evil designs of the Coalition government’.149 After announcing that he was abrogating the Constitution, Rabuka proceeded to install an interim administration. The local judiciary responded with a letter to Governor General Ganilau declaring the suspension of the Constitution and the judiciary illegal and invalid and avowed their continued loyalty and preparedness to work in accordance with their oath of office and Fiji’s laws.150 After much to-ing and fro-ing on the part of the beleaguered Governor General Ratu Sir Penaia Ganilau (who was also Rabuka’s high chief), Ganilau established and headed a Council of Advisors, consisting of mainly Alliance Party members. Ganilau proposed a ‘path back to democracy’ that included a review of the Constitution, national reconciliation and elections under a new constitution.

The path back to democracy, however, proved to be a long and winding road that for the Governor General and others entailed a renegotiation of the ways and means of that path. The Deuba Accord involved agreement between the Governor General and a bi-partisan group, aimed at creating a more inclusive, power-sharing caretaker government and a review of the Constitution. Contributing to the Coalition’s input on constitutional review was the international constitutional expert, Yash Ghai, who would also come to play a major part in more recent constitution-making processes.

Rabuka, however, did not approve of the Deuba Accord and once again intervened with a military coup intended to reinstate chiefly authority and related constitutional reform objectives. These objectives, according to Rabuka, involved:

[changing] the Constitution in favour of the indigenous Fijians. It meant political control through an increase in the number of Fijian parliamentary seats, the protection of Fijian economic interests and provisions for affirmative action for indigenous Fijians to improve their position in education and commerce. The aim was to bring them on a par with other communities.151

Rabuka’s loyalty and disloyalty towards the high chiefs were, in part, a reflection of the divisions in the Taukei movement, between those ‘whose communalism embraced commoner

149 Lal, above n 67, 365-366.
150 Ibid 371.
151 Rabuka, above n 162, 12.
goals, those who wished to retain the substance of chiefly authority, and those who viewed communalism as part of the revolutionary struggle against neocolonial protectionism.\footnote{Robertson, above n 163, 3.} For Rabuka, however, the chiefs always had a part to play. Essentially Rabuka saw that by ‘bind[ing] Taukei objectives to chiefly leadership’ he could ‘control the extremists…secure legitimacy for his coup and restore stability’.\footnote{Robert Norton, ‘The Changing Role of the Great Council of Chiefs’ in Jon Fraenkel, Stewart Firth and Brij V Lal (eds), \textit{The 2006 Military Takeover in Fiji: A Coup to End All Coups?}, A Coup to End All Coups? (ANU E Press, 2009) 102.} And the chiefs for their part

saw their post-coup consolidation within the Fijian polity as essential to achieve a central goal of the coups to maintain the unity and self-reliance of Fijian culture. That meant restoring to themselves control over many Fijian institutions now increasingly influenced by commoners.\footnote{Robertson, above n 163, 24.}

**The New Republic**

At Rabuka’s instigation and after he made his traditional apologies for breaches of protocol (with his coups), high chiefs Ganilau and Mara once again became President and Prime Minister, but this time of the new republic which Rabuka had declared (despite the chiefly efforts to retain much cherished links with the British Crown). A new constitution was promulgated in 1990 that enshrined Indigenous paramountcy and, as Lal comments, ‘entrenched complete electoral apartheid.’\footnote{Lal, above n 67, 486.} Under the Constitution, the President was empowered to suspend the Constitution and civil liberties in the interests of national security and was answerable only to the Great Council of Chiefs (GCC). A thirty four member Senate would be appointed by the GCC, the Council of Rotuma and the President. Of the seventy members of the House of Representatives, thirty seven seats would be reserved for Indigenous Fijians, twenty seven for Indo-Fijians, five for ‘General Electors’ and one for Rotumans. This arrangement not only removed the electoral equality of Indo-Fijians but, because of the nature of the electoral divisions, also impacted on the electoral equality of urban Indigenous Fijians. For a time, however, the force of an extremist, aggressive nationalism was dampened by constitutional appeasement and the GCC’s powerful assertion of Indigenous Fijian identity.\footnote{Norton, above n 169, 103.} As Norton comments, ‘the militants were not able to sustain an aggressive ethnic movement
independently of the ideology that affirmed the legitimacy of chiefly leadership. And for those most unhappy with the new Constitution but prepared to work with it, there was provision for its review within seven years.

In 1991 Rabuka resigned his military position to become leader of the Soqosoqo ni Vakavulewa ni Taukei Party (SVT), a party sanctioned by the chiefs to replace the Alliance party. Despite its chiefly affiliations, the SVT Party was mainly composed of commoners (Rabuka included), a sign of the changing times and the increasingly symbolic role that high chiefs would now play in Fiji’s politics. High chiefs would continue to occupy the chief executive position in government but after the elections in 1992, never again the prime ministership. Nevertheless, as Norton points out, the high chiefs, particularly in their institutionalised role of the GCC, remained an essential source of legitimacy for national government since their authority, grounded in a galvanizing of Indigenous identity and solidarity, also quelled extremism and mitigated ethnic conflict.

Meanwhile, after the death of Labour Party leader, Bavadra in 1989, Labour’s coalition with the NFP came under increasing strain. The FLP’s new leader, Mahendra Chaudhry, preferred to boycott any election under the 1990 Constitution rather than accord it legitimacy through participation in its political processes. On the other hand, leaders in the NFP such as Jai Ram Reddy, believed in dialogue and participation in ‘the search for a common, uniting purpose, the common space’. After the Coalition was dissolved in 1992 Reddy was elected as leader of the NFP and the stage was set for a new type of power-sharing.

Rabuka led the SVT Party to election victory in 1992 and as Prime Minister he was now more receptive to further constitutional reform and a government of national unity. Hopes for democratic reform and more equitable multiethnic representation were ignited but ethno-nationalistic sentiment was also inflamed. Thus the new constitution adopted in 1997 met with criticism from many quarters because of the compromises it entailed. Communal seats, for example, were not eliminated but more proportionally distributed, threatening Indigenous paramountcy for some while merely creating ‘the shadow rather than the substance of multi-racialism’ for others. Nevertheless, the process of creating the new constitution was inclusive of a broad range of inputs, from local public consultation and submissions, religious

158 Norton, above n 169, 100.
159 Lal, above n 67, 440.
160 Mahendra Chaudhry quoted in ibid 67, 619.
groups, political parties and non-aligned civic groups to research papers from international academics and legal experts. Members of the Constitution Commission (usually referred to as the Reeves Commission, named after the Commission’s head, Sir Paul Reeves) also visited other countries, consulting with politicians and academics. In the final part of the process the Reeves Commission’s report was debated upon in secrecy by the Joint Parliamentary Select Committee which changed some of the recommendations to include provisions such as power-sharing in the cabinet.

The GCC supported the new constitution, even while the changes also involved their reduced representation in senate and a rejection of their request to have Fiji declared a Christian state. Sealing the support of the GCC, according to Rabuka and others, was a speech delivered to the chiefs by Jai Ram Reddy, who was now an ally of Rabuka in constitutional multi-racial reform.\(^{161}\) Ratu Josefa Iloilo, who was President of the Senate at the time, originally proposed the idea that a non-Indigenous Fijian address the GCC and Rabuka agreed that ‘there was no one better to put the case [for the constitution]’.\(^{162}\) Reddy’s speech received a standing ovation, led by President Mara. In this striking oratory (an excerpt provided below) Reddy spoke with a deep sense of the moment, acknowledging the past and urging partnership between all the peoples of Fiji:

> Chiefs of Fiji, with the greatest respect and humility, I submit that you are chiefs, not just of Fijians, but of all the people of Fiji. I said I would speak to you of truth. Plainly and honestly, then, I say to you this: the Indians of Fiji, brought to these shores as labourers, did not come to conquer or colonise. We, their descendants, do not seek to usurp your ancient rights and responsibilities. We never have. We have no wish, no desire, to separate ourselves from you. Fiji is our home. Fiji is our only home. We have no other. We want no other.\(^{163}\)

Importantly, the chiefly endorsement of the constitution provided some stability for the transition to multiculturalism and reconciliation now advocated by Rabuka and welcomed by many. But ahead lay the general elections, and disunity in intra-indigenous and Indo-Fijian politics combined with political opportunism and the battles for political ascendancy saw old resentments resurface and new alliances formed, sometimes inadvertently. And despite the GCC’s endorsement of the Constitution, Fiji’s chiefs were by no means united, either behind the 1997 Constitution or the SVT Party. Rival parties drawing support from prominent chiefs

\(^{161}\) Ibid 625.
\(^{162}\) Ibid 624.
\(^{163}\) Jai Ram Reddy’s Address to the Bose Levu Vakaturaga, July 1997, quoted in ibid 635.
emerged to contest the 1999 general elections. For example, candidates in the Veitokani ni Lewenivanua Vakaristo Party (VLV) included close members of President Mara’s family who wanted the restoration of Fijian paramountcy as provided for in the 1990 Constitution; and the Party of National Unity (PANU) campaigned on contentious land leasing issues and was supported by prominent western region chiefs such as Ratu Iloilo. These parties did not win the 1999 elections but distribution of their preferences worked against the SVT Party and the FNP and their coalition forged by Rabuka and Reddy. Their humiliating defeat in the face of the victory of the FLP led by Mahendra Chaudhry marked a new and disturbing changing of the guard in Fiji. That same year Iloilo was appointed as Vice President of Fiji and within twelve months was contending with Fiji’s next coups which ousted not only Fiji’s first Indo-Fijian Prime Minister but also President Mara, the last of the ‘Big Four’, the paramount chiefs who led Fiji from British colony to independence.

**Part D: Crises of the 1997 Constitution**

**The Speight Coup**

Mahendra Chaudhry’s People’s Coalition Government, launched into office promising a series of reforms such as a minimum wage, lower housing loan interest and resolution of agricultural lease problems. However, within its own ranks the Government was fractious and the wider Fijian community met it with a growing hostility. Not least of the Government’s problems was its leader, Mahendra Chaudhry, who, as Indo-Fijian, could easily be perceived as a threat to Indigenous interests, especially given Chaudhry’s particular style of leadership. Many believed it was too soon for an Indo-Fijian to be Prime Minister and as the coups of 2000 indicated, this apprehension was not necessarily misplaced.

On the 19 May 2000, George Speight, a Fijian businessman with a dubious business record, entered the Fiji Parliament with group of armed men and took the Government hostage. Speight executed the coup in the name of ‘The Cause’, which he struggled to define, but which seemed to express an ethno-nationalistic desire for paramountcy of Indigenous interests. Shortly before the coup the Chaudhry Government had sacked Speight from his position as chairman of the state-run, Fiji Pine Commission and the Hardwood Corporation. But while Speight may have had a vested financial interest in seeing the Government

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164 Michael Field, Tupeni Baba and Unaisi Nabobo-Baba, Speight of Violence (Reed Books, 2005) 91.
removed, most commentators see the causes and the impetus of the coup as grounded in a much more complex domain, parts of which are still shrouded in mystery. Michael Field, Tupeni Baba and Unaisi Nabobo-Baba suggest that both Speight and Chaudhry were more like the ‘fall guys’ or a bluff for the real coup-plotters and agendas. Despite appearances, ‘the nature of the power play…had little to do with race and everything to do with an internal play by Fijian groups for power and control of resources.’ And over the fifty five days that the hostages were detained, the negotiations that were conducted between Speight and others were only ‘nominally over freeing Chaudhry and the hostages…their central, unstated focus was on putting in place a particular kind of Fijian government, controlled by the people who, since the departure of Rabuka’s government, had lost access to the money.’ In any case (including those heard in the courts) neither the GCC nor President Mara, nor indeed Commander Bainimarama, who ultimately resolved the hostage crisis, ever spoke of returning Chaudhry to the office of prime ministership.

**Bainimarama’s First Coup**

To resolve the hostage crisis, Bainimarama’s strategy entailed the purported abrogation of the *1997 Constitution* (which Speight, too, had earlier claimed to do); the ‘removal’ of President Mara who could not be persuaded to endorse the abrogation; the declaration of martial law (replacing Mara’s declared State of Emergency); Bainimarama’s assumption of full executive authority; the installation of an interim government and the appointments of Iloilo as President and Laisenia Qarase as Prime Minister; and the promise of amnesty to Speight and his supporters, conditional on the surrender of all their arms. Possibly because these measures were taken amidst the chaos and upheaval of Speight’s civilian coup, they largely avoided characterisation as a coup or counter-coup. Rather, Bainimarama was seen by many as the saviour of the nation, a sentiment so strongly and widely shared that the possibility of his prosecution for treason was never entertained by those who later mounted a legal challenge to the legitimacy of his counter-coup measures.

Within two weeks of the release of the hostages, the amnesty for Speight and fellow coup-makers was repudiated on the basis of the failure to return all the stolen military arms. Speight himself was detained and charged with a number of offences including treason. Supporters of Speight and ‘The Cause’ did not, however, settle readily for the new regime. Apart from the

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165 Ibid 119.
166 Ibid 120.
ongoing harassment of Indo-Fijians, an attempt was made to stage a mutiny, with a number of pro-Speight members of the elite Counter Revolutionary Warfare Unit launching an attack on the military barracks and on Bainimarama in particular. This uprising was quelled through an equally brutal response in which five of the mutinous soldiers were tortured to death, their attackers never yet brought before the courts. As indicated earlier, the Courts were, however, involved in determining the legitimacy of Bainimarama’s interim government and the abrogation of the constitution. The relevant cases are discussed in greater detail in the following chapter. At this point it suffices to say that following the Prasad judgments, the country was returned to the ballot box in 2001 with the 1997 Constitution intact.

**Qarase’s Governments**

To contest the 2001 elections in his own right (rather than as a military appointment) Laisenia Qarase formed a new party, the Soqosoqo Duavata ni Lewenivanua (SDL), with a platform of affirmative action for Indigenous Fijians. As Alumita Durutalo observes:

> Like its predecessors [the Alliance Party and the SVT] the SDL emerged as an eastern Viti Levu- and Vanua Levu-based Fijian political party. As with its predecessors, the link with the all-Fijian provincial councils provided the critical organizational underpinning for the party, and the backing of the Methodist Church proved of fundamental importance to the party’s success.167

The SDL was able to benefit from incumbency (with many of its members also members of the interim government installed by Bainimarama) and previous government initiatives such as the roadworks, financial contributions to education and distribution of agricultural tools and equipment (also denigrated as ‘pork-barrelling’).168 While the SDL won the most seats it fell short of the required majority and relied on the support of two independents and a coalition with the ethno-nationalist party, the Conservative Alliance–Matanitu Vanua (CAMV), to form government. The CAMV had supported Speight’s coup and Speight himself won them a briefly held seat from prison. This controversy and many more, embroiled Qarase’s new government. Disputation proceeded apace in the courts between the FLP (still under the leadership of Chaudhry) and the Government, concerning the

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constitutional requirements of forming a multi-party cabinet. But despite directions from the Courts, such matters remained unresolved.

The concept of power-sharing through a multi-party cabinet was an ambitious feature of the 1997 Constitution. Designed to promote national unity, it provided for a party’s representation in the cabinet if it secured more than 10 per cent of the vote. Thus, the FLP, winning 27 of the 71 seats in the House of Representatives, was clearly entitled to a place in the cabinet. While this was possibly a workable arrangement in the context of a relationship such as shared by Rabuka and Reddy, it was problematic for a relationship such as that between Qarase and Chaudhry and posed drawbacks for the Westminster system too. As Patricia Palmer points out, a multi-party cabinet may, among other things, ‘weaken the likelihood of a strong opposition that could form a credible alternative government.’ As it was, Qarase was criticized (and taken to court) for dragging his feet on forming a multi-party cabinet which he found ‘abhorrent’. After three years of the matter being litigated in the courts, Chaudhry ultimately rejected what he perceived as a tainted invitation to join cabinet and instead became Leader of the Opposition.

As Jon Fraenkel observes, ‘the perpetual centrality of struggles over the composition of government during the period 2001-2006’ kept the issue of legitimacy in leadership, government and legislature, a heated question, and indicated the way communal party politics would play out in Fiji. During its first term as elected government, the Qarase Government pursued a number of affirmative action initiatives for Indigenous Fijians that also fueled tensions with the military and others. As Steven Ratuva notes, detractors of affirmative action argue that it serves as a form of ‘reverse discrimination’, or, as in the case of the military’s objections, it may be seen as ‘subjected to the self-serving interests of powerful elites who control state institutions and resources.’ Among the more controversial of the Qarase Government initiatives was a national reconciliation process based on restorative justice principles and Indigenous Fijian forgiveness and reconciliation practices, to resolve the

173 Ibid 140.
conflict between victims and perpetrators of the Speight Coup. As formulated in the
*Reconciliation, Tolerance and Unity Bill* (RTUB) the process would also include the release
of the perpetrators of the Speight Coup. But the military and the FLP, who both preferred the
retributive justice approach, did not embrace either the projected restorative process or the
Bill.

Similarly, the *Qoligoli Bill* met with widespread opposition. The Bill provided for Indigenous
development through the transfer of ownership of off-shore Indigenous fishing rights, from
the State to Indigenous landowners. In later commentary, Qarase stated that despite the
frenzied opposition demonising the proposed Bill, the ownership of the *Qoligoli* (beach,
lagoon and reef areas) was a grievance held by Indigenous Fijians since the Deed of Cession
and an issue championed by Chaudhry and enthusiastically endorsed by Bainimarama and the
military in previous years. But by 2004 Bainimarama was openly criticising the
Government for destabilising national security with this Bill and particularly the RTUB.

Bainimarama maintained an antagonistic position in relation to the Government that only
intensified with each attempt that the Government made to curb the perceived over-reach of
the military. Fiji’s military which had once been ‘the key instrument of ethno-nationalist
Fijian rule’ was transforming into its nemesis. Nevertheless, the SDL powered into the
2006 elections with what Lal describes as an ‘assiduous courting of the Fijian voters through
special assistance programs and grants for the indigenous community, and an open appeal to
Fijian nationalism’, and proceeded to narrowly win a second term in government.

**Bainimarama’s Second Coup**

In contrast to his previous response to forming a multi-party cabinet, Qarase was keen to
share cabinet with his FLP counterparts in 2006. Chaudhry was less enthusiastic and refused a
portfolio for himself but nine other members of the FLP took up the invitation. These
appointments caused deep divisions in the FLP, partly because of the confusion that
membership in the cabinet created for the party which was now also in de facto opposition

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174 Ibid 149.
175 Laisenia Qarase, 'From Fear and Turmoil to the Possibilities of Hope and Renewal Once Again' in Jon
Fraenkel, Stewart Firth and Brij Lal (eds), *The 2006 Military Takeover in Fiji: A Coup to End All Coups?*
176 Ibid 368.
177 Stewart Firth and Jon Fraenkel, 'The Fiji Military and Ethno-Nationalism: Analyzing the Paradox' in Jon
Fraenkel, Stewart Firth and Brij Lal (eds), *The 2006 Military Takeover in Fiji: A Coup to End All Coups?*
(ANU E Press, 2009) 117.
178 Lal, above n 195, 27.
under a trenchant Chaudhry. Despite the eruptions of parliamentary party politics, however, there was also a sense that the Government was beginning to work more smoothly along the lines envisaged in the Constitution. But this was not a sense shared or welcomed by Bainimarama.

As the year progressed, Bainimarama’s grievances intensified and by October it was clear that a military coup was likely. Various attempts were made to dissuade Bainimarama from this course of action including mediation from Vice-President Ratu Jone Madraiwiwi, and the Government’s attempt to relieve Bainimarama of his command. Through international mediation conducted through New Zealand’s Prime Minister, Helen Clarke, in November, Qarase conceded to a long list of Bainimarama’s demands but Bainimarama returned from New Zealand ready to execute the well laid plans for the coup, or the ‘clean-up campaign’ as he preferred to name it.

On the 5th December the RFMF took control of the streets and Bainimarama declared a State of Emergency. President Iloilo’s reluctance to dismiss Prime Minister Qarase prompted the Commander’s assumption of Presidential authority after which he appointed a caretaker Prime Minister to advise a dissolution of Parliament. Four weeks later, the Commander handed back executive power to the President who promptly appointed the Commander as Interim Prime Minister. In the breadth of the President’s expanded executive powers, decrees were promulgated ratifying the dismissals and appointments made by the Commander, granting unconditional immunity to the RFMF and others and providing for legislation to be made by decree. As Fraenkel elaborates in the following excerpt from The 2006 Military Takeover in Fiji: A Coup to End All Coups? Fiji’s politics had been turned upside down:

Key coup victims of 1987 and 2000 emerged as defenders, enthusiasts and beneficiaries of the military takeover, while overnight, the coup-backers of 2000 became democrats and supporters of the rule of law. The director of Fiji Human Rights Commission, an assortment of Catholic social justice advocates, much of the business community and probably the majority of left-leaning civil society activists supported the coup. Vociferous opponents of previous illegal regimes, such as the widely respected Justice Anthony Gates, took positions in the new order, as did several well-travelled participants on the Pacific’s ‘good governance’ workshop circuit. Deposed 1999-2000 prime minister Mahendra Chaudhry became interim finance minister, as well as acquiring a host of other important portfolios, including sugar industry restructuring. The reaction from the bulk of the Fiji Indian community to the 2006 coup was astonishing; the group that had such a strong sense of its own victimhood, due to the 1987 and 2000 coups and the much
earlier experience of girmitya (indentured labour), was strongly in favour of the clean-up coup.179

The Interim Government, Reforms and Resistance

Two months after the coup, the Cabinet of the Interim Government approved a *Road Map* for the return to parliamentary democracy. The three-year plan involved a review of the 1997 *Constitution*, a census report and redrawing of constituencies and their boundaries, as well as land reform, budgetary changes and the continuation of a ‘clean-up’ to rid the country of corruption.180 The *Road Map* was further developed in accordance with advice from John Samy, a former executive with the Asian Development Bank who had previously headed Fiji’s Economic and Planning Ministry. Samy was adamant that despite the necessity for reform, the fact that Bainimarama had no mandate meant that he had to go to the people, and that this be done through an inclusive, consultative and participatory process, ie one that was not fettered with or manipulated by the Military and the IG [Interim Government], to enable the people to become better aware of the overall situation of Fiji, and for them to chart the way forward to resolve Fiji’s deep-rooted problems.181

Responding in writing Bainimarama stated:

> I agree with the idea of engaging and promoting a consultative and truly participatory approach in developing a road map for the way forward. I am keen to lay solid foundation for democracy, governance and accountability.182

Samy initiated work on a draft proposal for a *People’s Charter* designed to express a vision of a democratic future and the way it would be pursued. The overarching objective of the *People’s Charter* was ‘to rebuild Fiji into a non-racial, culturally vibrant and united, well-

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governed, truly democratic nation…that seeks progress and prosperity through merit-based equality of opportunity and peace." The draft proposal was circulated widely within Fiji as well as among Fiji’s international development partners and was officially launched after five months public consultation. Shortly after, in December 2007, the President appointed the forty-five member, National Council for Building a Better Fiji (NCBBF) which was supported by three National-level Task Teams and nine Working Groups that set to work diagnosing social, economic, legal and political problems, formulating policies and preparing the People’s Charter. The majority of the two hundred people in the Working Groups came from civil society, the professions, private sector and academia. The NCBBF was co-chaired by Interim Government Prime Minister Bainimarama and Catholic Archbishop Petero Mataca. While attempts were made to involve representatives from a broad cross-section of the community, the council was mostly comprised of Indigenous Fijians (Indo-Fijians were extremely under-represented and other minority groups over-represented). As Steven Ratuva remarks, ‘in terms of public symbolism [the gross disparity in representation on the council] undermined the very principle of equal participation and representation which the NCBBF claimed to represent.’

Some prominent political leaders who initially accepted a position on the NCBBF, later withdrew because of the Interim Government’s close involvement with the organisation while other key stakeholders such as the deposed Prime Minister Qarase, chose not to accept the invitation at all. Daryl Tarte, chairperson of the Fiji Media Council, resigned after concluding that ‘the Charter is dominated by the IG, with Bainimarama a co-chair, IG ministers as co-chairs of each working group, and IG/military reps heading teams to sell the concept in the villages.’ He also wanted to protest against the Interim Government’s assault on media freedom.

However, these resignations did not impede the momentum of the NCBBF and over the next year the various task forces conducted nationwide consultations with their findings and recommendations largely accounted for in the document, State of the Nation and Economy.

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184 Ibid iii.
185 Ratuva, above n 69, 183.
186 Ibid.
187 Larry Dinger, Bainimarama "No" on Reeves Dialogue; Qarase Court Case; Peoples's Charter Complications; Re-establishment of NSC and FIS; Commander's Intent (6 March 2008) WikiLeaks <https://www.wikileaks.org/plusd/cables/08SUVA89_a.html>.
This report fed into development of the Draft People’s Charter and in August 2008 the NCBBF endorsed the draft and initiated further public consultations. Four months later the NCBBF reported overwhelming public support for the People’s Charter. The report stated that 80 per cent of Fiji’s adult population had been consulted and that the total number of respondents supporting the Draft constituted 64.2 per cent of the adult population.189

Similar to a preamble in a constitution, the People’s Charter affirmed and declared a national commitment ‘to rebuilding a Better Fiji For All’, enunciated a ‘Foundation For The Common Good’ and a rationale for ‘Moving Forward Together’. The Charter also featured eleven ‘Key Pillars For Rebuilding Fiji’ and the critical problems and issues associated with each, which fed into more specific ways forward. These included the abolition of the electoral communal system of representation, the reduction of the voting age from 21 to 18 years, the adoption of a common name, ‘Fijian’, for all citizens and recognition of the Indigenous people as i-Taukei, and the establishment of an independent Commission on Healing Truth and Justice.190

Involving the public in the Road Map process was the preferred strategy of the Interim Government and to that end, resistance to participation in the charter-making process or resistance to endorsement of the charter’s principles, was unacceptable to the Government. Critics of the Road Map and the People’s Charter accused the Interim Government of using intimidation tactics to get public participation and endorsement of the People’s Charter. There were credible reports that people felt pressured to support the People’s Charter, especially given the role of the military and police in distributing, witnessing and gathering the survey forms.191 The US Ambassador McGann cabled,

the consultation process involved a wide range of coercion and is perceived as having very little legitimacy. Opponents continue to question why, if the public truly supports the Charter, the IG remains unwilling to hold a public referendum on the document as

190 National Council for Building a Better Fiji, above n 188.
originally promised. Meanwhile, the role the People’s Charter will play in Fiji’s future and how its aspirational goals will become political realities remains a mystery.¹⁹²

Resistance to the *Road Map* from various sectors and individuals was inevitable (the Methodist Church, the Fijian Teachers Association, paramount chief Ratu Naiqama Lalabalavu, and the ousted SDL party, to name some) but it came at a cost. As Bainimarama declared, ‘[t]he second option, in the absence of support for the change agenda from the political parties… will result in a protracted delay in the holding of parliamentary elections under a truly democratic electoral system.’¹⁹³

However, Bainimarama’s threat to hold the elections to ransom was only part of the complex politico-legal landscape. Until 2009, the 1997 Constitution was still in place and it contained clear guidelines for its amendment. And despite Samy insisting throughout the charter-making process that ‘the purpose of the Peoples Charter is not to replace the Constitution but to strengthen it’,¹⁹⁴ the envisaged changes actually involved radical amendment to the Constitution. For many who believed that any constitutional amendment could only be effected through constitutionally prescribed processes, the People’s Charter, indeed any initiatives of the Interim Government, ‘[were] born out of a treasonous act, lack[ed] credibility, [were] totally illegitimate and… any members of the…[NCBBF] have no democratic mandate whatsoever to determine how the people of Fiji should conduct themselves.’¹⁹⁵ But there were others who saw, perhaps even briefly, that, aside from it being an Interim Government initiative, the People’s Charter could pave the way to peace, equality and democracy. Father Kevin Barr, a Catholic priest, social justice advocate and long term resident of Fiji, pointed to the futility of ‘the legal/illegal paradigm being pursued in Fiji today’, which he said ‘creates an endless cycle of negativity and stalemates’. He argued that, ‘[i]t may not always be helpful to fight for the rigid application of the law’ and suggested

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¹⁹⁴ Ibid 17.

instead that, ‘law be balanced by principles of social justice, compassion and common
sense.’

In fact, neither legislation nor judge-made law could or would halt the juggernaut of the
Interim Government on its mission to democratise the nation. In 2008 and 2009 Fiji’s High
Court and Court of Appeal, respectively, delivered two important judgments concerning the
lawfulness of the coup and the subsequent dismissals, dissolutions and appointments of
government, ratified and decreed by President Iloilo. These cases will be analysed in greater
depth in the next chapter, but briefly stated, the High Court determined that the President’s
actions ratifying the coup were valid and lawful as an exercise of prerogative power, a
judgment which, in effect, endorsed the validity of the Interim Government. Bainimarama
‘called on all citizens to respect the declaration by the High Court favouring the regime’ and
‘invited registered political parties to meet, discuss and agree on an agenda for the way
forward towards constitutional and sustainable democratic governance.’ The following
year, however, the Court of Appeal overruled the decision and ordered the country back to the
ballot box, under a caretaker prime minister as appointed by the President but excluding
Bainimarama and Qarase. Arguably the Court of Appeal may not have had the last word on
the sovereignty of the Fiji Constitution. One final round of appeal could have been possible in
Fiji’s Supreme Court but events on the morning after judgment day made that a moot
question.

**Part E: The Rise of the Military**

Making a brief detour from the timeline thus far, the next part of the discussion looks at the
development of Fiji’s military which, along with other constellations of power, has been
instrumental in Fiji’s coups and the establishing of a new legal order. With historic roots in a
vibrant pre-colonial martial life Fiji’s military culture has ‘emerged out of deeply embodied
notions of masculinity, spirituality and society.’ As discursive features of Fiji’s militarism,
these notions have often realigned and recombined, reflecting and effecting changes in
political power structures.

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State Society & Governance in Melanesia Discussion Paper Series <http://hdl.handle.net/1885/10087>.

197 Fiji High Court Dismisses Qarase Case, Legalises President's Actions in Coup', Solomon Times (online) 13

198 Teresia K Teaiwa, ‘Articulated Cultures: Militarism and Masculinities in Fiji During the Mid 1990s' (2005)
After the ‘pacification’ of warring tribes in Fiji in the 1800s, occurring partly as an effect of Christian conversion and partly through the consolidation of Ratu Cakobau’s central government and then colonial government, new military-type institutions were created such as Cakobau’s Royal Army and Governor Gordon’s Armed Native Constabulary. These institutions, which were ‘used extensively to suppress anti-colonial and anti-Christian rebellion by tribal groups’,\(^{199}\) built on traditional links between chiefs (turaga) and the warrior class (bati) and the fount of their power and legitimacy, which with colonisation also incorporated Christian as well as British royal, well-springs.

In Fiji, the ‘metacultural formula’,\(^{200}\) *lotu, vanua* and *matanitu* (which may be translated as religion or church, land or community, and government, respectively) is often invoked as the basis of Fijian society, the three terms or pillars taking on ‘an almost Trinitarian solemnity in the inner life of Fijians.’\(^{201}\) Subsequently, as Jone Baledrokadroka (former Lieutenant Colonel in the RFMF) observes,

> the patriotic adage of *For God, King and Country* was grafted onto and sat well with Fiji’s traditional society. The three central ethos of the British Empire’s imperial slogan were integrated into Fijian society as the *Lotu, Vanua kei na Matanitu*. In the 96 years of British rule this slogan underpinned the colony’s military service through two world wars and the Malayan Communist emergency campaign in the 1950’s.\(^{202}\)

With the outbreak of the First World War in 1914, the Fiji Defence Force was established to defend Fiji from foreign attack. While many Fijians were anxious to join the British in their war effort, they, unlike their white compatriots (approximately seven hundred of whom joined the allies), were refused for active service overseas. Similarly, Indian indentured labourers who volunteered for service were ignored.\(^{203}\) But it was Fijian patriotism, financial contributions to war funds and man power on the European docks and in other foreign legions


at the time that ‘cemented an indelible social bond between native Fijians, their chiefs and the British crown.’

The Fiji Defence Force, largely comprised of Indigenous Fijians, remained operative after the war and swelled in number with the vigorous recruitment drive of Ratu Sukuna as thousands of Fijians enlisted in the newly-named, Fiji Military Forces to fight in World War II. Appealing to his Indigenous compatriots on the grounds of blood and sacrifice, Sukuna stated: ‘Fijians will never be fully recognized until they shed their blood for the Empire.’ The Fijian contingents distinguished themselves in their overseas war effort, which was mainly fought out in Bougainville and the Solomon Islands, against the Japanese. At home, the only local action for the Fiji Defence Force was its deployment in the sugarcane fields during the cane growers strike.

The war efforts of the Fiji Defence Force commended its suitability for jungle warfare and in the 1950s a Fiji Battalion was deployed in the Malayan Campaign as part of the Commonwealth force. As Steven Ratuva observes:

A significant paradox in this case was the use of colonial troops by the British to quell anti-colonial movement by other colonized people…Inspired by the exceptional Fijian soldiers’ performance in Malaya, the British government recruited 200 Fijians into the British Army in 1960, many of whom joined the elite regiments such as the British Special Air Service…and paratrooper units.

While recognising the prowess of the Fijian military, the British also saw that this largely Indigenous force with its strong customary hierarchy ‘guarantee[ing] loyalty and dedication’, could pose problems for Fiji’s Indian population and therefore urged its downsizing or even dismantling. But while the military had diminished to two hundred by independence, it was a well-entrenched institution and under Prime Minister Mara was again gradually upsized to become active in international peace-keeping operations.

According to Baledrokadroka, Fiji’s peace-keeping operations not only spawned the burgeoning number of military enlistments but also fostered ‘an inflated corporate self image’

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205 Ratu Sukuna, quoted in ibid 129.
206 Ratuva, above n 199, 100.
207 Goiran, above n 203, 62.
and engrained ‘the mediator role…in the collective military psyche.’ By 1975 that military ethos had been further enhanced through governmental nation-building efforts which, as well as defence of the nation and international peace-keeping, saw the military involved in rural development projects and maritime surveillance, non-core roles which Baledrokadroka characterises as ‘the force determinant for the RFMF’ and encouraging of its intervention in politics. Certainly, by 1987 and military coups under the command of Lieutenant Colonel Sitiveni Rabuka, ‘the Westminster civil-military relations ethos’ was shattered.

As Fraenkel observes, while ‘ethnic schisms revealed through electoral outcomes have…proved key catalysts for coups’, each coup in Fiji has had different ‘drivers and socio-political bases’, which reflect also in the military ethos. Even between Rabuka’s two coups in 1987 there were significant differences. The first coup aimed at restoring the power of the chiefs and Fijian political supremacy more generally while the second was seen as moving against the high chiefs.

Part of Rabuka’s rationalisation of his role as military leader of the 1987 coups involved his membership in the bati or warrior clan of his province, which accorded him with the duty to protect the chiefly system. Bati ideology also equipped Rabuka with an ‘almost infallible’ authority to initiate the coup even though he was a third-ranking officer upstaging the military authority of the Brigadier Nailatikau (later appointed President by Bainimarama) and the authority of Governor General Ganilau. The fact that the Governor General was also Rabuka’s paramount chief honed attention in on the ‘awkward tension’ between the chiefly authority of a military superior and the bati authority of a military (in)subordinate.

This ‘conflict[ing] interplay of the several forces of ethnic Fijian power: 1) the army; 2) volatile ethnic nationalism…whose leaders were mostly commoners but included several people of high chiefly rank; and 3) chiefly authority’, continued to influence Fiji’s politics in the aftermath of the coups, often in unexpected ways. After Rabuka was persuaded (by his

209 Ibid 107.
210 Baledrokadroka, above n 202, 53.
212 Teaiwa, above n 198, 212.
213 Ibid 213.
214 Ibid 212.
chiefs) to leave the army and join the ranks of parliament, the military, under the command of Epeli Ganilau (son of the Governor General Penaia Ganilau), was encouraged to adopt a more ‘professional ethos opposed to Fijian nationalist influence and committed to institutional responsibilities and interests.’ Subsequently the military came to play a more autonomous role as distinct from what was perceived as its role servile to an Indigenous elite. It was nonetheless deeply implicated in the coups of 2000, by which time Commodore Frank Bainimarama was in command. But, as Norton comments:

It is ironic that Ganilau’s project to move the army away from the political arena should eventually clash with Fijian nationalist initiatives in a way that encouraged his successor [Bainimarama] to make the army into a far more strongly interventionist force than Rabuka had done.

**The Military and the Coups of 2000**

The coups of 2000 were shadowy affairs in as much as they involved hidden actors and agendas. So although civilian George Speight had the very public face of coup-maker, the extent of the military’s involvement has never been thoroughly investigated or reported on. However, at least thirty members of the eighty strong, elite Counter Revolutionary Warfare Unit (CRWU) were involved in Speight’s coup. According to Lal:

In the face of the coup, the army stood divided and confused, unable or, worse still, unwilling to uphold the constitution or protect the security of the state. The security forces were shown to be infected by the virus of provincialism and regionalism, insubordination and indiscipline. Had martial law not been declared when it was, and the rebels gone further than they had, the army might well have fragmented into factions defending their own *vanua* (land, province) and chiefs.

Under Commander Bainimarama the military’s intervention in the chaos brought about by the coup, including the arrest of the military and civilian insurgents, although a stabilising force, did not signal a return to the status quo. Indeed, while not often characterised as such, the military intervention amounted to another coup. As was known (and later challenged in the courts in the *Prasad* cases) Bainimarama’s (coup) strategy entailed abrogating the Constitution and ‘asking’ President Mara to step aside while the military assumed total

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216 Ibid 112.
217 Fraenkel, above n 211, 329.
218 Norton, above n 215, 113.
control, a strategy that would repeat itself in Bainimarama’s subsequent coup in 2006. Although Rabuka’s coups were executed along similar lines, the coups under Bainimarama introduced a new kind of sovereign, or as Lal puts it, ‘[i]n a very real sense, Bainimarama became in his own right the paramount chief of a new vanua: the Fijian military.’

**Conclusion**

This chapter approaches the threshold of Fiji’s new legal order, tracing trajectories of power in Fiji through a procession of people and events and political structures. By identifying various elements and the relation between them, the discussion is geared towards an interpretation of structures of power that, following Foucault, can be seen ‘in the form of strategies and tactics.’ Most of the chapter is plotted along points of a timeline which may suggest an inevitability about the new legal order, except for the frequent ‘surprises’ along the way. These happen with the particular alliances and disjunctions at different moments but also with sudden reminders of longstanding beliefs, practices or social structures.

In Part A the Indigenous Fijian concept of vanua was introduced as a historical notion of interconnectedness, the fluidity of which defies codification or being set in time. The exploration of the ‘golden threads’ of the vanua commenced with regard to the ascendancy of chiefly power of eastern regions of Fiji and its early alliances formed with capitalism and Christianity introduced by Europeans. Political instability, including land grabs and the unsavoury conditions of exploitation provoked through this ‘unholy’ trinity, prompted offers of cession to the British.

In Part B the analysis of the colonisation of Fiji focused on the British policy of indirect rule and the production of divisions and alignments between race, commerce, tradition, chiefly power and British sovereignty. Under the protection of British paternalism, and aligning with the British regard for class and hierarchy, chiefly power flourished. Projected and perceived as the guardians of traditional Indigenous culture, the chiefs were positioned at the apex of a communal order that was maintained by the segregation of the Indigenous community from other races, particularly Indian indentured labourers, and from commerce more generally.

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Post indenture, despite their presence in numbers on the cane farms and in business and education, Fiji’s Indians struggled for politico-legal recognition. Notions of equality or parity, promoted by prominent Indo-Fijian spokespeople, competed with notions of Fijian paramountcy and European privilege, setting the co-ordinates for future political battlefields.

In Part C the discussion turned towards decolonisation and processes of Fiji’s nation-making. One of the main points made in this section is that a thorough analysis of power and its resistances must remain attentive to the complexity of alliances and oppositions. Two significant axes of power — Chiefly power and racial division — made their way into the politics of independence, party politics, and the Westminster system of government bequeathed by the British. But less than ten years after independence, the harbinger of future coups appeared with the first major upset in the political status quo and the chiefly centre of power in the government. A ‘palace coup’ reinstated the chiefly (Alliance) party in government but, in the 1980s, the labour movement, aligned along class issues, emerged to compete in party politics. Political liaisons formed between Indo-Fijian trade unionists and Indigenous (commoner) Fijians contesting the monopoly of chiefly power over Indigenous interests. This powerful coalition met with a militant Indigenous ethno-nationalism, containable only by the chiefs or a well-supported military leader. But Rabuka’s military coups in 1987 underscored the effective brutality of ethno-nationalism in league with hierarchical, traditional notions of Indigenous paramountcy. Post-coup, Rabuka’s politics steered a middle course of negotiation and compromise with Reddy’s liberalism but this alliance was no match for a resurgent Labour Party.

Part D marks several changings of the guard starting with the Labour Government under Fiji’s first Indo-Fijian Prime Minister, Mahendra Chaudhry, being unseated by a civilian coup in 2000. Subsequently, in the course of what amounted to Bainimarama’s first military (counter) coup, the paramount chief, President Mara, was given his marching orders. Minus the ‘stabilising effect’ of Mara’s chiefly power, the military under the command of Bainimarama sought to deliver the nation from anarchy into the strictures of a new legal order. Although the courts ruled out this possibility and the military abided by the ruling, the next part of the chapter shows how Bainimarama was actually a governor in waiting for a new legal order.

What the discussion also made apparent was an evolution in military power through which an institution still mostly comprised of Indigenous Fijians was cutting off from the old correlations of chiefly power, Indigenous paramountcy and tradition. By the time of Bainimarama’s next coup in 2006, the loyalty of the military was to a commander with no
chiefly background and an implacable opposition to an elected Prime Minister (Qarase) with strong, Indigenous, ethno-nationalistic sympathies. This coup also attracted the support of many Indo-Fijians who had been victims of previous coups, as well as other groups anxious to put ethnic tensions to rest. The High Court gave its seal of approval to President Iloilo’s endorsement of Bainimarama’s ‘clean-up’ campaign, and the heavily militarised, interim government continued with the renovation of the politico-legal order. The subsequent judgment of the Court of Appeal effectively marked the point after which the blurring of law and fact, or law and non-law, became visible as the groundless foundation of Fiji’s new legal order. This part of the chapter has thus drawn to a conclusion with many of the conditions for the new legal order laid out in anticipation.

Before moving on to the next chapter, Part E revisited the military, tracing some of the changing ‘articulations’ of militarism Fiji. This part of the discussion allowed for a fuller appreciation of the military’s role in Fiji’s new legal order and Bainimarama’s authority as its chief architect. Following roughly the same timeline as the preceding parts of the chapter, Part E illustrated how the military has been sustained as ‘the strongest embodiment of Fijian power’. This has happened, often paradoxically, with an institution made up almost exclusively of Indigenous Fijians, which, over time, has converged with, opposed or even cancelled out various other Indigenous structures of power (traditional warrior class, chiefly power, the Methodist Church, ethno-nationalism). Most importantly, Part E has shown that despite Fiji’s military involvement in international military campaigns, for example, it has also always functioned, police-like, as an apparatus of government and security. And this is important for an understanding of the military’s part in the bipolar governmental machine of the new legal order.

222 Teaiwa, above n 198, 204.
223 Norton, above n 215, 110.
Bainimarama: There is no government in place

By SAKISI NAVARANA

MILITARY Commander Commodore Bainimarama has said the election of the Prime Minister which he led by more than two years ago was not in accordance with the Constitution. The President yesterday afternoon informed him of the Court of Appeal's decision that the "ouster impugnations" he and the Party line were outside the jurisdiction of the President.

Bainimarama, in a statement issued late last night, said that, as commander of the RFMF, he had no authority to dissolve the government. "I am Commander of the RFMF, together with all services forces shall ensure that there will be no disturbance to law and order," he said.

"I also want to caution any person who is thinking of introducing the peace and security forces of our Fiji (that no such act will be tolerated)."

Last night Bainimarama came of age and showed that the interests of Fiji are bigger than those of any one individual, political party or segment of society.

— Editorial Comment

Last night Bainimarama came of age and showed that the interests of Fiji are bigger than those of any one individual, political party or segment of society.

— Editorial Comment

“Happiness to all of you that you must be loyal and patriotic citizens of our beloved country. You will be able to observe the peace and security forces of our Fiji (that no such act will be tolerated).”

—from More on Page 2, 3
Chapter 3
THREE PARTS OF THE LAW

Introduction
This chapter provides an historical overview of Fiji’s law and legal apparatus that in subsequent chapters will be read in relation to the novelty of Fiji’s new legal order. Following the timeline of Chapter 2 the discussion proceeds from pre-cession Fiji and early European contact, through colonisation to post-independence to present an account of some of the main features of the legal system which, since colonisation, is largely based on the English common law system. While written constitutions and other laws or rules held sway with varying reach and effectiveness prior to colonisation, by 1874 (the time of Fiji’s colonisation by the British), ‘the common law produced a positivized doctrine of Crown sovereignty’ which had significant implications for the way the colony would be governed and subsequently many aspects of post-colonial governance.¹ A ‘hierarchical and deferential attitude … toward the Crown prerogative’ reflected in an ‘unenforceable Crown trusteeship’ and a non-justiciable obligation of guardianship towards Indigenous Fijians,² are two of the currents discernible throughout a large part of Fiji’s legal history. And yet as far back as its annexation ‘Fiji was regarded an exceptional case’,³ neither a mark of British colonial expansionism nor later providing a clear cut locus of political authority.

Part A: Law and Legal Systems of Pre-Cession, Colonised and Independent Fiji focuses mainly on the constituting laws, including the three Independence/post-Independence constitutions that established Fiji’s governments and the legal context in which they would operate. Part B: The Coups and the Prasad Cases and Part C: The Coup and the Qarase Cases examine the three common law doctrines — the doctrine of necessity, the doctrine of

² Ibid.
effectiveness and the reserve powers or the prerogative — that were tested in the courts in the wake of the coups in 2000 and 2006. These doctrines and the cases in which they featured went to the heart of existential crises concerning the 1997 Constitution and Fiji’s legal order.\(^4\)

In that regard Fiji’s coup-related jurisprudence offers insights into the difficulties posed for legal thought at the limits of law, where what emerges, as Agamben puts it, ‘is the radical crisis of every possibility of clearly distinguishing between membership and inclusion, between what is outside and what is inside, between exception and rule.'\(^5\) At times it is the judiciary which is at the coalface of this crisis and Part C includes further discussion of the role of the judiciary in deciding on the ‘undecidable’.

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**Part A: Law and Legal Systems of Pre-Cession, Colonised and Independent Fiji**

**Pre-Cession Governments**

While the people of Fiji had their own rich and complex system of customary law when Europeans first arrived in Fiji in the 1800s, the Europeans brought with them jurisdictional and aspirational associations with European law. Some Fijian groups too, introduced new systems of law primarily to deal with issues provoked by European contact, in particular the question of land tenure. Wesleyan missionaries attempted to introduce a code of laws based on Christian principles, an import from their earlier efforts in Tonga, but it was the Tongan expatriate, Ma’afu, and the part Tongan chief, Vakawaletabua, (both also recognised as prominent Fijian chiefs) who were more successful in establishing their own regional governments and a system of laws along Tongan-European lines in their respective provinces of Lau and Bua. While short-lived, these systems of governance, as keenly observed by Peter France, provide an insight into the practices and possibilities of autonomous native governments, ‘corresponding to the traditional patterns of authority within the group [taking] …the first steps…to develop an indigenous system of government to deal with the problems which the changing times were bringing to Fiji.’\(^6\)

There were many features of the legislation of these governments that stood in contrast to later codifications of tradition, including the alienability of large pieces of land, the

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\(^4\) *Constitution (Amendment) Act 1997* (Fiji).


recognition of government controlled ‘waste lands’ and the provision for allotments of land to commoner tax payers. These native governments, however, did not meet the demands of the increasing white population, particularly those concentrated in the Bau region, which was ‘essentially a frontier society… [of] [p]lanters, heavily dependent on the profits of cotton cultivation…whose aim was to usurp ultimate power in the islands from the few powerful chiefs in whose hands it was concentrated’ and establish a national government.\(^7\)

As chief of Bau and then newly crowned king of the Kingdom of Bau, a position and government ‘wholly European in concept and inspiration’,\(^8\) Cakobau presented himself as best suited to head a constitutional monarchy ‘set up by the settlers … exclusively for their benefit’.\(^9\) Thus with the support (however short term the commitment) of the resident whites and Fijian chiefs such as Ma’afu, Cakobau legislated to set up Fiji’s first national government and a Lands Title Commission to issue land grants. The government was divided into two houses: a House of Representatives composed of elected whites and a Privy Council composed of Fijian chiefs and the King’s Cabinet. This arrangement accommodated the Fijian chiefs’ desire to be consulted and not ‘ruled by whites alone’,\(^10\) and also, as reported in the *Fiji Times*, ‘obviate[d] the necessity of the two races mingling in the Assembly and voting together.’\(^11\)

However, the Cakobau Government did not thrive. It met resistance from three main sectors: from the white settler community which protested against lack of consultation with them about formation of government and the new constitution or else rejected various liabilities such as taxes demanded by the new government; from whites and Fijians who saw that Fijians would be mercilessly exploited at the hands of white speculators and ambitious Fijian chiefs; and also from chiefs unconvinced of Cakobau’s regal entitlements. Cakobau himself was prone to disregard various constitutional requirements particularly those pertaining to land transfer. Despite his government ‘passing laws favouring its merchant-planter backers and finding ways to line the pockets of its chiefly members’,\(^12\) debts and dissent in all quarters mounted.

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\(^8\) France, above n 6, 78.
\(^9\) Ibid 92.
\(^10\) Spurway, above n 7, 312.
\(^11\) Ibid 313.
The new government’s survival depended in part on the willingness of chiefs to renounce traditional authority in obeisance to the new laws and legal system. Ma’afu, among others, believed that a general government was only possible if Fijian customs concerning chiefly management of their own or any other chiefdom were abandoned. And his loyalty to a general government was dependant on that. However, for many chiefs, measures such as the new Crown Lands Bill which ‘proposed to convert all Fijian land not occupied by Europeans into Crown land in direct defiance of the traditional rights of the mataqali, was intolerable.’ And, as indicated above, Cakobau himself ‘continued to use his personal authority in land dealings as he had done before the [Land Titles] Commission or the Government, were in existence.’

By 1873, with civil war threatening on different fronts, many whites and Fijians believed that the solution to the unrest and financial crisis in the country lay in Fiji being ceded to Britain. Two commissioners were appointed to investigate whether or not Cakobau’s Government should be recognised and what sort of power the British should exert in Fiji, whether it would be magisterial power wielded by the British Consul over British subjects, establishing a protectorate, or annexing Fiji.

**British Notions of Sovereignty**

Prior to Cession, the laws of various European jurisdictions pertained mainly to the criminal acts of expatriates. With the increase of Europeans arriving during the 1800s, their respective countries appointed consuls to administer their law in the more populated areas of the islands. British subjects were required to come onto British soil to be tried, but in practice it was convenient for captains of visiting naval ships to execute the law. Indeed, the military capabilities of these (and other European and American) ships proved to be indispensable not only in the administration of criminal law but also in the protection of various other European interests, such as the deeds to land sales.

Since Tudor times all English (and then British) subjects owed allegiance to the Crown and were liable for certain crimes wherever they were committed. This relation was ‘founded upon the old common law conception of the subject’s ligeance accompanying him wherever

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13 Spurway, above n 7, 319.
14 Ibid 324.
15 France, above n 6, 98.
he travelled, an indestructible personal relation between ruler and subject.\textsuperscript{16} The personal nature of that bond was a legacy of medieval feudal relations and which characterised notions of constitutional authority more generally. Played out in England’s first Empire and its reach into the New World (from 1580s to the 1780s), constitutional authority, as exhibited in imperial practice, recognised the realities of other forms of governance, such as encountered amongst the Gaelic tribes or later, the Mughal kingdoms of India and the First Nations tribes of America. As P G McHugh argues, ‘the Crown recognised the juridical capacity of non-Christian rulers to license a British \textit{imperium} in their territory. Relationally the Crown proceeded on the basis that any governance or \textit{imperium} over the non-Christian societies of those territories was directly related to their consent.’\textsuperscript{17} But, as McHugh also points out, this was not a static state of affairs and as the concept of sovereignty emerged in modernist thought in its all-encompassing, monolithic form, so too did an enduring tension between the tendency towards pluralistic and monolithic forms of sovereignty,\textsuperscript{18} a tension that was apparent in the ongoing encounters between British sovereignty and Aboriginal societies.

In its modern, monolithic and more secular form, British sovereignty coincided in different times and places with several ways of thinking. Enlightenment thought, humanitarianism, evangelical Christianity, the concept of progress through stages of civilisation (but rooted in the unity of mankind), liberalism, individualism and social Darwinism, combined with and shaped the law to produce unique politico-legal hybridities in British colonies. Subsequently, by the time of Fiji’s annexure in the late 1800s, European settlement, trade and commerce was expanding to the tune of various forms of nineteenth century thought with particularly racist undertones. As Spurway notes:

\begin{quote}
There existed in the minds of most of members of the fractious settler society a notion of race pre-eminence, such as that articulated in the pages of the \textit{Fiji Times}: ‘True to the instincts of the Anglo-Saxon race we have come to this ultima thule of creation; to bring a savage race within the pale, and to partake of the benefits of our civilization; let us hope to bring them beneath the sway of the British sceptre, and thus to open up more fully a new and profitable field for British enterprise.’\textsuperscript{19}
\end{quote}

However, such attitudes (and accompanying practices) did not recommend the concept of full British annexation to Fiji’s chiefs. Their resistance to ceding their land (and authority) to

\textsuperscript{16} McHugh, above n 1, 70.
\textsuperscript{17} Ibid 66.
\textsuperscript{18} Ibid 64.
\textsuperscript{19} Spurway, above n 7, 345.
Britain was expressed in a document prepared for Queen Victoria, which requested, among other things, that in shifting their allegiance the people would nonetheless ‘retain all existing rights real and personal’ and the ruling chiefs would be recognised as owners of the land and guardians of the rights and interests of their tribes.\textsuperscript{20}

These requests did not go down well in the Colonial Office with Henry Herbert pointing out that they would ‘concede to her Majesty only “the high privilege” of governing Fiji at the expense of the British taxpayer.’\textsuperscript{21} The formal reply came from Britain six months later through the Governor of New South Wales, Sir Hercules Robinson, who advised the chiefs that only a complete and unconditional transfer of sovereignty was acceptable but with reassurances that ‘reasonable rights and interests of chiefs would be recognised as far as consistent with British sovereignty and colonial form of Government.’\textsuperscript{22}

\textit{Colonisation and Introduced Law}

Britain’s annexure of Fiji meant the introduction and application of the British legal system. The constituent laws or ‘laws that establish the main organs of government and define the relationship of people of that country to those organs’,\textsuperscript{23} such as the constitutions enacted under Cakobau’s Governments, came to an end and were replaced by constituent laws which were ‘enacted in Letters patent, orders in Council and Royal Instructions issued by the British Crown.’\textsuperscript{24} Other British law that came into force in the dependency of Fiji fell under the categories of legislation, subsidiary legislation and the principles of common law and equity.

Legislation was made up of imperial laws or ‘introduced legislation’ from Britain that was applied to or adopted in Fiji and colonial laws or ordinances made in Fiji by the Governor. Introduced legislation consisted of statutes of general application that were in force in England on 2 January 1875. These statutes were those that regulated conduct or conditions which exist among humanity generally as distinct from those that regulated conduct or conditions peculiar to the United Kingdom.\textsuperscript{25} They applied only ‘so far as circumstances admit’ in a particular country (Fiji in this case).\textsuperscript{26} Subsidiary legislation was usually made by the Governor to give effect to his ordinances and included orders, rules and proclamations.

\begin{footnotes}
\item[20] Report on the Cession of Fiji islands, Article 15 cited in Drus, above n 3, 106.
\item[21] Drus, above n 3, 106.
\item[22] Spurway, above n 7, 419.
\item[24] Ibid 64.
\item[25] Ibid 28.
\item[26] Ibid 18.
\end{footnotes}
Eventually the autocratic Governor legislated with the advice and consent of a legislative council whose composition changed over time, from British officials to more elected Fijian and Indian representatives.

As with introduced legislation, the principles of common law and the rules of equity that had been established in England by 2 January 1875 were also extended to Fiji, ‘so far as they were not inapplicable to the circumstances of the country.’ As Jennifer Corrin notes, ‘[while] this would seem to allow a court to hold that a particular rule of common law or equity is not in force because it is inconsistent with a rule of custom which is part of the circumstances of the country [t]his does not seem … to have occurred’, even after independence. Customary law, however, was recognised by the Governors at least to the extent that it was relevant to traditional forms of land tenure as administered by the Native Administration or was embodied in the Fijian Regulations, drawn up by the Native Affairs Board and administered in special Fijian Courts. By 1962 these courts had fallen out of use. Later constitutions (but not Fiji’s most recent) would make provision for a greater role of custom in the legal system. However, Parliament has not legislated to provide for the application of customary laws or for dispute resolution in accordance with traditional Fijian processes despite the provisions of the 1990 or 1997 Constitutions to do so.

In his analysis of the common law and Aboriginal societies, McHugh observes that from the mid-nineteenth century:

> the common law produced a positivized doctrine of Crown sovereignty which denied any original or residual legal capacity in the aboriginal tribes…The Colonial office, operating upon a guardianship principle, regarded British sovereignty over aboriginal peoples as vital to their protection from exploitation by settlers.29

That obligation of guardianship ‘was inherently non-justiciable … [and] reflected the hierarchical and deferential attitude in the nineteenth century towards Crown prerogative.’ As McHugh argues, tribal peoples’ ‘claim to distinctiveness’ as an aspect of their native sovereignty then had to be made within the framework of constitutionalism and common law systems that ‘had become, where tribal peoples were concerned, doctrinaire and fixated with

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27 Ibid 25.
29 McHugh, above n 1, 213.
30 Ibid.
shoring rather than limiting the governmental hand.\textsuperscript{31} Although British sovereignty in Fiji assumed a similar ‘monologic, suppressive tone’,\textsuperscript{32} Fiji presented a slightly different set of conditions to the British colonisers that demonstrated some of the tensions and contradictions posed by a lingering or reconfigured pluralism and that also conditioned the subsequent transformations to independence and beyond.

While sovereignty had been ceded to the British, there was a sense in which that sovereignty in Fiji was not quite as exhaustive or exclusive as it had generally become by the 1800s. This played out in the notion of Fijian paramountcy which may not have usurped the Crown’s paramountcy but it was fashioned along similar lines and fostered in the sense of alliance with the colonisers or at least as a feature in an order of succession. However, sovereignty exercised as an unreviewable or non-justiciable prerogative power or as a form of Crown protection over Indigenous peoples and their concomitant distinct claims for that special treatment did not sit comfortably with the impulse towards equality, particularly as espoused by the Indo-Fijians, presaging the lay of future politico-legal tensions in Fiji’s nascent nationhood.

If Fiji’s Colonial Government can be considered as taking seriously its role of protector of Indigenous Fijians, the same has certainly not been said of its role as trustee of indentured labourers’ rights. In 1879 Lord Salisbury issued a dispatch which then and later was relied upon by the Indian diaspora in Fiji to attest to their rights as British subjects. The dispatch stated:

\begin{quote}
Above all things we must confidently expect, as an indispensable condition of the proposed arrangements, that the Colonial laws and their administration will be such that Indian settlers who have completed the terms of service to which they agreed, as the return for the expense of bringing them to the Colonies, will be in all respects free men, with privileges no whit inferior to those of any other class of Her Majesty’s subjects resident in the Colonies.\textsuperscript{33}
\end{quote}

It is understandable that for the girmityas, who laboured under the difficult and highly regulated conditions of indenture, these words may well have given hope and solace. The welfare of Indians who came to work in Fiji from 1879 was under the protection of the Agent General of Immigration and various Labour Ordinances largely amalgamated under an

\begin{itemize}
\item \textsuperscript{31} Ibid 214.
\item \textsuperscript{32} Ibid.
\end{itemize}
Indenture Ordinance. However, dominating the sugar industry, the CSR was also influential in the interpretation and enforcement of the law, often winning concessions or the support of the government in disputes between workers and planters. Indeed, as Lal notes, ‘there was a startling discrepancy between the extent to which the indentured labourers and their employers were able to use the courts.’

Racism underpinned much of the practices and policies of the time, ‘not so much in causing violence to the indentured workers as in blunting sensitivity to it. All planters and overseers were white, while the labouring force was coloured, members of an assumed inferior race whose own best interests were served by being kept under white tutelage.’

The playing field was not levelled out for Indians by the freedom guaranteed at the end of indenture or supposedly accompanying uncontracted Indian migrants. Lord Salisbury’s words, which, according to Lal, ‘are perhaps the most misunderstood’ in Fiji’s politics, were often relied on in political debates as, ‘the charter of equal rights for the Indian population of Fiji, equal in spirit and intent, they point out, to the Deed of Cession which promised the paramountcy of Fijian interests when Fiji was ceded to Great Britain in 1874.’

But rather than smoothing a path forward, the dominant positions or principles, (that Lal succinctly terms as paramountcy for the Fijians, parity for Indians, and the third position of privilege for the Europeans) that leaned on or were gleaned from documents such as the Deed of Cession or Lord Salisbury’s dispatch, became dangerously entangled in the battlezone of Fiji’s nascent statehood, and reflected in Fiji’s constitutions and constitution-making processes.


As Fiji moved towards independence, Britain enacted written constitutions in 1963 and 1966 and then with independence in 1970, brought a constitution in force through an Order in Council, made by the Queen and enacted by the British Privy Council. The 1970 Constitution largely reproduced and further entrenched the colonial system of governance, with some accommodation of a less racial system sought by the Indo-Fijians and the

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36 Ibid 80.
38 *Fiji (Constitution) Order 1963* (UK).
39 *Fiji (Constitution) Order 1966* (UK).
possibility of future constitutional review. As a projection of the past and codified in the Constitution, the settlement in 1970, as commented upon by Yash Ghai and Jill Cottrell:

embodied a mix of the democratic and the oligarchic; liberalism and ethnic separatism; equality of all and paramountcy of Fijians; a market economy and restrictions on land and labor; a unitary state and significant autonomy for one community only; and freedom of religion and the close relationship of one religion, Christianity, to the state. The whole system depended on maintaining the separation of races or, more accurately, on keeping Indo-Fijians outside the alliance of others.41

Apart from one ‘hiccup’ in 1977 when the National Federation Party (the main Indian Party) won the elections but was sidelined by the President for hesitating to announce their leader (discussed in Chapter 2) the 1970 Constitution served the interests of the dominant Fijian chiefly party well for seventeen years. However, when the coalition of the Labour Party and National Federation Party won government in 1987, constitutional change followed soon after. Under the military command of Lieutenant Rabuka the two coups in 1987 ushered in the 1990 Constitution.42 This Constitution closed the ‘loopholes’ that had permitted anything other than Fijian dominance of government.

Customary law was recognised under the 1990 Constitution and was no longer subject to provisions guaranteeing protection from discrimination.43 The opinion or decision of the Native Lands Commission on customary matters was final and unreviewable in the Courts,44 and additional protection was afforded through Parliament’s entitlement to curb free speech, specifically in order to protect the ‘the reputation, the dignity and esteem of institutions and values of the Fijian people’.45 While the new Constitution also provided for the protection of ‘the reputation, dignity and esteem of institutions and values of other races in Fiji, in particular their traditional systems’,46 it worked to produce instability in the light of the societal changes and economic realities of the time. In the view of Ghai and Cottrell:

42 Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990 (Fiji) (‘1990 Constitution’).
43 Ibid s 16(3)(d).
44 Ibid s 100(4).
46 Ibid.
On the one hand, the indigenous institutions had been largely freed of constitutional supervision; on the other, however, many of the native institutions had been so recomposed and manipulated they could no longer be regarded as indigenous but, rather, as instruments of those Fijians who controlled the state.47

Rabuka’s Government suffered international censure and local criticism, not just for the coups and the Constitution but also for the corruption and inefficiency perceived to be afoot. With the crisis of confidence and recognising the need for a broader multiracial support base, Rabuka initiated constitutional review in 1993.

The Government appointed New Zealand’s former Governor General and Archbishop, The Right Reverend Sir Paul Reeves, as Chairman of a Constitutional Review Commission, with Indigenous Fijian politician, Tomasi Rayalu Vakatora and Indo-Fijian academic, Brij Lal, as the two Commissioners.48 The Commission was required to produce a report recommending constitutional change that would, ‘meet the present and future needs of the people of Fiji, and promote racial harmony, national unity and economic and social advancement of all communities.’49 After nearly two years work receiving over eight hundred written submissions, multiple academic research papers and specialist advice, conducting numerous public debates and meetings with government and non-government organisations, making visits to similarly placed countries and scrutinising previous constitutions, the Commission compiled its report. It recognised that Fiji’s constitutional problems stemmed from an uneasy interplay between four previous constitutional arrangements:

Two were understandable responses to Fiji’s multi-ethnic society: the principle that Fijian interests should be paramount and the communal system of representation in Parliament. Two reflected the Westminster system of government that Fiji inherited: the role of political parties and the principle that a government must command the support of a majority in Parliament.50

To address what the Commission saw as the need for comprehensive but gradual change, the lengthy (but inspiring) report featured hundreds of recommendations, many of which were included in the subsequent 1997 Constitution.51 However, many were not included or were replaced by other measures such as the multi-party cabinet, designed to foster inter-ethnic

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47 Ghai and Cottrell, above n 41, 652.
48 This is the same Brij Lal whose work as an historian is an important source also relied on in the previous chapter.
50 Ibid 5.
51 Constitution (Amendment) Act 1997 (Fiji) (‘1997 Constitution’).
cooperation and national unity but, in fact, prompting conflict, frequent litigation and hardening of racial divisions. This is not to suggest that the Report was above criticism or even that the 1997 Constitution was totally ineffective as an instrument of national unity. For many Fijian people the enactment of the 1997 Constitution briefly inspired hope for a less troubled future. But, like its predecessors, the 1997 Constitution laboured under misconceptions, ‘caught uneasily’ in what Ghai and Cottrell refer to as a twisting ‘integration-consociation polarity’.\(^{52}\) In their discussion Ghai and Cottrell use the term ‘integration’ to refer to political processes ‘advocating an integrated, non-racial state, based on individual rights’, and the term ‘consociation’ to characterise the free political association of separate or communal groupings.\(^{53}\) The problem with consociation-type arrangements, as they see them in Fiji’s constitutions, is that they can ‘seamlessly slide into hegemony’.\(^{54}\) So where consociation might celebrate diversity, it (or its misapprehension) has more often exacerbated divisiveness, exclusivity and the control of one group over another.\(^{55}\) Ghai and Cottrell thus offer the following perspective on Fiji’s 1970, 1990 and 1997 Constitutions:

The constitutions have been based on the assumptions (a) that there are distinct communities separated by their race (thus privileging this identity over all else); (b) that these communities are homogenous, sharing common interests (thus ignoring the many divisions within each of the communities); and (c) that their interests are antagonistic (thus subverting the aspirations of the many people of all communities who yearn for integration and common identity). The rules for access to state power have given some reality to the ideology implicit in the foregoing. Rules for elections and the formation of governments have helped those politicians who have set themselves up as the so-called protectors of ethnic and communal interests against the ostensible designs or conspiracies of other communities. Politicians have become comfortable with racial politics, having had little opportunity and even less incentive to learn of the problems facing other communities. So strong has this become the political tradition that even constitutional devices to promote accommodation and integration have been turned to adversarial uses.\(^{56}\)

In 1999 the first general election under the 1997 Constitution was won by the FLP Coalition led by Mahendra Chaudhry. The new Constitution featured the ‘alternative vote’ (AV) or preferential voting system, making Fiji ‘the first country in the world to adopt the AV system for nationwide legislative elections as a deliberate tool for managing ethnic diversity and

\(^{52}\) Ghai and Cottrell, above n 41, 639.
\(^{53}\) Ibid.
\(^{54}\) Ibid.
\(^{55}\) Ibid 668.
\(^{56}\) Ibid 667.
mitigating conflict. However, as per the Constitution, the electoral process (and outcome) did not favour the more moderate and conciliatory party politics such as the coalition forged between Rabuka and Reddy and instead was at least partially to blame for the emergence of ethno-extremism and the coup that overthrew Chaudhry’s Government within its first year. Similarly the concept of a multi-party cabinet intended to promote power-sharing in a government of national unity was easily derailed and instead became a cause célèbre for Chaudhry and later Qarase.

Crucial testing of the 1997 Constitution, not only in regard to its interpretation by the courts but also as an existential question of Fiji’s legal order has significantly involved the development of three common law doctrines. In the discussion that follows I will focus on the doctrine of necessity, the doctrine of effectiveness and the reserve powers or the prerogative, their implications for constitutional law and the Courts that have interpreted it. The cases arose in the wake of the coups in 2000 and 2006.

Part B: The Coups and the Prasad Cases

Doctrine of Necessity

The Prasad cases concerned events of 2000 when George Speight and a group of military and other supporters stormed parliament and held parliamentarians hostage. The same day as the coup President Mara declared a State of Emergency. Undeterred, Speight purported to abrogate the 1997 Constitution and appoint a new president. To control the spiraling chaos and violence on the streets, the military laid (light) siege to the parliamentary complex. Commander Bainimarama, out of the country on the day of the coup, returned to initiate negotiations with Speight and secure the release of the hostages. On advice from the Acting Prime Minister (appointed by the President in Chaudhry’s absence due to his being held hostage), President Mara prorogued parliament and then Acting Prime Minister Momoedonu resigned.

Shortly after, Bainimarama advised the President that the Constitution should be abrogated. Following the President’s refusal to remove the Constitution and his subsequent departure

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from the main island of Viti Levu, Bainimarama assumed full executive control of
government, declaring the abrogation of the Constitution and the imposition of martial law.
The following month Speight agreed to the terms of the Muanikau Accord which was
designed to address Speight’s political demands including amnesty for the coup-makers in
exchange for the release of the hostages and the surrender of arms. Speight was arrested two
weeks later in possession of weapons said to contravene the terms of his amnesty, and was
charged with treason.

The Interim Military Government remained in control until authority was transferred by
decree to an Interim Civilian Government under the executive authority of President Iloilo,
newly appointed by the Great Council of Chiefs. President Iloilo then appointed Interim
Prime Minister Qarase and various other ministers.

The judgments in the Prasad cases, delivered by the High Court in November 2000 and the
Court of Appeal in March 2001, concerned the status of the 1997 Constitution, the legal status
of the Interim Government and the lawfulness of various activities outlined above.\textsuperscript{58} The
action was brought by Chandrika Prasad, an Indo-Fijian farmer from Viti Levu who had been
forced to relocate to a refugee camp after being attacked by Speight sympathisers. As reported
on the Scoop website:

Prasad said he wanted to fight his case for the many families of Muainaweni, who lost
their belongings as a result of the political upheaval…when houses were set on fire,
 farms raided, farm animals slaughtered, and household items and farming equipment
carted away. There were also cases of physical assault on residents. Crimes were
committed without fear of prosecution…Prasad said toiling the land of Muainaweni for
the past four decades was painstaking and being forced out of their homes after all these
years was very sad and “mentally disturbing”… [he] described the post-May 19 coup
experience as one in which "civilisation had come to an end" in a community that
boasted a previously harmonious co-existence between ethnic Indians and indigenous
Fijians.\textsuperscript{59}

Prasad wanted his case to focus international attention on human rights violations in Fiji and
sought declaratory orders including that the 1997 Constitution was still in force and that the
elected government was still the legitimate government. Presiding judge, Gates J, commented

\textsuperscript{58} Prasad v Republic of Fiji [2000] FJHC 121 (15 November 2000); Republic of Fiji Islands v Prasad [2001]
FJCA 2 (1 March 2001).
\textsuperscript{59} Scoop, The Man Behind the Constitutional Case (21 February 2001)
that the case ‘may be the second most significant and important action ever brought before a Fiji court’,\(^{60}\) (the first being the aborted case concerning the 1987 coup). However, according to some commentators the \textit{Prasad} cases do have kudos as the first decisions to ‘restore a Constitution, and the democratic system of government created by it.’\(^{61}\)

While the Constitution may have survived, at least for a while, the democratic system remained in abeyance until the country returned to the ballot box and parliament resumed seven months later, with the bonus of incumbency supporting Qarase’s electoral success. Such situations demonstrate how the artifice of politics can easily hide behind the edifice of law. But also, as Michael Head argues in his analysis of the \textit{Prasad} cases, beyond the realities of what actually happened after the judgments, a close reading of the decision reveals that, ‘the Court of Appeal of Fiji refused to require democracy before upholding the legal authority of a coup d’état.’\(^{62}\) Head draws attention to the fact that the Court of Appeal was silent on the question of parliament’s recall and ruled implausibly on the timing of President Mara’s resignation which in effect ‘permitted the regime to meet, substantially, the demands of the Western powers for a return to constitutional rule, without disrupting the prevailing order.’\(^{63}\)

In addition, the Court rejected a democratic criterion for a successful revolution from the Granadan \textit{Mitchell} case that stipulated, ‘it must not appear that the regime was oppressive and undemocratic’, on the grounds that it went to the legitimacy rather than the legality of a regime.\(^{64}\)

Judicial review of the legality and legitimacy of coups, emergency powers and new legal orders is an endemic feature of much of the post-colonial, politico-legal landscape. In common law countries the relevant case law is laced with persuasive precedents from the jurisprudence of similarly beleaguered nations. Fiji’s constitutional cases have contributed significantly to that pool of legal knowledge and also demonstrate the weight that such judgments carry, not only in relation to the country in which they are delivered but also in shaping the legal co-ordinates of others. The judgments in the \textit{Prasad} cases, developing the doctrine of necessity and affirming the doctrine of effectiveness, were closely modeled on cases heard in jurisdictions such as Pakistan. An interesting feature of these judgments is the

\(^{60}\) \textit{Prasad v Republic of Fiji} [2000] FJHC 121 (15 November 2000).


\(^{63}\) Ibid.

\(^{64}\) \textit{Republic of Fiji Islands v Prasad} [2001] FJCA 2 (1 March 2001) (‘\textit{Prasad No 2’}).
way that such legal reasoning can almost be seen as prescribing the course of future events and their legal justification, such as in relation to the way events (and court cases) unfolded with the coup in 2006 and beyond.

Philosophers as far back as Aristotle have entertained the concept of necessity and in the common law too, the doctrine of necessity has a long but confusing pedigree. It makes an appearance in English law reports of the 1500s in cases such as Reniger v Fogoso in 1551 in which it was stated:

> In every law there are some things which when they happen a man may break the words of the law, and yet not break the law itself; and such things are exempted out of the penalty of the law, and the law privileges them although they are done against the letter of it, for breaking the words of the law is not breaking the law, so as the intent of the law is not broken. And therefore the words of the law of nature, of the law of this Realm, and of other Realms, and of the law of God will also yield and give way to some acts and things done against the words of the same laws, and that is, where the words of them are broken to avoid greater inconveniences, or through necessity, or by compulsion.65

Different interpretations of the adage necessitas legem non habet (necessity has no law) suggest either that necessity does not recognise any law or else creates its own law but generally philosophical debate concerns whether necessity is inside or outside the law, juridical norm or mere fact. Agamben argues that necessity is actually a threshold concept ‘where fact and law seem to become undecidable.’66 And he is dedicated to lifting ‘the veil covering this ambiguous zone’.67 In State of Exception Agamben discusses different opinions on the concept of necessity and its relation to law and the legal order.68 Seen as a foundation of the state of exception or emergency, a judgment concerning the existence of necessity ‘resolves the question concerning the legitimacy’ of a state of exception.69

In Fiji at the time of the Prasad cases the state of exception or emergency was regulated explicitly in the Emergency Powers section of the Constitution70 and the legislation enacted pursuant to that section.71 However, the hostage situation during Speight’s coup made adherence to the legislative requirements impossible, demonstrating, in part, Carl Schmitt’s

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65 Reniger v. Fogossa (1551) 75 ER 1, 29.
67 Ibid 2.
68 See ibid.
69 Ibid 24.
70 Constitution (Amendment) Act 1997 (Fiji) ss 187-189.
contention that the exception cannot be ‘made conform to a preformed law’. Schmitt further argued that the impossibility of anticipating or spelling out the precise details of an emergency and its elimination meant that ‘the precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited. From a liberal constitutional point of view, there would be no jurisdictional competence at all.’ Common law judges, do however, have the competency of interpreting common law doctrine through which they have augmented the scope of emergency powers in ways that Schmitt may have approved. Indeed, On the Three Types of Juristic Thought contains a tentative endorsement by Schmitt of English case law as not being ‘susceptible to the one-sidedness of normativism’ in the same way as adjudications of law in other European nations.

As a doctrine applicable to acts of state, the doctrine of state necessity ‘provides a justification for otherwise illegal government conduct during a public emergency.’ However, not all legal commentators agree that all exceptions to a law or legal system should find justification in the common law system. Mark Stavsky, for example, argues that the doctrine is susceptible to abuse (and consequently the most scathing of criticisms). He writes:

> The necessity doctrine is not suitable to a coup d’état. The operation of the doctrine presumes a political structure where the rule of law prevails. Since a coup in a constitutional political structure is a denial of the rule of law, reliance upon the necessity doctrine is a sham. The use of the doctrine attaches legal respectability to an unquestionably illegal regime and gives a new government the appearance of constitutional propriety. Power and law are at odds in a coup, but necessity forces them to converge.

However, until the 1958 Pakistani Dosso case, the doctrine provided the main common law framework to ‘validate extra-constitutional acts of lawful regimes.’ After that case, courts developed Kelsen’s theory of revolutionary legality to accommodate revolutionary changes in government (discussed in the next section). The doctrine of state necessity evolved to include non-government conduct, such as the acts of de facto heads of state. Underpinning these and other doctrines to different degrees, the principle of salus populi suprema lex (the welfare of

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72 Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty (George Schwab trans, The University of Chicago Press, 2005) 6.
73 Ibid 7.
76 Ibid 388.
the people is the supreme law) in effect creates a mélange of similar and often interchangeable legal justifications for an otherwise unlawful exercise of state power. The Prasad cases were decided amidst this jurisprudential field of possibilities.

In Prasad (No 1) Gates J invoked the salus populi principle to validate the President’s proclamation of a State of Emergency under the doctrine of necessity. While the emergency power was available to the President under the Emergency Powers Act, the Act stipulates, among other things, that the President must act on advice of the Cabinet. However, since most of the Cabinet was being held hostage, Gates J was ‘satisfied that the President acted as lawfully as he could in the circumstances, that he acted under the doctrine of necessity and that he acted in an attempt to buttress the lawful framework of the State.’

Justice Gates drew on the pragmatics of Oliver Cromwell to further elucidate:

> Oliver Cromwell who had briefly studied law at Lincoln’s Inn but who had probably gained his directness and common sense from farming in Cambridgeshire allegedly said: “If nothing should be done but what is according to law, the throat of the nation might be cut while we send for someone to make a law.”

However, Gates J was more circumspect in regard to applying the doctrine of necessity to legitimise Bainimarama’s conduct. Relying on case law from various international jurisdictions as well as academic legal commentary, Gates J pointed to the salient features of the doctrine that would determine which of Bainimarama’s acts could be legally justified. Drawing from the Mitchell case in Granada, Gates J laid down the requisite conditions in order for necessity to be a constitutional validation of unconstitutional acts: (a) there must be an emergency or crisis that is (b) not provided for in the constitution; (c) the emergency action must be a temporary and (d) a proportionate response; (e) the acts must be done in order to uphold the rule of law and the existing constitution; (f) the doctrine is valid only to protect not destroy, it cannot be resorted to in order to justify or support the abrogation of the existing legal order, and it would allow only for a short-lived suspension of the constitutional structure.

Justice Gates appeared to extend the doctrine to a non-head of State with his reference to the work of New Zealand Professor Brookfield who writes that the power of Head of State extends to executive and legislative acts intended to preserve or restore the Constitution.

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78 Prasad v Republic of Fiji [2000] FIHC 121 (15 November 2000) (‘Prasad No 1’).
79 Ibid.
80 Ibid.
Justice Gates also quoted from Lord Pearce’s dissenting opinion in the *Madzimbamuto* case where he refers to ‘acts done by those actually in control’ and the Supreme Court of the United States which accorded validity to actions of the southern confederacy following the outbreak of Civil War.\(^{81}\) In that regard the doctrine begins to sound more like the doctrine of implied mandate which is a variation of the necessity doctrine that applies to a usurper rather than emergency measures of an executive or legislature. The theory of implied mandate derives mainly from the work of Hugo Grotius according to whom ‘courts must validate certain necessary acts of a usurper because the *lawful* sovereign would want these acts to be done in the interests of preserving the state.’\(^{82}\) While this distinction may appear academic it is noteworthy that later in the political turmoil of 2006 the President explicitly endorsed Bainimarama’s acts as something he himself would have done in the interests of preserving the State.\(^{83}\)

With the conditions for necessity in mind, Gates J proceeded to determine which acts of Bainimarama could fall under the protection of the doctrine:

> the doctrine of necessity could come to aid Commodore Bainimarama in resolving the hostage crisis, imposing curfews, maintaining roadblocks and ensuring law and order on the streets. Once the hostage crisis was resolved and all other law and order matters contained if not entirely eradicated, the Constitution, previously temporarily on ice or suspended, would re-emerge as the supreme law demanding his support and that of the military to uphold it and to buttress it against any other usurpers. The doctrine could not be used to give sustenance to a new extra-constitutional regime … Nor could it provide a valid basis for abrogating the Constitution and replacing it with a Constitutional Review Committee and an Interim Civilian Government.\(^{84}\)

What is apparent in the application of the doctrine is what Agamben following Schmitt recognised as the ‘extreme aporia’ of judging necessity which concerns the presupposition of ‘a pure factuality’.\(^{85}\) However, this is not a problem simply because ‘necessity clearly entails a subjective judgment, and … obviously the only circumstances that are necessary and objective are those that are declared to be so.’\(^{86}\) It is also because, as part of the larger problematic, ‘necessity ultimately comes down to a decision … [and] that on which it decides

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\(^{81}\) Ibid.

\(^{82}\) Stavsky, above n 75, 374.

\(^{83}\) *Qarase v Bainimarama* [2009] FJCA 9 (9 April 2009) [67].

\(^{84}\) *Prasad (No 1)* [2000] FJHC 121.

\(^{85}\) Agamben, above n 66, 29.

\(^{86}\) Ibid 30.
is, in truth, something undecidable in fact and law. Here Schmitt’s intuition on the
decisionist foundation of the state of exception (and of necessity) articulates the
(paradoxical) link between the state of exception and the law. The decision (concerning the
exception or necessity) ‘frees itself from all normative ties’ but ‘the exception remains …
accessible to jurisprudence because both elements, the norm as well as the decision, remain
within the framework of the juristic.’ And importantly for Schmitt’s theory, ‘the telos [of
which] … is the inscription of the state of exception within a juridical context’, the decision-
maker or the sovereign ‘who can decide on the state of exception, guarantees its anchorage to
the juridical order.’

In the common law system the judge’s decision on the exception or necessity may involve the
conditions of the judgment itself (orders of the court for example) or the subject matter under
judgment or else involves the jurisdiction of the court (its legal authority or the obligation to
make a judgment). In each of these contexts the structure or topology of the exception has
similar contours. In the Prasad cases, for example, a judgment was made concerning
necessity but not in the light of a norm (as it might normally be). The suspension of the
Constitution at the time of various acts under scrutiny meant that the judges were free to
decide in response to a concrete situation. In Prasad (No 2) the Court of Appeal also cited
the Mitchell case and the words of Haynes P who declared ‘It is for this court to pronounce on
the validity (if so) of any unconstitutional action on the basis of necessity, after determining
as questions of fact, whether or not the … conditions [for necessity] exist.’ Those conditions
included exceptional circumstances not provided for in the Constitution that called for
immediate action, no other course being reasonably available to the President. Certainly
there were few who could debate that on this occasion the hostage crisis constituted
exceptional circumstances. But some crises may be more opaque, such as when the crisis is
engineered by those who would like to avail themselves of the necessity doctrine. These and
other aspects of a crisis have also come to form some of the doctrinal criteria (temporariness,
proportionality etc) for interpretation and application of necessity. And similarly, while
Schmitt may have rejected the notion that the exception could or should be regulated by law

87 Ibid.
88 Schmitt, above n 72, 13.
89 Agamben, above n 66, 32.
90 Ibid 35.
91 Daniel McLoughlin, 'In Force Without Significance: Kantian Nihilism and Agamben's Critique of Law' (2009)
  20 Law Critique 245, 249.
92 Ibid.
93 Mitchell v Director Public Prosecutions [1986] LRC (Const) 35 (Granada).
94 Republic of Fiji Islands v Prasad [2001] FJCA 2 (1 March 2001)
he was concerned that concept be ‘distinguished from other ideas like absolutism, despotism or tyranny’ and was adamant that the concept ‘always remains in a state of functional dependence on an existing or imagined constitution.’ 95 This meant, among other things, that the power to decide – sovereign or dictatorial power – could only be transitional. 96

While the common law system may not fit as neatly or immediately into the Schmittian schema even the doctrine of precedent cannot stave off the exception in law. The doctrine of precedent with its foundations buried in time immemorial guarantees legal authority through measures of time and tradition to the judges or legal decision-makers of the present who move backward-looking toward the future. This notion of law’s authority, often expressed in the syntagm ‘Law of law’, 97 maintains a foundational mythologeme, a presupposition of ‘a mysterious centre of power that ought to remain ungraspable, universal, transcendent and ineffable’. 98 And while judges may have at their disposal a range of terms to relate their judgments to precedent and anchor them to Law, the finding and declaring of law according to the common law tradition is also, as Peter Goodrich observes so elegantly, ‘an interlinear and supra-textual moment of invention, an entry into practice, and a poetic moment of creation of judgment. There is no law here, only image, and the work of legal invention that takes place outside of law.’ 99 The suspension of law, for example, functions just as significantly in the common law judgment as in the ‘necessary’ suspension at the time of the crisis and also functions, through the judges, as a fusion of law and non-law.

The concept of effectiveness or efficacy in the doctrine of effectiveness plays a similar part to necessity. But instead of the concrete conditions of crisis or emergency it is the concrete conditions of effectiveness produced after the crisis that must be judged. The next section focuses on the doctrine of effectiveness which featured in the Prasad cases in the High Court decision and even more prominently in the decision of the Court of Appeal.

The Doctrine of Success

In Prasad (No 1) Gates J recognised that Bainimarama had strayed beyond the reach of the doctrine of necessity but he was not prepared to consider the wayward part of Bainimarama’s

96 Ibid 127.
98 Ibid 6.
conduct in the context of revolution or the doctrine of effectiveness which countenances the possibilities of a successful revolution. This was because, as he so quixotically put it, ‘Commodore Bainimarama is clearly no usurper’. Nevertheless, like the judges in the subsequent Court of Appeal, Gates J considered that a valid overthrow of government and constitution could be effected through a successful coup or revolution.

On the basis of further materials before it in *Prasad (No 2)* the Court of Appeal found that Bainimarama did have a genuine desire to remove the 1997 Constitution and clearly was a usurper. The Court was then prepared to rule on the success of what was referred to as a revolution and, according to John Hatchard and Tunde Ogowewo, that meant Fiji had strayed into the realms of ‘dodgy jurisprudence’. In their analysis of the jurisprudence of coups in Commonwealth countries, Hatchard and Ogowewo refer to a string of judgments that legitimise coups and place usurpations within a common law framework, as dodgy or unsafe jurisprudence. Like the *Dosso* decision in the Pakistan Supreme Court from which they emanate, the judgments ground the validity of a new legal order in a determination of its efficacy.

The doctrine of effectiveness or efficacy owes much of its development to judicial adaptations of Hans Kelsen’s pure theory of law through which Kelsen attempted ‘to bring the study of law to the level of a critical legal science.’ In *Dosso* the Court described Kelsen’s theory of revolutionary legality as ‘one of the basic doctrines of legal positivism, on which the whole science of modern jurisprudence rests.’

Kelsen’s theory of legal validity rests on the presupposition of a meta-legal, basic norm or *Grundnorm* at the apex of a hierarchy of norms that provides law with a chain of authorisation. This presupposed, founding norm is a hypothetical norm, not a positive norm which can be questioned. Indeed, for Kelsen, the origins of the validity of the basic norm, are ‘an inexplicable *Mysterium.*’ Kelsen’s presupposition of the *Grundnorm* was key to his efforts in formulating a science of law that strove to keep the conceptualisation of law

100 Ibid.
101 Ibid.
104 *State v Dosso* PLD (1958) SC 533 (*‘Dosso’*).
106 *State v Dosso* PLD (1958) SC 533, 538.
contained, unified and separate from its socio-political context. His theory, according to Kalyvas, is therefore more concerned with ‘the internal congruence, logical consistency and hierarchical relation within an abstract legal system between superior and inferior norms’ than with legitimation of the system.\textsuperscript{108} But, as Kalyvas and others have argued, while ‘Kelsen could account for the validity of all derivative norms (the issue of legality)’ his failure or refusal to confront the ‘vexing issue of the origins of the validity of the basic norm itself (the issue of legitimacy)’ meant that there was neither a will nor a way to ‘distinguish between power and norm, force and rules, politics and law. Validity would ultimately refer to nothing more than the efficacy of certain actors to impose a new basic norm.’\textsuperscript{109}

Kelsen’s theory, however, is usually identified as descriptive of a functioning legal system rather than prescriptive of principles of law. Understood in that context, his notion of efficacy of a legal order is thus ‘only a condition of validity, not validity itself’ or its cause.\textsuperscript{110} He was strongly insistent on the separation of statements of ‘is’ and ‘ought’, believing that ‘to allow a discussion of “ought” to affect a discussion of “is” would not be science but “ideology”. Science must be kept pure of ideology.’\textsuperscript{111} And Kelsen himself emphatically rejected the notion of his theory serving a normative function or purpose: ‘Never, not even in the earliest formulations of the Pure Theory of Law did I express the foolish opinion that the proposition of the Pure Theory of Law “bind” the Judge in the way in which legal norms bind him.’\textsuperscript{112}

Despite Kelsen’s attempt to keep the validity of law separate from the question of law’s founding, in some of the landmark cases concerning the validity of a revolutionary government, judges have turned, directly or indirectly, to Kelsen’s theory of revolutionary legality. Or as Tayyab Mahmud argues, in basing the determination of validity upon a factual finding of efficacy,\textsuperscript{113} courts misinterpreted or misapplied what was an inherently flawed theory\textsuperscript{114} and thus, ‘[f]ollowing Kelsen [the courts] fail to distinguish between legitimacy and the validity of a legal order.’\textsuperscript{115}

The problem is, however, that the realms of legality and legitimacy are entwined in a presuppositional structure. Law can only presuppose its own foundation, its legitimacy. And

\textsuperscript{108} Ibid 77.
\textsuperscript{109} Ibid 104; 106.
\textsuperscript{110} Kelsen quoted in Mahmud, above n 77, 113.
\textsuperscript{111} Stewart, above n 104, 278.
\textsuperscript{112} Kelsen quoted in Mahmud, above n 77, 111.
\textsuperscript{113} Mahmud, above n 77, 113.
\textsuperscript{114} Ibid 106.
\textsuperscript{115} Ibid 53.
this is never so clear as in a judgment of effectiveness. For while the court may concern itself with the efficacy of a regime the actual foundation of that regime, for example a violent usurpation or military coup, does not come into the picture, at least not in the picture so declared. But what remains visible, if not explicit, is the judge who silently sutures the law of present things to its ancient foundations. According to this schema law maintains a separation from the political order and law’s foundations are out of the question. And so too, the violent (or non-violent) foundations of the political order remain unaccountable. And yet, as desirable as it may be (for positivists and political realists alike), the political and the legal are not autonomous realms. As Stewart Motha argues, ‘[s]overeignty is in constant movement in relation to a frame or limit. That frame or limit is law.’ 116 Thus law becomes the ‘alibi’ of sovereignty, 117 not only in relation to the political dimensions of sovereignty but also through the sovereign dimensions of law. And law thus inhabits the same paradoxes, as Agamben writes in his reflection on such conundrums:

The paradox of sovereignty consists in the fact that the sovereign is, at the same time, outside and inside the juridical order … [t]his means that the paradox can also be formulated in this way: “the law is outside itself,” or: “I, the sovereign, who am outside the law, declare that there is nothing outside the law”. 118

In Prasad No 2 the Court of Appeal noted that case law contains many formulations of what must be proved to validate a new legal order, none of which was binding on the Court, but nonetheless the Court drew heavily from case law to formulate the test for effectiveness in Fiji as laid out below:

(a) The burden of proof of efficacy lies on the de facto government seeking to establish that it is firmly in control of the country with the agreement (tacit or express) of the population as a whole.

(b) Such proof must be to a high civil standard because of the importance and seriousness of the claim.

(c) The overthrow of the Constitution must be successful in the sense that the de facto government is established administratively and there is no rival government.

(d) In considering whether a rival government exists, the enquiry is not limited to a rival wishing to eliminate the de facto government by force of arms. It is relevant in this

117 Ibid 328.
118 Agamben, above n 5, 15.
case that the elected government is willing to resume power, should the Constitution
be affirmed.

(e) The people must be proved to be behaving in conformity with the dictates of the de
facto government. In this context, it is relevant to note that a de facto government
(as occurred here) frequently re-affirms many of the laws of the previous
constitutional government (e.g. criminal, commercial and family laws) so that the
population would notice little difference in many aspects of daily life between the
two regimes. It is usually electoral rights and personal freedoms that are targeted. As
one of the deponents said, civil servants such as tax and land titles officials worked
normally throughout the coup and its aftermath. Their functions were established
and needed no ministerial direction. We derive little proof of acquiescence from
facts of that nature.

(f) Such conformity and obedience to the new regime by the populace as can be proved
by the de facto government must stem from popular acceptance and support as
distinct from tacit submission to coercion or fear of force.

(g) The length of time in which the de facto government has been in control is relevant.
Obviously, the longer the time, the greater the likelihood of acceptance.

(h) Elections are powerful evidence of efficacy. It follows that a regime where the
people have no elected representatives in government and no right to vote is less
likely to establish acquiescence.

(i) Efficacy is to be assessed at the time of the hearing by the Court making the
decision.\footnote{Prasad (No 2) [2001] FJCA 2.}

The Granadan Mitchell case provided the primary guidance for the Prasad efficacy test with
the exception of one condition in Mitchell (referred to above in Michael Head’s analysis), that
stated ‘it must not appear that the regime was oppressive and undemocratic.’\footnote{Ibid.} The Court of
Appeal decided, with the help of Professor Brookfield, that this ‘condition goes to the
legitimacy of a regime and not its legality’, \footnote{Ibid.} a distinction that was curiously not relevant for
other criteria of effectiveness.

Applying the efficacy test to the case at hand the Court of Appeal found that on the evidence
presented there was a rival government seeking to govern despite the lack of evidence of
organised or forceful resistance. Also, neither the continued functioning of government

\footnote{Prasad (No 2) [2001] FJCA 2.}
\footnote{Ibid.}
\footnote{Ibid.}
administration nor the ‘bare statement of belief by the Commander [Bainimarama]’ as well as statements from his government officials, provided the requisite evidence of ‘widespread public support for the Interim Civilian Government and acquiescence in the purported abrogation of the 1997 Constitution.’

And this was especially apparent when measured against the ‘five volumes of affadavits … filed on behalf of Mr Prasad to prove that people in Fiji by and large do not support the Interim Civilian Government.’ Further, the Court noted that since Prasad (No 1) other courts had proceeded on the basis that the 1997 Constitution remained in force; plus a Commonwealth Human Rights delegation had reported that there was little public support for the Interim Government. And, despite its rejection of the Mitchell condition, the Court noted the emergency legislation in force which inhibited the public expression of dissent.

Thus while the Court was prepared to accept that the Appellants were in actual control of the country, which was relevant for the determination of the legality of various intervening acts, the Interim Government had not proven they were in effective control, which required proof of control plus its popular acceptance and support. Consequently the Court found the Interim Government unlawful, upheld the supremacy of the 1997 Constitution and the parliament under which it was created was declared prorogued rather than dissolved.

For Kelsen 'the new order begins to be efficacious, because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, [and] then this order is considered a valid order.' This conceptualisation is part of Kelsen’s attempt to keep the legal norm separate from the political, but as his critics observe, ‘he concluded with the near fusion of norm and fact, “ought” and “is”, validity and efficacy.’ Kelsen’s attempt to keep his legal theory separate from concern with political power also meant that, as he reluctantly conceded, even the most oppressive and authoritarian of political regimes or usurpations of lawful government could nonetheless be accorded legal status.

While Schmitt argued strongly against Kelsen’s attempts to ‘elevate jurisprudence in all purity’ to a normative science, insisting instead that ‘like every other order, the legal order

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122 Ibid.
123 Ibid.
124 Ibid.
125 Ibid.
126 Kelsen quoted in Kalyvas, above n 107, 112.
127 Ibid 108.
128 Ibid 114.
129 Schmitt, above n 72, 20.
rests on a decision and not on a norm’, the Schmittian schema could not deliver the Weimar state from the totalitarian horrors of Nazi Germany either, not that, it must be added, Schmitt rushed to decry National Socialism or indeed Hitler’s early actions. But as stated earlier, Schmitt did not intend his ideas to support arbitrary despotism; and at a certain point ‘he realized the limits of decisionism.’ Even so, Schmitt persisted with the idea of a concrete reality and an existential sense that sovereign power, separated from the norms of law, had the capacity to decide upon. In his essay *The Concept of the Political* Schmitt focuses on the friend/enemy distinction and the ‘inherent reality and real possibility of such a distinction’. He argues that the friend/enemy grouping is the decisive political entity ‘and it is sovereign in the sense that the decision about the critical situation, even if it is an exception, must always necessarily reside there.’ But Schmitt is also concerned to point out that the concepts of sovereignty and political entity do not necessarily imply totalitarianism nor that the orientation towards the friend/enemy grouping is sovereign ‘in any kind of absolutist sense’. Agamben, however, asserts that the shortcomings of Schmitt’s ideas are not so very different from Kelsen’s. As Daniel McLoughlin puts it: ‘Just as Schmitt accuses Weimar jurists [including Kelsen] of failing to accept the normative groundlessness of the legal order, Agamben accuses Schmitt of failing to accept just how radically groundless the legal order is and has always been.’ And Agamben’s work is largely devoted to exposing the implications of such of failures.

Rather than Kelsen, the more substantial challenge to Schmitt’s work, as taken up by Agamben, is the debate enlivened by Walter Benjamin’s ideas. In this ‘gigantomachy’ as Agamben calls it, Benjamin’s *Critique of Violence* shifts, shatters, reformulates and deactivates the dialectic between law-making and law-preserving violence (which corresponds to Schmitt’s conceptualisation of constituent and constituted power) in order to expose ‘law’s interest in a monopoly of violence’. This monopoly is maintained most

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130 Ibid 10.
131 See Tracy Strong’s ‘Foreword’ in ibid 7.
134 Ibid 28.
135 Ibid 38.
136 Ibid 39.
138 Agamben, above n 66, pp 52-64.
vitaly through (the sovereign decision on) the exception where law is suspended or recedes but an unlimited authority or force of law remains.

Agamben, following Walter Benjamin, is more concerned to deactivate the structure of the exception as the way that law or many other exceptions function; not because of law per se but because of the relation of the exception between power (law, politics etc) and life. Through concepts such as ‘bare life’ or its paradigmatic form of homo sacer Agamben exposes what is at stake in the separation between life and its form(s) that the inclusive exclusion of the exception involves. In his analysis of the concentration camp, for example, Agamben sees the camp (rather than the prison) as an ‘absolute space of exception’,\(^\text{140}\) where lives transformed by their subjection to the Nazi rendition of the concentration camp entered a threshold of indistinction between bare life and juridical rule but where the camp ‘nevertheless incessantly decide[d] between them’.\(^\text{141}\) While Schmitt argued that the state of exception or his term ‘dictatorship’ could only be ‘a matter of transition’,\(^\text{142}\) Agamben, following Benjamin, shifts the paradigm slightly so that the exception cannot be distinguished from the rule. Seen in this light Schmitt’s exception can be understood as a strategy, a technique, a capture of anomie in the law or at least a relation between a zone of anomie and the law that ‘must be maintained at all costs’.\(^\text{143}\) In its unmasking, however, Benjamin and Agamben show that ‘the attempt of state power to annex anomie through the state of exception … is: a fictio iuris par excellence’.\(^\text{144}\)

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*Part C: The Coup and the Qarase Cases*

**The Prerogative**

While the process of establishing effective control may have been part of a long term strategy employed by the perpetrators of Fiji’s next coup in 2006, it did not constitute the basis of their legal argument in the Qarase cases in 2007 and 2008 and no doubt for good reason, including the fact that the cases came just too soon after the coup. Instead, the concept of prerogative

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\(^\text{140}\) Agamben, above n 5, 20.

\(^\text{141}\) Ibid 173.

\(^\text{142}\) Schmitt, above n 94, xl.

\(^\text{143}\) Agamben, above n 66, 59.

\(^\text{144}\) Ibid.
power was used to justify the conduct of a President who had been persuaded to act in support of the coup.

Law concerning prerogative power is notoriously uncertain and unclear and often evocative of its ancient pedigree back to medieval times or the even mistier realms of time immemorial. The prerogative as ‘ancient rights, privileges and powers of the Sovereign including the prerogative of mercy, political prerogatives such as declaring war or peace, and financial prerogatives such as bona vacantia’ was, in effect, a virtually unlimited and arbitrary power befitting of the divine status of kings.\(^{145}\) With the emergence of democracy and responsible government, however, and particularly after the Glorious Revolution of 1688, the prerogative became less a Royal power and more an aspect of government. So while the mode of governing shifted from princely rule to parliament or its equivalent, the prerogative persisted. Many prerogative powers became subsumed under statute but some continued under common law, sometimes as the very guardian of the politico-legal order they seem to defy.

While acknowledging several forms of prerogative power, the High Court in the Qarase case concentrated on the power ‘to preserve the State from civil strife, and to act in an emergency to ensure the well-being and safety of the people.’\(^{146}\) The Court traced the prerogative from its Norman Conquest days to that which ‘followed the Crown’s servants and adventurers as they traversed the globe and forged the empire.’\(^{147}\) The Court described it as a discretionary power, ‘not derived from Parliament and … not subject to statutory control.’\(^{148}\) It is to be exercised by the executive government in the event of a grave emergency. ‘[T]he scope both of emergencies and of acts to be justified by emergency extends, and the prerogative adjusts itself to new discoveries’.\(^{149}\) The power is not amenable to judicial review, except in relation to the Court’s determination of its existence. Since the power is part of the common law, it remains unless ‘superceded by statute, eroded by judicial decision or atrophied by neglect or disuse’.\(^{150}\)

Turning their attention to Fiji, the Court found that ‘the relevant prerogatives have not been abrogated by the Constitution’\(^{151}\) and ‘as part of the common law of Fiji [sit] happily with


\(^{146}\) Qarase v Bainimarama [2008] FJHC 241 (9 October 2008) [81].

\(^{147}\) Ibid [120].

\(^{148}\) Ibid [104].

\(^{149}\) Ibid [103].

\(^{150}\) Ibid [120].

\(^{151}\) Ibid [136].
Thus if the President ‘acts in a crisis without mala fides and addresses the grave problems in a way that he believes honestly addresses those problems whether in peace time or war, the courts will uphold his action.’ Despite the references to the evolution of constitutional monarchy and a history of democratic change, the Court in this case found an exclusive, expansive, malleable, unfettered power inhering in Fiji’s constitutional presidency the fount of which was the common law, or more precisely, the royal sovereign under the common law.

However, while the prerogative may have travelled to the British colonies its place in the law of Fiji at the time of the hearing was not the same as upon its arrival in 1875. For one thing when Fiji became a republic in 1987 (albeit, maybe not a republic ‘in the accepted meaning of the word’), the reign of the British monarchy in Fiji was ended and the President, unlike the Governor General, was no longer the representative of the Queen with a prerogative power sourced exclusively in the Crown. The Court, however, relied on a line of authorities that mainly related to the prerogative powers of Governors or Governor Generals of former British colonies. The Court also saw that the prerogative as part of the common law was ‘indicated as a continuing common law power in sections 85-87 of the Constitution’, which establish the office of President. The Court implied the continuation of common law in those sections, by virtue of the fact that the Constitution ‘nowhere excludes such a power.’ The Court stated it was ‘dealing with the most fundamental of the reserve powers of the Head of State’.

The Court described this power as:

the ultimate reserve power…a prerogative power long afforded to Governors and Heads of State by the common law. It flows naturally from the Ciceronian maxim salus populi est suprema lex, “the welfare of the people is the paramount law” … It also derives from an implied mandate.

John Locke’s thought, which informed much of the liberal orientation of the shifting polity of his time (seventeenth century), incorporates a theory of king’s prerogative that is ‘a

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152 Ibid [132].
153 Ibid [149].
155 Qarase v Bainimarama [2008] FJHC 241 (9 October 2008) [148].
156 Ibid [148].
157 Ibid [136].
158 Ibid [148].
paradigmatic expression of princely reason of state’.

This theory also seeps into more contemporary interpretations of executive power including its reference in the *Qarase* case. According to Locke the prerogative is the power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it…for since in some governments the lawmaking power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to execution; and because also it is impossible to foresee, and so by laws to provide for, all accidents and necessities that may concern the public, or to make such laws as will do no harm, if they are executed with an inflexible rigour, on all occasions, and upon all persons that may come in their way; therefore there is a latitude left to the executive power, to do many things of choice which the laws do not prescribe.

As a presidential power, the prerogative has rarely been used in republics such as the United States of America. The American move away from British monarchy and a deep suspicion of the unbounded power of the prerogative did not, however, extinguish the prerogative-like power of the Executive, enabled through constitutional principles and statute. Indeed, as Clement Fatovic observes, ‘[t]hese laws confer so much discretion on the Executive that practical differences (if not legal status) between Lockean prerogative and action taken in accordance with these laws are difficult to discern.’ Unlike the US President, however, Fiji’s President, according to the 1997 Constitution and emergency laws at the time, performed a largely symbolic role with minimal discretionary power. Nevertheless, telling in the fact that Bainimarama did not attempt to (officially) avail himself of the prerogative, the office of Fiji’s President was more than symbolic of the national unity and equality of representative democracy. And for the High Court too, it was the President alone, (rather than the Prime Minister for example) who would be accorded a reserve power, very much modelled on the Lockean-type prerogative.

Once this power was seen to be in existence, Locke believed there ‘can be no judge on earth’ who can judge whether this power is being used rightly. Similarly the Court stated that it was ‘the existence only and not the exercise of the President’s powers…that was capable of

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judicial review.’ And like Locke, who states ‘prerogative is nothing but the power of doing public good without a rule’, the Court could only assume that Fiji’s Head of State, embodying the unified will and identity with the people, could do no wrong. Thus the Court could affirm that President Iloilo acted ‘in what he gauged was in the best interests of the nation’ with the intention ‘to unify the people of Fiji’, even ‘without the reassurance of popular mandate during the interregnum’. The Court was not interested in the details of how or when this intention was to be realised. Rather, the judges voiced ‘no doubt [that] the President will have uppermost in his mind the twin imperatives of the sanctity of fair elections on the one hand and the need for urgent return to democratic rule on the other.’

Nevertheless, in relation to the crisis or emergency that precipitated the exercise of the prerogative, the Court was prepared to rule, but somewhat equivocally. That there was a crisis in Fiji that threatened the welfare of the people was indisputable, but the successful case for the President’s prerogative relied on a particular reading of the facts (and a particular interpretation of the Constitution). First citing cases that supported the contention that only the Governor-General could judge whether an emergency existed, the Court then went on to admit a situation where the existence of an emergency could be contested. In that case the burden of proof would lie on the party alleging ‘that there is no or no sufficient emergency’. The Court disposed of that matter later in the judgment when dealing with the President’s non-compliance with various sections of the Constitution:

The plaintiffs maintain there was no need for the President to act outside of the Constitution. What was he to do instead in the face of the crisis, crisis being an assessment of the situation accepted by Mr Qarase [the ousted Prime Minister] in his evidence, was not clearly put forward.

In deference to the President and his prerogative power, the Court, as George Williams comments, gave ‘no consideration…to the fact that the source of that instability was the Commander of the RFMF himself, who as a result of the exercise of these prerogative powers

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163 Qarase v Bainimarama [2008] FJHC 241 (9 October 2008) [171].
165 Qarase v Bainimarama [2008] FJHC 241 (9 October 2008) [157].
166 Ibid [167].
167 Ibid [160].
168 Ibid [169].
169 Ibid [89].
170 Ibid [127].
was himself made Prime Minister.’

Nor did the Court pay attention to other realities of contemporary Fiji which included, ‘prevalent perceptions of the current state of health of Fiji’s President.’ As Graham Leung pointed out at the time,

> The octogenarian president, who is 87 years of age, was in all probability unable to deal with complexities of the architecture of the post-coup Fiji situation. It is difficult to believe, as suggested by [Justice] Gates et al, that he had the wherewithal to steer any course through the January 2007 crisis. There is a strong body of opinion in Fiji of the view that the President is a ‘military stooge’. Yet few people are prepared to discuss this because of cultural reasons, and in particular because of the President’s high standing as a traditional chief from Vuda (in Western Viti Levu).

Thus, for a time, at least until the appeal case was heard, the people’s only other remedy, as Locke theorised, was ‘to appeal to heaven’. President Iloilo exercised a power, constitutional and extra-constitutional, recognised by law but not limited by it, except to the extent that the President’s intentions could not be proven mala fides. And no one, not even the staunchest of the interim regime’s critics was prepared to mount that challenge in the courts.

While Schmitt may have railed against liberalism for its attempts to impose limits on the sovereign power of a head of state, constitutional theorists such as Clement Fatovic argue that the prerogative or a prerogative-like power, as an inscrutable God-like power, is embraced in the work of some stalwarts of liberal constitutionalism such as John Locke, William Dicey and Alexander Hamilton. As Fatovic observes, despite the deistic turn that Schmitt saw as crucial to the emergence of liberalism, the survival of the prerogative suggests that ‘liberalism may adopt a theistic mindset when confronted with … [some ] kinds of emergencies’.

Indeed, as Fatovic notes (and Fiji’s High Court judgment reinforced):

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172 Ibid 8.
173 Ibid.
the exercise of a power that emerges out of a jurisprudential void like a *deus ex machina* coming to the rescue in the darkest hours demands at least a temporary suspension of disbelief in the fallibility of the executive. Prerogative asks the public to waive ordinary requirements for verifiable proof and defer reverentially to the judgment of the executive in times of life and death.\[160\]

Thus the High Court in Fiji was not alone with the notion of a transcendent type of prerogative. But just as in the wider world of liberal constitutional thought there are those who would ‘subordinate[] the executive to various forms of popular control that make unilateral and unaccountable exercises of power impossible’,\[177\] in Fiji the Court of Appeal took a different view from the High Court, subscribing instead to a more “immanent” notion of emergency powers. In Agamben’s thought, however, the transcendent and the immanent approaches are ultimately part of ‘an unceasing, unwinnable, desolate dialectic’ that fuels the bipolar machine of government.\[178\]

**Constitutional Power**

The victory in the High Court sustained the Interim Government and its programme of reforms until Mr Qarase’s appeal was heard in the Court of Appeal the following year.\[179\] In that case, three different expatriate judges found that the President’s acts had been unlawful under Fiji’s Constitution. Unlike the Court of the first instance, the Court of Appeal found that ‘the provisions of the Fiji Constitution have sought to limit clearly … the discretions of the President.’\[180\] The Court found that while common law formed part of Fiji’s regime of laws, the prerogative had no place in the Republic of Fiji. The Court rejected the submission that the ultimate source of the President’s power was that of ‘State necessity’ as distinct from the necessity doctrine espoused in the earlier *Prasad No 1* case. And while the Court ‘accept[ed] entirely that the doctrine of necessity as described by this Court in *Prasad* may well empower a President to act outside the terms of the Constitution’,\[181\] apart from the fact that it was not part of the original litigation, the doctrine could not be used to justify ‘what is in effect a military coup.’\[182\] And furthermore, as their Lordships remarked, ‘It is entirely unclear to us why the first thing called for in a time of national emergency is the dismissal of

\[160\] Ibid 497.
\[177\] Ibid 491.
\[179\] *Qarase v Bainimarama* [2009] FJCA 9 (9 April 2009).
\[180\] Ibid [122].
\[181\] *Qarase v Bainimarama* [2009] FJCA 9 (9 April 2009) [143].
\[182\] Ibid [140].
the Prime Minister and his government.¹⁸³ This, they considered, exposed the real flaw in the argument for the Respondents. ‘It exposes the fact that what has occurred in this case and previous cases is simply a military coup or an unlawful usurpation of power.’¹⁸⁴ However the Court was prepared to validate the President’s appointment of another interim Prime Minister (but not Qarase or Bainimarama), as a matter of necessity, in order for the country to proceed to elections as soon as possible. Later, the President would suggest that the Court was unfair to make the substance of its own decision on the grounds of necessity while refusing to extend those grounds to the President.¹⁸⁵

**The Role of the Judiciary**

The day after the Court of Appeal delivered its judgment the President announced his abrogation of the Constitution and the birth of Fiji’s new legal order. Many did not anticipate the judgment that was delivered in Fiji’s Court of Appeal. As one academic from the University of the South Pacific wrote:

> There was a perception that the Court of Appeal could easily be “stacked” so that it would act as a “rubber stamp” for the High Court decision. Another point to note is that the abrogation that was the consequence of the decision may have also surprised many. Maybe after the Prasad decision some people had a naïve faith in the power of a court decision to restore democracy.¹⁸⁶

The question of judicial independence is only part of the problem facing law and the legal system in the upheavals of constitutional breakdown and new legal orders. Other questions concerning the judicial reasoning, its analytical coherence, authority and complicity with political currents also feature in this fraught landscape, especially where the foundations of the politico-legal order are challenged.

The Court of Appeal judges sitting on Prasad (No 2) rejected the doctrine of necessity as being the only basis on which to decide the validity of Bainimarama’s unconstitutional conduct. Instead they opened the judicial door to the possibilities of a successful revolution,

¹⁸³ Ibid [132].
¹⁸⁴ Ibid.
insisting on their entitlement to do so. However, they were careful to note the jurisdiction of the court:

Each of the members of the Court was appointed under or has had his appointment renewed under either the 1990 or 1997 Constitutions. Each of us has taken the oaths of office prescribed by one or other of those Constitutions. None of us has taken an oath of office under the Judicature Decree 2000 of the Interim Civilian Government. That Decree stated that nothing should affect our continuance in office as Judges of the Court of Appeal and it did not require us to take new oaths.\(^{187}\)

The basis of their jurisdiction was significant for what they could recognise as a valid legal order. Indeed, given their affiliation with the 1997 Constitution, juridical recognition of a new legal order could immediately fracture at least part of the skeleton of constitutional common law. As Fieldsend J put it in the *Madzimbamuto* case, "a court ‘is not a creature of Frankenstein which once created can turn and destroy its maker … nor continue to exist to enforce some other constitution.’\(^{188}\) And yet some judgments suggest otherwise.

When a judge is faced with a powerful military which has achieved the *fait accompli* of at least the early stages of a coup, the pressures to find in its favour, despite apparent transgressions of law, may be too hard to resist maybe because of fears for personal safety or the prospects of dismissal or resignation. But also, the call of duty to maintain the institutions of law, even if they may appear slightly battle-worn or even corrupt, may influence a judge’s decision to carry on. The judgments that have been made during these times concerning unconstitutional conduct may be a testament to the bravery or commitment of judges (or else something less virtuous) but they also highlight the insistence of the common law to submit even the most extraordinary spheres of power to its judgment. The prospects of a legal vacuum are often what haunt the politico-legal landscape, as much as the desire for legitimation.

The condition of law that demands decision or judgment is connected to its obsession with exteriority by which, as Peter Fitzpatrick observes, ‘law is unceasingly and intrinsically pulled … beyond what it may at any time determinately be’.\(^{189}\) In Agamben’s reckoning this condition is governed by the paradox of sovereignty, the structure of which is the exception:


\(^{188}\) Justice Fieldsend quoted in Mahmud, above n 77, 64.

Here what is outside is included … by means of the suspension of the juridical order’s validity – by letting the juridical order, that is, withdraw from the exception and abandon it. The exception does not subtract itself from the rule; rather the rule, suspending itself, gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as a rule. The particular “force” of law consists of this capacity of law to maintain itself in relation to an exteriority.\(^{190}\)

This particular force of law that ‘floats as an indeterminate element’\(^{191}\) was claimed in the name of Fiji’s new legal order (although not precisely in these words); and the state of exception in which law is separated from the ‘force of law’ and fact and law are indistinguishable became its stomping ground. And in the state of exception where there is a presuppositional nexus between a law and its authority, which, in this situation involves law’s suspension, sovereignty reigns, but not alone.

In his book, \textit{The Kingdom and the Glory}, Agamben develops the idea of oikonomia to articulate a separate paradigm of ‘power as government and effective management’ that is functionally related to sovereign power.\(^{192}\) The word \textit{oikonomia} has an ancient Greek history but Agamben’s work has been to demonstrate its significance as a theological idea which takes its place in contemporary thought alongside the idea of ‘political theology’, as developed by Schmitt among others,\(^{193}\) which bequeathed itself to modern (juridical) theories of sovereignty. Agamben argues that:

\begin{quote}
Oikonomia … is the concept by means of which theologians tried to reconcile the god, the unity with the Trinity. Their argument was roughly … the following: God, as far as his substance or being is concerned, is absolutely one. But as for his oikonomia, his economy, that is to say the way he manages the divine house and life, he is three.\(^{194}\)
\end{quote}

It is here that Agamben finds the ‘first seed of the division between the Kingdom and the Government …which introduces a fracture between being and praxis in the deity himself’ and that also operates in worldly politics as the two poles of sovereign power.\(^{195}\) Indeed, the theological legacy of the fracture between God’s being (the Father) and God’s action (Christ, the word, logos, economy) according to which action has no foundation in being and therefore, like being, is anarchical (without foundation or beginning), is what makes a

\(^{190}\) Agamben, above n 5, 18.
\(^{191}\) Agamben, above n 66, 38.
\(^{192}\) Giorgio Agamben, \textit{The Kingdom and the Glory} (Stanford University Press, 2011) xii.
\(^{193}\) See Schmitt, above n 72.
\(^{195}\) Agamben, above n 192, 111.
government both possible and necessary. According to Agamben, ‘it is the groundless and anarchical paradigm of human action that makes it possible to govern this action. If being and action were the same we could not govern the action.’\textsuperscript{196} However, the distinction between being and action involves more than a separation. It is also, importantly, a functional relation. According to Agamben this relation can be understood theologically as a condition of divine government of the world, which ‘is possible only if Kingdom and Government, [transcendent norm and immanent order, general and particular] are correlated in a bipolar machine.’\textsuperscript{197} That correlation or reconciliation is made possible and intelligible through the \textit{oikonomia}.\textsuperscript{198}

The paradigm of government in the \textit{oikonomic} governmental machine, which is really two paradigms at work - the juridico-political (giving rise to the modern theory of sovereignty) and the managerial, leading to modern biopolitics\textsuperscript{199} – coincides with the state of exception in the idea of \textit{oikonomia}.\textsuperscript{200} Agamben’s insight into the relation between these paradigms, the state of exception and \textit{oikonomia} are usefully summarised by Thanos Zartaloudis:

\begin{quote}
There is no substance or essence at the origin of power, but only governance (\textit{oikonomia}). The price of the Trinitarian attempt to reconcile the division between being and \textit{praxis} through divine providence or \textit{oikonomia} is the rearticulation of two distinct planes (transcendental/immanent, general providence/special providence, intellectual knowledge/\textit{praxis} and so forth) and this through a bipolar machine. The \textit{oikonomia} in question forms as a zone of undecidability between a general law and an administrative apparatus. \textit{Oikonomia} is the modal or functional relation between a glorified transcendental power (that appears but cannot be used) and an immanent praxis (that is invisible and yet effective).\textsuperscript{201}
\end{quote}

In the following chapters Fiji’s new legal order will be analysed as an articulation of various levels or planes that Agamben sees functionally correlated in concepts such as \textit{oikonomia}, the state of exception and the bipolar machine. Indeed, as Zartaloudis points out, the only

\textsuperscript{196} Agamben, above n 194.
\textsuperscript{197} Agamben, above n 192, 114.
\textsuperscript{198} Ibid 51.
\textsuperscript{199} Ibid 1.
\textsuperscript{200} Ibid 50.
\textsuperscript{201} Zartaloudis, above n 97, 85.
analytical gesture that remains effective against the bipolar machine is the mutual exposure of its two poles and 'their subtle but widely effective co-ordination.'

202 Ibid 53.
PART THREE:
STATES OF EXCEPTION IN
FIJI’S NEW LEGAL ORDER
General Introduction

In 2009 President Iloilo abrogated the constitution and declared a new legal order. In anyone’s language, this declaration conjures up a sense of mystery and profundity that I think is attendant in all beginnings, but some beginnings are definitely more spectacular, or at least suggest that they should be. The following chapters are my attempt to make sense of that mystery, to articulate the paradoxes rather than yield to their resolution, although that is the temptation. Throughout the process, however, I have been haunted by a suspicion that is not allayed by the maintaining or holding open of paradoxes. And while I can concede that such suspicion or discomfort may indeed be part and parcel of dealing with paradoxes, I have come to believe that it has held a final irony, or at least the definitive *crux interpretum*.

I would like to keep this suspicion until the end, as my final sleight of hand, but since it has been part of the driving force of my inquiry and has coloured my thoughts throughout, I will briefly allude to my diagnosis. I will call it the pathos of absence that the performance of the conjunction of ‘as if’ can never assuage. And in relation to Fiji’s new legal order that pathos doubles since it relates not only to sovereignty’s absences or fictions (as advanced by Agamben and others) but also to the dishonesty of usurpation, even if, in relation to the latter, ‘no one has ever doubted that truth and politics are on rather bad terms with each other … [or] has ever counted truthfulness among the political virtues.’¹ But it is more complicated than that and here I will merely point to two ways that it is so.

Not only did the new legal order behave (speak) as if it was sovereign and democratic in defiance of law and legal judgment, but in the midst of the rupture and crisis of its beginning and constituted in those very conditions of exceptionality, its government also assumed the language of control and security, a language of management that, as Agamben points out, has no foundation in being. From the beginning, the government’s complicity in the cause and many effects of its governance was made seem almost irrelevant, or at least understated,

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which if anything, lent itself to an effective sovereign enrobing, finally clasped by the national elections, to emerge the legally-unchallenged champion of democracy.

Rather than a shifting of goal posts, what I felt I was contending with was an upping of stakes, a floating anchor that could be dropped wherever or whenever necessary. Cast adrift from constitutional moorings (at least in the first few years, but which are, in any case arguably as ungrounded as that which replaced them) Fiji’s new legal order had no legal foundation or register according to which actions could be measured and compared, just the constant noise of the bipolar machine struggling to inhabit and articulate two poles of power and the tension between them. Caught in the incoherence of men who would be king (and ‘governor’), the division between ‘an almighty sovereign who is effectively impotent’ and ‘the chaotic mess of the particular acts of interventions of governance’, and the persistent grinding together of the two paradigms (kingdom and government), I have turned to Agamben to understand the source or the relevance of another dissonance. This is the sense that despite its ubiquitous and almost irresistible logic that absorbs even the most blatant of lies, sovereignty or the bipolar machine is only drowning out and not necessarily completely or forever, the ‘real state of exception’.

Sovereignty functions as one of the primary conceptual devices in this next section’s discussion. The concept of sovereignty is, however, notoriously unstable and not least because of its meaning changing over time, its disputed relevance to non-Western societies, and indeed its contested desirability as an organising principle anywhere. Agamben’s work, however, has been to dig into the various dimensions and connotations of sovereignty ‘in order to understand what really is at stake here’. For Agamben it is the structural interrelation or the interweaving between the two poles of the sovereign structure of governance that must be questioned. Thus, because a sovereign system or structure is always double – law and non-law, kingdom and government etc – and works by means of opposition:

we must learn to see these oppositions not as “di-chotomies” but as “di-polarities,” not substantial, but tensional. I mean that we need a logic of the field, as in physics, where it is impossible to draw a line clearly and separate two different substances. The polarity is present and acts at each point of the field. Then you may suddenly have zones of indecidability or indifference. The state of exception is one of those zones.

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4 Ibid.
Part Three (Chapters 4, 5, 6 and 7) contains the synthetic content of the thesis and demonstrates the utility of the Agambenian apparatus at work in post-colonial Fiji. These chapters articulate the polar interweavings of three possible figures or zones in the sovereign structure of Fiji’s new legal order: the leaders, the politico-legal apparatus and the people. The leaders – President and Commander – are shown as functionally related, in the way that Agamben speaks of ‘two paradigms [that] live together and intersect with one another to the point of constituting a bipolar system.’\(^5\) The President performs the crucial role of upholding the appearance of sovereign continuation while the law is suspended or broken and the Commander actually governs.

In relation to the politico-legal apparatus, the bi-polar sovereign-governmental system or machine is made evident in the control and securitisation of the country through emergency regulations, the judiciary/rule of law and the media. Judicial independence or autonomy, performs a sovereign function in preserving the rule of law and maintaining the semblance of legality. But with the interference of government, the institutions of law are emptied of such meaning despite keeping up appearances. Similarly, a media subjected to rigorous security measures may be heavily censored but still performs a sovereign task. Indeed governmental control of the media not only underlines the media’s importance and relevance for the government of public opinion and the management and dispensing of what Agamben refers to as: ‘Glory, the acclamative and doxological aspect of power.’\(^6\) It also demonstrates how an indiscernibility between the ‘glorious’ sovereign aspect of power and oikonomia or government maintains a sovereign-governmental machine, which links readily to both democratic and authoritarian traditions.

Chapters 6 and 7 focus on constitution-making and public elections, two acts traditionally linked with democratic politics, and the sense in which they are implicated in a bipolar system. As Agamben points out, the term ‘democracy’ has a double meaning, ‘it designates power's form of legitimation as well as the modalities of its exercise.’\(^7\) These meanings correlate with interpretations of (popular) sovereignty and government. And the problem, as Agamben sees it, is the failure to recognise the ambiguity in the political concept of democracy and the extent to which ‘sovereignty … binds both [sovereignty] and government together in an indissoluble knot.’\(^8\) This problem resonates in the fiction of sovereignty which

\(^5\) Giorgio Agamben, *The Kingdom and the Glory* (Stanford University Press, 2011) 64.
\(^6\) Ibid xii
\(^8\) Ibid 2.
is its concealment of the emptiness at the centre of the sovereign-governmental machine. The discussion of the constitution-making process in Fiji between 2012 and 2013 shows how, even with the government’s blatant ‘hijacking’ of a democratic process, sovereignty and government remain tied together under a sham of popular sovereignty.

Even if the constitution-making process is exposed as lacking in democratic legitimacy (but productive of a constitution) the general public elections held in 2014 lent another opportunity for the government to stake its claim on democratic legitimacy and for participants to voice their opinion on the state of affairs from 2009. But the resounding victory of the FijiFirst Party, claimed by Bainimarama as the leading the Fijian people into ‘true democracy’, was never going to be a straightforward, uncontested victory for democracy. Disentangling some of the threads of that electoral victory and the wider arena in which it was made possible, Chapter 7 amplifies the voices of the people I interviewed in Fiji at election time about their perceptions and conceptualisations of legitimacy. These views are organised around various distinctive polarities such as ends/means or legal/political power. But rather than attempting to resolve the dialectic between them, for example, the ends justifying the means and the means justifying or guaranteeing the just ends, the chapter shows the distinction between them that in earlier discussion is blurred in a state of exception become the rule.

Despite or perhaps because of what now appears to be the firmly-entrenched, well-oiled machine of Fiji’s new legal order, Chapter 7 concludes on an optimistic note. Stirring at the edges of change and a heartfelt desire to move Fiji forward, most interviewees expressed an interest in some kind of reconciliation process. This notion of reconciliation is taken up in the context of Agamben’s hope and insights concerning the proximity of a ‘real state of exception’. Rather than an engagement with sovereignty and the governmental machine, in any of their guises, the views on reconciliation are suggestive of other possibilities of community and ways of going on together. These views look towards the deactivation of the apparatus of inclusive exclusion, signaling a perfectly coincident potentiality for conceiving the relationship between life and law in terms other than the state of exception.

In a way the thesis is a kind of detective story, implicated in the forensic discovery of what lays beneath as well as an investigation of appearances and effects that traces back and forwards to understand how meaning has taken hold. In adopting Agamben’s diagnosis of sovereignty and its conditions, the aim is therefore, as much a (re)discovery of the concept of
sovereignty as an understanding of ‘the deeper historical and discursive conditions that have enabled authority to be authoritative’.\(^9\)

While the prescience of Agamben’s analysis of the state of exception and its normalisation in contemporary western democracies has taken even him by surprise (as he stated, ‘I could not imagine that my diagnosis would prove so accurate’\(^{10}\) his work has been criticised for its lack of historical detail and structural analysis.\(^{11}\) And, as discussed in Chapter 1, postcolonial scholars have also pointed to Agamben’s neglect of the relation between colonialism and the state of exception. However, in understanding the intersection of (Foucauldian) biopolitics with the (Schmittean) state of exception as a ‘matrix of intelligibility for … [Agamben’s] account of the normalisation of the state of exception’\(^{12}\) as Daniel McLoughlin, among others, does, we can see how Agamben’s thought accommodates both the historical continuities and the ‘particularity and contingency of historical events’,\(^{13}\) as they unfolded in Fiji’s new legal order.

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\(^9\) Andrew Neal, ‘Giorgio Agamben and the Politics of the Exception’ (Paper Presented at Sixth Pan-European International Relations Conference of the SGIR, Turin, 12-15 September 2007).


\(^{12}\) Ibid 705.

\(^{13}\) Ibid 704.
Figure 3 "Fiji very safe, says tourism". Fiji Sun, 11 April 2009, Page 1
Chapter 4
RULERS and GOVERNORS

Introduction

This chapter is an analysis of two figures of authority through which a new legal order was instituted in Fiji in the period from 2009 to 2014. The first part focuses on the role that President Iloilo played in the founding moments of Fiji’s new legal order and draws on Schmitt’s decisionist theory to trace some of the convolutions of Iloilo’s power and authority and the performative force they have exerted on Fiji’s legal order.¹ The second part analyses the role that Frank Bainimarama played in instigating and administering Fiji’s new legal order. The two parts can also be read in relation to Agamben’s bipolar governmental machine, President Iloilo serving as the nation’s father and symbol of unity and transcendence, Commander Bainimarama serving as the immanent, administrating son of the nation.

As figures of authority and power, the President and the Commander can also be seen as embodying a dialectic between auctoritas and potestas which Agamben traces through to its modern convergence in the state of exception. Auctoritas refers to the concept of an authority ‘that can at once “grant legitimacy” and suspend law … It is what remains of law if law is wholly suspended.’² Auctoritas can be understood as ‘the right to exercise power’ in contrast to potestas which refers to the ‘power or ability to achieve certain ends.’³ According to Agamben, in the past of republican Rome or medieval Europe, the concepts of auctoritas and potestas were more likely to ‘remain correlated yet conceptually, temporally, and subjectively distinct’. However, in the state of exception ‘they tend to coincide in a single person’.⁴ While neither the President nor Bainimarama can simply be substituted for either or both elements,

¹ As one colleague commented in an earlier conversation: ‘It’s almost as if Schmitt is being channeled in Fiji.’
⁴ Agamben, above n 2, 86.
their power does share an uncanny and useful (for the purposes of this analysis) resemblance with the two principles, ‘the auctoritas (that is, power without actual execution) and the potestas (that is, a power that can be exercised)’ and their coordination in the governmental machine.5

**Part A: The President Rules**

**The Old and the New President**

Constituted in a uniquely Fijian constellation of conditions of possibility, the nature of authority in Iloilo’s multifarious presidency6 and the different constitutional and extraconstitutional realms in which that authority staked its claim, bring Iloilo’s own ‘undecidability’ to the paradox of founding. The paradox or ‘vicious circle’ is what Hannah Arendt and Carl Schmitt, among others, saw emerging in ‘the perplexing relationship between radical founding acts and politics as usual in a secular age’.7 Schmitt, unlike Arendt, grappled with a solution in terms of ‘the theological legacy of a sovereign will’,8 which led to his endorsement of ‘an omnipotent personalistic executive with a plenitude of dictatorial powers’.9 Even Schmitt’s turn to ‘concrete order thinking’ and the recognition that ‘the sovereign is necessarily required to take into account the social fabric which is the genuine addressee of her/his indications’,10 does not shift the structure of authority as theorised in his work.

Schmitt maintains law’s dominion through his theory of sovereign dictatorship and the state of exception, whereby law is annexed to anomic (actions outside the law) through a relation of inclusive exclusion, which is instituted in the decision on the exception. For Schmitt the exception ‘remains … accessible to jurisprudence because both elements, the norm as well as the decision, remain within the framework of the juristic.’11 The sovereign decision on the exception thus sustains the legitimacy of the sovereign and the legal order. While Schmitt

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6 Iloilo was appointed or made President on four different occasions.
8 Ibid 196.
recognises that the question of competence, or who should decide, is important, the more salient issue is establishing the role or place of the sovereign as the guarantor of the legal order. Indeed Schmitt’s denigration of any (liberal) attempt to circumscribe the sovereign decision on the exception tends to push the question of sovereign authority into the realm of deduction with his general sovereign principle: ‘sovereign is he who decides on the exception.’\textsuperscript{12} At least that is the effect of a theory and praxis of sovereignty in which all roads of political struggle ‘eventually lead back to a new constitutional order or the restoration of the old one.’\textsuperscript{13} As will be discussed, such ineluctability sat well with the President and the new legal order.

In the afternoon of the 9\textsuperscript{th} of April 2009, I excitedly made my way to the Suva Courthouse to hear the Court of Appeal’s judgment in \textit{Qarase v Bainimarama}.\textsuperscript{14} This was the case discussed in Chapter 3 that was brought by the ousted Prime Minister Qarase. He was appealing the High Court decision that had validated certain acts of President Iloilo as the lawful ‘exercise of the prerogative powers of the Head of State to act for public good in a crisis.’\textsuperscript{15} The outcome was by no means certain and in the days preceding, many who had been convinced that the appeal would not succeed had begun to think otherwise.

The courtroom was packed and the military presence, although not overbearing, signalled the importance of the decision, which, effectively, could change the order of Fijian politics and put Fiji at a cutting edge of constitutional law. As the judge read out the judgment the courtroom rippled with approval. The Solicitor General, however, rose to his feet during the final submissions to cast the decision in a more sombre light. There would be trouble if the judgment could not somehow be suspended, he warned. Indeed, in the persistence of his warnings the threat of what lay ahead could hardly be ignored. But apart from granting leave to appeal, the Court would only reaffirm that what they had declared was nothing more than what the Fiji Constitution guaranteed.

Moving past Mr Qarase and the sea of journalists buoying him along outside the court I was suddenly struck by the quiet on the streets. I was imagining how such a constitutional moment might go down in Australia. On the streets of Suva there were no signs of celebration or disgruntlement and it was hard to resist an underwhelming sense of the mundane. Later that

\textsuperscript{12} Ibid 5.
\textsuperscript{14} \textit{Qarase v Bainimarama} [2009] FJCA 9 (9 April 2009).
\textsuperscript{15} Ibid 4.
night when I did find myself in a more convivial party of law students, lawyers, diplomats and others, it became clear that the celebrating was already overshadowed. The more pressing issue on most people’s minds was whether the constitution would be abrogated. The day after, on Good Friday, Fiji was delivered the radical answer.

In his momentous address to the nation on Good Friday, President Iloilo stated that the Court of Appeal judgment had left Fiji without a government and therefore, in consultation with Commander Bainimarama, he would act in a decisive manner to map out a smooth path to various reforms. The President then announced that ‘to facilitate the holding of true democratic and parliamentary elections’, he was abrogating the constitution, sacking the judiciary and appointing himself head of a new legal order. The country was to remain in a state of emergency as it had been since the coup in 2006.

The Easter connection was not lost on some commentators. In one interpretation, a journalist with the *Fiji Sun* wrote:

> Let us be reminded from Father Tumate’s parting words to his congregation – “The tomb is empty and you must never return to it.” He added that they must not revisit the tomb and carry on with their new life. Surely as many critics are still trying hard to accept the changes that had happened in the country over the weekend, they should be reminded that they should not revisit that tomb of thought. It is a fact the tomb of thought and of belief they were in had been nullified and must never revisit it. It is a fact that we are facing a hard time but we have to accept its reality. The reality is – the tomb is empty.17

But of course the empty tomb is rich with symbolism. To borrow a phrase (or two) from Peter Goodrich’s thoughts on the tomb in Fra Angelico’s painting: ‘the empty tomb is far from empty, it is heavy with meaning, it is the exemplary figure of an absent cause, the sign of an invisible truth.’18 And later; ‘the unwritten law, the empty tomb, is witness to a plethora of critical possibilities. It is here that the force of law encounters the contours of affect’.19 Thus we may see that the religious overtones on the occasion of the birth of Fiji’s new legal order also point, for example, to a certain messianism in its chief protagonists and to the political

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19 Ibid 629.
importance of religious and other symbolic orders in secular Fiji. But was the President Fiji’s saviour? This question will be handled in relation to Agamben’s theory of the oikonomy but it is useful to first interpret the President’s role in light of Schmitt’s work on dictatorship and the state of exception.

In 2000 when Iloilo was first appointed president, the Republic of Fiji was a constitutional democracy under the 1997 Constitution. The Constitution established the office of President, vested executive authority of the State in the President and also made him or her Commander-in-Chief of the military forces. According to the Constitution the President symbolised the unity of the State, a role that was indeed mostly symbolic since the President was largely bound to act on advice and could only act in his or her own judgment in circumstances prescribed by the Constitution. The President was appointed by the Bose Levu Vakaturaga or Great Council of Chiefs (GCC) after consultation with the Prime Minister. The Constitution also provided for the Parliament to make laws conferring emergency powers on the President including the power to make regulations relating to the state of emergency. And this had happened with the enactment of the Emergency Powers Act in 1998.

However, the year that Iloilo was first appointed President was politically tumultuous. As discussed in Chapter 2, in May 2000, George Speight had led a civilian coup ousting Fiji’s first Indo-Fijian Prime Minister, Mahendra Chaudhry, who along with thirty five other parliamentarians were kept hostage in the parliamentary precincts for nearly two months. The military forces under the command of Frank Bainimarama quelled the disturbance but in effect staged a counter-coup. When the then President Mara refused to continue as President after Bainimarama’s purported abrogation of the 1997 Constitution, Bainimarama assumed full executive power until July when the GCC appointed Iloilo as President. This appointment, clearly made outside Constitutional provisions, was later invalidated in the courts. Ironically, because Iloilo had been Vice President since 1999, he could have been constitutionally recognised as Acting President in the event of President Mara’s absence. But in view of the Court’s decision invalidating Bainimarama’s interim regime and restoring or reaffirming the 1997 Constitution, as well as recognizing a later date for President Mara’s official resignation, the GCC once again voted in Iloilo as President.

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20 Constitution (Amendment) Act 1997 (Fiji) cap 7.
23 Constitution (Amendment) Act 1997 (Fiji) cap 7, s 88(2).
In 2006 Iloilo was appointed to another five year term of presidency in conformity with the Constitution. That same year, following a general election, Laisenia Qarase was reappointed as Prime Minister. However, with the irrevocable souring of relations between Bainimarama and Qarase, Bainimarama staged his second military coup (the first being his military coup after Speight’s coup in 2000) and once again assumed full executive power. According to Bainimarama the situation necessitated his ‘stepping into the President’s shoes since His Excellency appeared to have been blocked from exercising his constitutional powers by those surrounding him or who were putting undue pressure on him.’

During his month of full control, Bainimarama launched his ‘clean-up campaign’, dismissed Prime Minister Qarase and duly dissolved Parliament after appointing a caretaker Prime Minister to advise him of that dissolution. A few weeks later, Bainimarama purported to ‘hand back’ the presidency to Iloilo who immediately and publically endorsed all that Bainimarama had instigated. The President stated that, ‘given the circumstances I would have done exactly what the Commander of the RFMF, Commodore Josaia Voreqe Bainimarama did since it was necessary to do so at that time.’ The President went on to announce his intention to appoint an interim government whose mandate would include the continued upholding of the Constitution, the facilitation of legal protection and immunity to all members of the RFMF and the giving of effect to the actions of the RFMF including the suspensions, dismissals and removal from office of civil servants. In subsequent days the President appointed Bainimarama as Interim Prime Minister as well as making various other ministerial appointments on advice from Bainimarama.

Initially, when the lawfulness of the President’s acts was challenged in the *Qarase* case, the President successfully argued that he retained a species of prerogative power or ultimate reserve power, a residue of discretionary or arbitrary authority from ancient times when ‘the kings of England reigned as absolute monarchs.’ Given the limitations of the doctrine of necessity, as previously discussed in Chapter 3, it was perhaps unsurprising that the President’s case did not rely on it but the dusting off of an archaic, unreviewable prerogative power shocked many legal commentators. The victory in the High Court sustained the Interim Government and its programme of reforms until Mr Qarase’s appeal was heard in the Court of

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24 *Qarase v Bainimarama* [2008] FJHC 241 (9 October 2008) [55].
25 Ibid [69].
26 Ibid.
27 Ibid.
28 Ibid [79].
Appeal the following year. In that judgment the Court overturned the High Court’s ruling, and returned the President to his more symbolic office as head of the country. The next day was Good Friday and the occasion of President Iloilo’s momentous address to the nation.

In terms of Schmitt’s theory of dictatorship, the abrogation of the Constitution can be seen as marking a transition from commissary dictatorship to sovereign dictatorship. As elaborated in Schmitt’s *Dictatorship*, ‘commissary dictatorship suspends the constitution in order to protect it – the very same one – in its concrete form.’ The suspension is not an invalidation of the constitution but ‘only represents a *concrete exception*.’ That concreteness relates to what Schmitt refers to as ‘the immediate actuality of a situation that needs to be resolved – in the sense that resolution appears as a legal task, which legally justifies a power according to the concrete situation and to the goal of its resolution.’ But, the concept of commissary dictatorship as the execution of constituted power, ‘authorised by a constituted organ and [with]…an identity in the existing constitution’, could not justify the revolutionary founding of a new legal order.

Schmitt’s concept of sovereign dictatorship, deriving ‘directly from the amorphous *pouvoir constituant*’, expanded the scope of dictatorship beyond the suspension of an existing constitution to the creation of conditions in which a ‘true’ constitution or one ‘that is still to come’, is made possible. Thus, like a commissary dictatorship, revolutionary or sovereign dictatorship ‘remains functionally dependent on the idea of a rightful constitution – because even in the revolutionary dictatorship the constitution to be realized by that dictatorship is itself suspended, as is the ever present *pouvoir constituant*.’ The notion of constituent power and the concept of sovereign dictatorship as theorised by Schmitt, allow him to find a relation between law and the lawlessness of actions of a revolutionary power. According to Schmitt’s reasoning ‘[a] “minimum of constitution” still remains as long as the *pouvoir constituant* is recognised’ and the task and justification of sovereign dictatorship is the creation of the external conditions that the constituent power requires in order to come into

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31 Ibid.
32 Ibid.
33 Ibid 127.
34 Ibid.
36 Ibid 126.
37 McLoughlin, above n 22, 515.
effect.\(^{38}\) However, even for Schmitt there are ‘provisos’, including the temporal limitations of sovereign dictatorship, and these will be discussed in the context of Iloilo’s presidency.

**The Appearance of Sovereign Dictatorship**

As the courtroom appearances indicated, the ‘interim regime’ clearly preferred the mantle of constitutional legitimacy and a notion of commissarial dictatorship as may be interpreted in the President’s retention (but suspension) of the Constitution. But President Iloilo was obviously not relying on the Constitution (as read by the Court of Appeal) to authorise his abrogation of it. Nevertheless his continued use of presidential title served as a reiteration of his authority as Head of State, not only as artifice for a now defunct law but as a confident assertion of his extraordinary authority to represent and execute the constituent power of the people. At first blush at least, President Iloilo resembled a Schmittian kind of sovereign dictator.

Josefa Iloilo had been elected President by the GCC, a statutory body of Indigenous chiefs which was constitutionally endowed with power to appoint the President. The GCC, however, was not a nationally elected body but chosen by the provincial councils. Nevertheless the GCC commanded wide respect as an embodiment of Indigenous paramountcy and was considered ‘an essential source of legitimacy for a national government.’\(^{39}\) Iloilo was not only President, and therefore ex-officio member of the GCC, he was also Tui Vuda or paramount chief of the Vuda district on Fiji’s northwest coast. This chiefly status was significant, not only for the respect it received from the Indigenous Fijian community but also as recognised in the broader multiethnic community. Iloilo took that leadership role seriously. He told his fellow chiefs in 2005 that they had to prove worthy of their authority. He recalled the words of the highly regarded chief and statesman, Ratu Sukuna, who ‘declared that chiefs could only be sure of their people continuing to follow them as long as they appreciated that chiefly authority was better than anyone else's.’\(^{40}\) That President Iloilo’s exercise of power had not been challenged in the courts on the grounds of mala fides or incompetence, was testament to this authority.

\(^{38}\) Schmitt, above n 39, 127.


In the course of his Good Friday speech, President Iloilo did not speak of his chiefly status. Instead, indicating the inconsistency of the Court that was prepared to validate some extra-constitutional measures but not those that he had taken, he re-endorsed the performance of the interim government. ‘It has adhered to my mandate’ he said, and ‘has had a positive impact on the lives of our people in particular the ordinary citizens of our country, including those in the rural areas.’\(^{41}\) The president’s pointed reference to his mandate, melded with his concern for the welfare of the people, served to reinforce the appearance of authenticity in his claim to authority. This was further steeled by Iloilo’s recourse to the project of democracy (and also wherein lay the fuller significance of the President’s performance of legitimacy). Iloilo’s democratic urgings were voiced as an aspiration towards a democratic future and an endorsement of his past and present politics. He made reference to various post-coup initiatives such as the *People’s Charter for Peace and Change*, a document designed to express a vision of a democratic future and the way it would be achieved. Importantly, the Charter, the council appointed to prepare it, and their processes, were held up as demonstrative of widespread public participation and consultation. Sixty four percent of Fiji’s population was said to support the programme of reforms, providing clear evidence of identification between Iloilo and a majority of the people.\(^{42}\)

For Schmitt ‘the logic of democratic argument rests on a series of identities - the identity of rulers and ruled, governed and governing, subject and object of state authority, the people and their representatives in parliament, the state and the voters, the state and the law.’\(^{43}\) The identity between ruler and ruled is thus pivotal in the decision to suspend or inaugurate the law in a state of emergency or a (democratic) revolution. But aside from the somewhat dubious claims about popular support for reform (as will be discussed in the next chapter) Iloilo struggled to justify his authority in democratic terms. Otherwise he was a Prince (in the sense discussed below), the self-appointed president of Fiji’s new legal order or else he was the military’s stooge.

Schmitt’s work may place some significance on the issue of representation and the identity between the ruler and the ruled but there is an uneasy coupling in his account of a sovereign

dictatorship and its ‘appeals to the ever present people, who can take action at any time.’

Schmitt contends with the wondrous (but possibly inconvenient) dimensions of the ‘infinite, incomprehensible abyss of the force of the pouvoir constituant [from which] new forms emerge incessantly’, through his insistence on the transitory nature of dictatorship and ‘its dependence on a task to be accomplished.’ This also enables him to distinguish between the sovereign dictatorship and the sovereignty of absolute monarchy or sovereign aristocracy.

But as critics such as Leonard Feldman observe, with his primary concern to defend the order and authority of a sovereign dictatorship, Schmitt actually collapses ‘sovereignty as a democratic constituent power [into] sovereignty as a quasi-monarchical decision on the exception.’ As Feldman puts it, ‘Schmitt’s invocation of constituent power is less as a real mechanism of accountability and more as a rhetorical veneer of legitimation to encourage a mute populace to identify with an elite.’ Indeed, in Schmitt’s state of exception, the ever present people, or more precisely, ‘the content of the constituting will…is not actually available’. And in Fiji at the time, that was not least because of the very real and pervasive threat of military violence. But for Schmitt it seems that the violent and coercive possibilities of emergency decrees can be tempered or justified by the temporary nature of dictatorship and the identity between ruler and ruled.

There is no doubt that amidst the coup and its ramifications, Fiji’s politics were in turmoil. But this was a polyvalent crisis, depending on where you stood in relation to the deposed government, the law and the interim military and civilian government. And from Schmitt’s point of view, this is precisely why the sovereign decision is needed and cannot be grounded in law or fact. For Schmitt, according to Daniel McLoughlin, ‘the sovereign is necessary because neither law nor fact can determine the exception: their role is to decide when a situation of danger exists and suspend the law in response.’ President Iloilo may have adopted Bainimarama’s response to what he saw as a racist, corrupt and incompetent Qarase government that was destroying the country, or he may have perceived an incapacity of the law to deliver the country from evil. Or Iloilo may have apprehended the real and present

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44 Schmitt, above n 39, 127.
46 Ibid 127.
47 Ibid.
49 Ibid.
50 Schmitt, above n 39, 127.
51 McLoughlin, above n 22, 517.
52 Ibid.
danger that a thwarted military commander posed to national security in the event of the President following the Court of Appeal’s directions. Certainly, in beseeching the Court of Appeal to reserve its judgment, the Solicitor General voiced his apprehension of violent upheaval. But for the President, at least as indicated in his speech, Fiji was facing a crisis of democracy because of the obstacles posed by the existing order. In which case, as Schmitt recognises, ‘the task of clearing the way by eliminating the existing order through a revolution would appeal once more to the pouvoir constituant’.\(^53\) One of the problems with that proposition, however, is that under a state of emergency, the pouvoir constituant, or some of its bearers, may be radically suppressed and certainly not initiating or participating in a revolution (at least not in the form of a popular uprising) or even available in its aftermath.

As discussed earlier in the thesis and again later in this chapter, Bainimarama was commander of a large, well-armed and loyal military with a strong presence on the streets. The military was increasingly gaining employment in key government positions, and wielding virtually unlimited power under the decreed emergency regulations, without it ever really becoming clear what actually constituted the emergency. And these emergency regulations had already been in force for three years prior to the new legal order. Nevertheless President Iloilo saw that the ongoing state of emergency would ensure the order and stability required for the reforms crucial for conduct of true democratic elections and believed a further five years was necessary to implement those reforms. And, indeed, Fiji did return to the ballot box after five years, as the President had predicted.

The unstable or dangerous elements that the President sought to pacify coincide in Schmitt’s thought on the ‘enemy’ as one side of what he refers to as the fundamental political distinction between friend and enemy.\(^54\) For Schmitt, the friend-enemy grouping ‘is always the decisive entity, and it is sovereign in the sense that the decision about the critical situation, even if it is the exception, must necessarily reside there.’\(^55\) Schmitt writes that [t]he friend and enemy concepts are to be understood in their concrete and existential sense…the concern here is…with the inherent reality and the real possibility of such a distinction.\(^56\) And it is the sovereign dictator, with the same background ‘of general beliefs and convictions lying behind a collectivity’ who makes that distinction in the state of exception, thus assuring the stability

\(^{53}\) Schmitt, above n 39, 126.
\(^{55}\) Ibid 38.
\(^{56}\) Ibid 28.
of a ‘normal’ social order. But as Mariano Croce and Andrea Salvatore argue, the logic of Schmitt’s conceptualisation is ‘characterised by a monistic logic. Only this logic assures the political unity which is the condition of possibility for and, at the same time the real aim of communitarian identification with one concrete legal order.”

A problem of this logic that upsets the possibility of an identity between ruler and ruled is the impossibility of ‘any unity to the people in the constituent moment.’ Indeed, as Illan rua Wall suggests, ‘the people in its constituent moment should not be conceived of as a fully present and self-aware entity in the process of self-determining’, not because of its invocation as a principle of radical political change, but because of its invocation as a ‘closed unity that tends towards homogeneity’. This is the people as it may be known from a constituted order, yet even then it remains uncertain. However, for President Iloilo at the time of his announcement, supposedly the people would see themselves clearly in a constituted order five years down the track. Meantime, the state of emergency would contain the threat of a ‘rogue’ or enemy constituent power and its ‘promise that things could be otherwise.’

For theorists such as Andreas Kalyvas, Schmitt’s assertion of an identity between law and the people is a logical expectation for the notions of political community, common action and shared public good to make sense. But as Kalyvas concedes, because Schmitt denigrated the liberal political practices of public deliberation and civic debate, his ‘constituent sovereign is left with nothing more than the passive options of acclamation, noise, and shouts, becoming defenceless to pervasive forms of manipulation and demagogy.’ Not that Schmitt was unaware of those and other possibilities. As he warned, ‘[t]he people's free will can be enslaved through contrived methods and external constrains or by causing confusion and disorder in the conditions.’ To deal with those contingencies Schmitt turns to Charles Borgeaud who wrote that ideally the people must have a choice between an old and a new regime. But in the event of a revolution when the old constitution no longer exists and a

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57 Croce, above n 14, 53.
58 Ibid 54.
60 Ibid.
61 Ibid 82.
62 Ibid 89.
63 Ibid 88.
64 Kalyvas, above n 16, 123.
65 Ibid 124.
66 Schmitt, above n 39, 126.
67 Ibid.
provisional charter may be enacted, the action of a revolutionary power ‘should come to an end whenever the new government has been constituted and order has been restored.’ The main point Schmit makes is that any inhibition to the free exercise of or appeal to the *pouvoir constituant* must be cleared (through a revolution for example) and that (sovereign) task would make itself dependent upon the appeal, once more, to the *pouvoir constituant*. ‘Consequently’, as Schmitt writes, ‘this dictatorial power is sovereign, but only as a “transition”’.69

In relation to the time of dictatorship, one may wonder how long an acceptable (to Schmitt) transition may take, and indeed, a crucial part of Agamben’s and Walter Benjamin’s critique of sovereignty (returned to later) is the concept of a permanent state of exception. But in regard to the time of Iloilo’s dictatorship, the ailing President, who at eighty eight was the world’s oldest Head of State, retired shortly after the new legal order was announced and is now dead and buried.

The role of President Iloilo in founding the new legal order highlights the problem of continuity that has consumed the history of western political power.71 This problem springs from the concept of the power of authority or *auctoritas* adhering in the person or body of the prince, king or monarch rather than in the office. That person must die yet authority ‘must remain in effect if the juridical order is to remain legitimate.’ As DeCaroli puts it:

> For the political order to remain viable, authority must remain continuous, and so, with regard to the political life of the sovereign, survival cannot merely correspond to the biological lifespan of any particular emperor or prince because biological life is simply too fleeting. The death of the king must be managed by rituals of continuity so that the authority vested in the kings body outlives, that is to say, survives, the end of his biological life. If biological death is the most certain of all biological necessities, and if the political domain is distinguished by its distance from such necessity, then the capacity to extend (political) life by surviving (biological) death is undoubtedly the greatest triumph of the political sphere.73

In Fiji the power of authority (and the legitimacy of the legal order) appeared to survive President Iloilo’s death, partly because of the blurring between the person and office (that had

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68 Ibid.
69 Ibid.
70 Ibid 127.
71 DeCaroli, above n 12, 235.
72 Ibid.
73 Ibid.
taken place hundreds of years before) and the ritual transmission of power in office. Iloilo was replaced by President Nailatikau, who was appointed, not by the GCC which Bainimarama had dissolved after the coup, but by the Interim Government, cementing not only a new president but the new office of presidency to the power of authority. By then, however, the seat of that auctoritas was clearly drifting, or the necessity for it to be anchored thus, was less pressing. And the fact is that while it was President Iloilo who declared (if not decided) the state of exception and the new legal order, and so, according to the Schmittian dictum, sovereign was he, as all observers, sympathetic or otherwise, knew, it was Frank Bainimarama who had led the military coup three years earlier and initiated the ‘clean-up’ campaign that followed. And Bainimarama purportedly but firmly filled the shoes of presidency as long as Iloilo failed to support Bainimarama’s plan. Nevertheless, it was clear that both the title (with its constitutional pedigree and political status) and the chiefly person of President were important legitimising symbols for the interim government. And while Bainimarama may have commanded the military and the government, he did not command the same respect as a paramount chief or the chiefly appointment of president. In that regard the President and the Commander embody a relation between sovereignty and government reflected in the maxim: the king rules but does not govern.

In his development of the concept of bio-power and governmentality, Foucault draws on that maxim to articulate what he sees is a ‘new privileging of government over sovereign power.’\textsuperscript{74} Agamben’s more recent work in The Kingdom and the Glory ‘locates itself in the wake of Michel Foucault’s investigations into the genealogy of governmentality’ but casts his interrogation of the past into the early centuries of Christian theology to observe the working and articulation of the governmental machine.\textsuperscript{75} As discussed in Chapter 3, Agamben’s argument revolves around the concept of oikonomia which he sees not only as paradigmatic of the ‘immanent ordering’ of modern biopolitics but also as paradigmatic of theology,\textsuperscript{76} and thus as theologically relevant to secularisation as the Schmittian concept of political theology which ‘grounds in the one god, the transcendence of sovereign power’.\textsuperscript{77}

\textsuperscript{74} Jessica Whyte, ”’The king reigns but he doesn’t govern”: Thinking Sovereignty and Government with Agamben, Foucault and Rousseau’ in Tom Frost (ed), Giorgio Agamben: Legal, Political and Philosophical Perspectives (Routledge, 2013) 147.
\textsuperscript{75} Agamben, above n 14, xi.
\textsuperscript{76} Ibid 3-4.
While Foucault speaks of modalities of power (juridical, disciplinary and governmental or bio-power) one of which ‘constitutes at each turn the dominant political technology’, Agamben speaks of ‘various changing articulations, also conflicts … of these two poles of power: reign and government, sovereignty and economy, the father and the son, law and order’. According to this perspective, as Jessica Whyte states, ‘[w]hile at any time one pole may be more prominent, their functional articulation means that they always form a single machine….Agamben’s account of government is thus oriented not to distinguishing it from sovereignty but to demonstrating the complicity between the two.’ Thus, while President Iloilo may have appeared like the roi mehaignie or the Fisher King of the Grail Legend, old and frail (wounded or mutilated in the legend), a king who reigns but does not govern, his power too ‘cannot be separated completely from him.’ The fact that Iloilo’s power was not, strictly speaking, the executive power with which his constitutional office was endowed, only helps us to see that the division that is ‘consubstantial with the machine’, between an absolute transcendent power of general ordering (ordinatio) and the exercise of an immanent executive power (executio), is fictional and problematic.

In the next part of the chapter the distinction (and blurring) between the power of authority and its exercise is taken up in relation to Frank Bainimarama and his part in the governmental machine. Through his attention to semantics Agamben shows a relation between government and its latin roots in gubernatio and Greek roots in kybernetes meaning steerage or pilotage, which makes an almost uncanny appearance as the ‘sea pilot’ in Fiji’s new legal order in the person of Commodore Bainimarama. However, Fiji’s sea pilot is also distinguishable from the sea pilot in Agamben’s work. In The Kingdom and the Glory the sea pilot is part of Agamben’s discussion of Schmitt’s analysis of the Weimar Republic and ‘a genealogy of a “government of men” that seems to anticipate, with a vertiginous glimpse, the genealogy that, in the second half of the 1970s, will occupy Michel Foucault’. According to Agamben, Schmitt identifies Adolf Hitler as ‘a function of government ‘and ‘a new figure of political power’ who now faces the sovereign (Weimar president) who reigns but does not govern. Schmitt argues that the Fuhrer is different from the ‘sea pilot’ or the shepherd because of the ‘secularisation of the pastoral paradigm … that eliminates its transcendent character’. But

78 Agamben, above n 14, 109.
80 Whyte, above n 83, 149.
81 Agamben, above n 14, 72
82 Ibid.
83 Ibid 76.
Agamben points out that Schmitt can only distinguish or subtract the Fuhrer from the governmental model by taking the ‘absolute equality of species’ that Schmitt claimed existed ‘between the Fuhrer and his followers’ and ‘giv[ing] a constitutional status to the concept of race’. This politicisation of the people thus occurs by:

> turning the equality of lineage into the criterion that, in separating what is foreign from what is equal, decides at each turn who is friend and who an enemy … racism thus becomes the apparatus through which sovereign power (which for Foucault, coincides with a power over life and death while, for Schmitt, it corresponds with the decision over the exception) is reinserted into biopower.

In Fiji however, the new legal order was steered in by Bainimarama on a platform of equality multiculturalism, and suggestive of a different apparatus through which sovereign power would be reinserted into biopower.

### Part B: Commander Bainimarama

#### Military Man

In this section I focus on the authority of Frank Bainimarama as chief protagonist and architect of change in Fiji’s legal order. While his political ascendancy has provoked controversy and often met with local resistance and international censure, ultimately Bainimarama’s command of Fijian culture prepared the bed of acceptance of, or belief in, the legitimacy of his authority. This is not to deny the significance of Bainimarama’s military command but rather points to its place in a web of beliefs and practices, as well as its violent coercive possibilities. Several historical legacies, as outlined in Chapter 2, paved the way for Bainimarama, key of which include a respectful regard for hierarchical power and military strength.

Bainimarama was appointed Commander of the Republic of Fiji Military Forces in 1999 after a rapid rise through the ranks from his enlistment as an Ordinary Seaman in 1975, and with a ‘baptism of fire’ in the political crisis of 2000 (as outlined previously). He emerged from that crisis as one of its heroes. Indeed this was one of the more curious outcomes, given his efforts

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84 Ibid.
85 Ibid.
to abrogate the Constitution and replace the elected Chaudhry government. When I inquired, some years later why such actions had not been met with charges of treason or sedition, I was assured, even by legal colleagues less than sympathetic to Bainimarama’s later coup, that those actions were merely part of the affable Bainimarama’s rescue effort, treason being furthest from his mind.

As discussed earlier in the thesis, in the eyes of the Court of Appeal in the Prasad case, however, Bainimarama was clearly a usurper. And, seemingly undeterred, in the years after that judgment Bainimarama demonstrated a very clear rejection of the next elected government and its political processes and, indeed, much more. With his dismantling of the Great Council of Chiefs shortly after the coup in 2006, and the suppression of many activities of the Methodist Church, Bainimarama effectively recalibrated the ‘metacultural formula’ of lotu, vanua and matanitu, as discussed in Chapter 2. All this was accomplished, not to the rallying cry of revolution or even coup d’état, but under the much more banal euphemism of ‘clean-up campaign’. In light of Agamben’s sovereign exception, however, the public emergency regulations invoked to place the country under a state of emergency, signalled much more clearly what the arrival of Fiji’s new administrator, or the administrator’s new clothes would mean.

The intrusion of the military, as occurred in Fiji under the command of Frank Bainimarama, is characteristic of the state of exception that since the World Wars (or earlier) and especially since 2001 has been transformed by the logic, measures and technologies of ‘security’. Agamben uses the phrase, ‘Security State’, to refer to this new form of government in which the state of exception as a technique of government has not only been prolonged and normalised but ‘has gradually been replaced by an unprecedented generalization of the paradigm of security’. Rather than eliminating the crisis or emergency and restoring law and order, the use of the state of exception is geared toward managing or regulating crisis, and even producing it. Agamben’s analysis of the semantics of ‘crisis’ and its place in the security paradigm is particularly germaine to the Fijian context. He states that while the term ‘crisis’ has medical and theological roots, where ‘crisis’ refers to the moment a doctor has to

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88 Agamben, above n 11, 14.
judge or decide if a patient will live or die, or to Christ’s Last Judgment, the use of crisis as a security reason abolishes a connection with a certain moment in time:

The crisis, the judgement is split from its temporal index and coincides now with the chronological course of time, so that, not only in economics and politics, but in every aspect of social life, the crisis coincides with normality and becomes, in this way, just a tool of government. Consequently, the capability to decide once and for all disappears and the continuous decision-making process decides nothing. To state it in paradoxical terms, we could say that, having to face a continuous state of exception, the government tends to take the form of a perpetual coup d’état.90

The pervasion of security apparatuses into the regulation of life has profound implications, not only effecting the transformation of politics to biopolitics, as Foucault has shown us, but also for comprehending something like a usurpation of that power. Indeed, the very nature of biopower would seem to preclude the conceptual possibility of its usurpation. Yet in order to comprehend the nature of Bainimarama’s legitimacy we must probe a convoluted performance of masks and smoke and mirrors, and that requires not only a Foucauldian analytics of biopower and its completion in Agamben’s state of exception and the ‘security state’. I am drawn here to the words of Kelly and Kaplan, which, although a reflection on George Speight, resonate with the task at hand:

In order to take Speight’s coup seriously, we have to reckon with the elements of fraud and farce, as well as the terrorism, that clearly characterised it…To claim analytically that his actions reflect a politics of recognition or any kind of critique of the liberal nation-state paradigm would be to neglect the obvious – that Speight patently, scrupulously, ham-fistedly deployed such critique. Speight’s coup attempt was not even a clever manipulation of global disquiets. It was a crude exploitation of them. And to see this is to take him more seriously.91

Similarly, Bainimarama’s political ascendency has been blatantly achieved as biopolitical spectacle and sovereign exception. Leaving the old president (and the language of law and liberal politics) to take care of the juridical structure of sovereignty in the popular imaginary, well aware of the thrall in which juridical power is held, Bainimarama went about the business of policing the state, renovating it as the new juridical home. This process involved


91 John Kelly and Martha Kaplan, Represented Communities: Fiji and World Decolonisation (The University of Chicago Press, 2001) 196.
the blurring of norm and exception in a flurry of decrees (promulgated by the President but prepared by Bainimarama and the military council and others) and the day to day administration of state, all the while with security reasons, which Agamben refers to as ‘vague non-juridical notions … used to instaure a stable state of creeping and fictitious emergency without any clearly identifiable danger.’92 Thus, even while Bainimarama seemed to have a leg in both camps, reinforcing the separation of the juridical from the biopolitical and demonstrating their intersection in the state of exception, his authority also embodied the emptiness, or worse, the violence at the heart of the matter: the spiral of security and terror that Agamben warns ‘may form a single deadly system, in which ... [security and terrorism] justify and legitimate each other’s actions.’93

Let us be clear here. Bainimarama took on the business of State as a military man, with the backing of a large loyal force, the only armed force in Fiji. Like the coup-makers before him (whose activities are outlined in Chapter 2), Bainimarama did not presume to act as formal sovereign or as the poor or armless voice of political struggle, nor indeed, as the voice of a popular uprising. His takeover was only possible (and perhaps only even conceivable) on the back of his military might. And while Bainimarama’s military strength may not have always been on display, it reared its head whenever he needed to make his point or get his way. The loyalty of the troops to their commander and his loyalty in return were thus primary concerns. To these ends, military men have been rewarded with prominent roles in government while insurrection has been dealt with mercilessly. Suspicion was cast on the military after the torture and killing of five rebel soldiers involved in a mutiny after the Speight coup. However, the military’s involvement with these deaths remains largely uninvestigated and given Bainimarama’s reluctance to investigate the matter, will remain so for the foreseeable future. More recently, Bainimarama has supported violent acts of Fiji’s security forces as necessary security measures. Responding to a widely publicised video of police caught in the act of violently beating prison escapees in 2013,94 Bainimarama stated:

93 Agamben, above n 99.
At the end of the day, I will stick by my men, by the police officers or anyone else that might be named in this investigation … We cannot discard them just because they've done their duty in looking after the security of this nation and making sure we sleep peacefully at night … In that two weeks I remember I was very worried about the security of the people of Fiji.\(^95\)

As discussed in Chapter 3, historically, security technologies have featured prominently in the functioning and orientation of Fiji’s military (and of course its police forces). But, however effective as a technique of colonial and post-colonial government, the mechanisms of security and the extended state of emergency in Fiji’s new legal order have also been criticised because of their relation to violence. In its 2016 report on Fiji’s security forces, Amnesty International identifies a number of security issues that impact directly and indirectly on the incidence of torture and other ill-treatment.\(^96\) These include: the blurring of the roles and functions of the military, police and corrective services (collectively comprising Fiji’s security forces) which has seen the military involved in civilian policing matters but also military officers appointed as Police and Corrective Services Commissioners; all security forces reporting to the same Minister for National Security and Defence (but with the military commander only consulting on certain issues); and no independent oversight mechanism for the security forces. Amnesty International links these features directly to human rights violations and unaccountability, stating:

> the most serious cases of torture and other ill-treatment arose from a joint military-police taskforce, whose chain of command is not clearly established within the police force. When the military is involved in policing matters, human rights violations are more likely to occur and they are less likely to be held accountable for their actions.\(^97\)

The culture of impunity has been further enhanced by immunity provisions in law for certain acts associated with previous coups as well as any government action between 2006 and 2014.

While Fiji ratified (with reservations) the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 2016, Bainimarama has (rightly) reminded critics that, in the broader security context, various nations have acted in similarly problematic ways while Fiji has been singled out for condemnation. In his speech at the regional workshop on the CAT in 2016 Bainimarama pointed to the ‘tragedy for the


\(^97\) Ibid 5.
whole world’ that democratic societies have inflicted ‘in the interests of state-security.’ To illustrate, Bainimarama referred in particular to America’s resort ‘to torture, with the stated objective of protecting itself against a determined and ruthless enemy’ and ‘Australia’s policy of detaining asylum seekers offshore … clearly … at the expense of the rights of ordinary men, women and children seeking refuge from some of the most troubled places on earth.’

These statements, made in 2016, with the luxury of incumbency, after the 2014 general elections when Bainimarama was voted in as Prime Minister, highlight (at least) two points about the modern state of exception and its paradigm of security as remarked upon by Agamben: that it is a creation and contemporary practice of democracies; and that security measures (such as the treatment of terrorist suspects) expose ‘the immediately biopolitical significance of the state of exception’. That Bainimarama relied on these techniques to inaugurate a new legal order, in the name of democracy, adds yet another facet to the nexus that Agamben has so eloquently brought to light ‘between the Foucauldian problem of government [biopolitics] and the Schmittian problem of the exception’. By injecting himself (as military commander and politician) and the military into the machinery of administration and regulation and its management of the state of exception, Bainimarama has added sham to what Agamben refers to as the fiction ‘according to which anomie (in the form of auctoritas, living law, or the force of law) is still related to the juridical order and the power to suspend the norm has an immediate hold on life.’

Leaving aside Agamben’s philosophical proposition of the fiction for the moment, the issue of sham or fraud that bedevils this analysis must be teased out in order to grasp the complexity of the transition to Fiji’s new legal order. As outlined in Chapter 3 where I discussed the laws that established and regulated the government or the context in which governance would take shape, in Fiji the state of exception was regulated by the 1997 Constitution, the Emergency Powers Act and the common law doctrine of necessity. Provisions for the military to maintain essential public services were enacted under the Royal Fiji Military Forces (Amendment) Act

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99 Ibid.

100 Agamben, above n 11, 3.

101 McLoughlin, above n 7, 705.

102 Agamben, above n 11, 86.
Under these laws the power to suspend the law and declare a state of emergency was primarily in the hands of parliament and the minister but the doctrine of necessity could accommodate a temporary exercise of that power by the president or those in de facto control such as the military. These laws had all been tested in Fiji’s constitutional cases and unlike the situation in Germany under the Weimar Constitution, where no limitations were placed on the president’s emergency powers (ultimately facilitating Hitler’s rise to power), Fiji’s final Court of Appeal recognised and upheld certain limitations on emergency powers. Yet Bainimarama proceeded, almost seamlessly, from that decision to another decision that founded a new legal order.

Of course, given that with the abrogation of the Constitution, the dissolving of parliament, the sacking of the judiciary and a variety of ouster clauses, any measure of the old yardstick might not apply to an assessment of the new legal order’s validity or legitimacy, there could be other grounds on which Bainimarama might proceed, legally or legitimately. As examples, the forces of revolution or civil war, or the right of resistance which correspond to the concept of constituent power or ‘the violence that establishes and constitutes a new law’, could be stretched for the sake of argument to Bainimarama’s part in the new legal order. But Bainimarama never spoke of resistance or revolution, or not at first. His manoeuvres were masked in a ‘fancied emergency’, and the state of emergency or exception he needed the president to declare. Only for a month just after the 2006 coup, when the beleaguered president dragged his feet (which was attributed to the pressure of ‘cultural reasons’), did Bainimarama briefly show his hand while, ‘stepping into the president’s shoes’.

But then the sham and fiction of Fiji’s state of exception does not preclude its effectiveness as a juridico-political system, indeed, as the cases show, effectiveness can validate and legitimate the legal order. Part of the secret to that effectiveness lies in Bainimarama’s almost uncanny grasp and moulding of the ‘the milieu’ and its relationship with the apparatuses of security. Used here in a Foucauldian sense, ‘the milieu’ is the target of intervention for bio-power:

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103 Royal Fiji Forces (Amendment) Act 1998 (Fiji) s 3A.
104 Agamben, above n 11, 15. Agamben suggests that ‘Hitler could probably not have taken power had the country not been under a regime of presidential dictatorship for nearly three years and had parliament been functioning.’
106 Agamben, above n 11, 3.
The milieu, then, will be that in which circulation is carried out. The milieu is a set of natural givens – rivers, marshes, hills – and a set of artificial givens – an agglomeration of individuals, of houses, etcetera. The milieu is a certain number of combined, overall effects bearing on all who live in it. It is an element in which a circular link is produced between effects and causes, since an effect from one point of view will be a cause from another.\textsuperscript{108}

Intervening within Fiji’s milieu, Bainimarama’s security measures have been aimed at a population contending with the legacies of colonisation manifest in high levels of poverty, shifting but prominently racialised divisions, and a historical connection between the holders of economic and political power. However, the militarisation of government by a mostly Indigenous military (and not usually the holders of economic power) coupled with a stated commitment to (capitalist) democratic reform and a policy of multiculturalism has meant that Bainimarama’s interim and post-election governments have successfully regulated (and engineered) the milieu in distinctly different ways from predecessor regimes.

Scott Macwilliam describes Bainimarama’s manner of intervention as a form of Bonapartism, a mediation at the political level ‘on behalf of capital when its most important members are not of any particular firms or capitalists.’\textsuperscript{109} In the case of Bainimarama’s ‘project’, this has involved breaking institutional connections between economic and political power (such as those forged in the Great Council of Chiefs, trade unions and political parties), mobilising popular support (which in turn ‘provides the means for organising the representation of labour within a capitalist economy’), yet also presenting the government as ‘represent[ing] capital, industrial and commercial, urban and rural.’\textsuperscript{110}

While Bainimarama’s ability to ‘mediate relations between these various classes and strata’ may commend a certain level or quality of effectiveness to his rule,\textsuperscript{111} the notion of ‘mediation’ does not fully account for his modus operandi or the success of his success. Nor does it account for the ‘pathos of absence’ that haunts my analysis of Bainimarama’s legitimacy. For Bainimarama the state of exception and the various processes through which the stage was set for the new legal order (including constitution-making, political party formation and judicial selection) were advanced as the necessary mode or means through

\textsuperscript{110} Ibid 12.
\textsuperscript{111} Ibid 3.
which the end – Bainimarama’s vision of democracy, equality etc – could be realised. The questionable nature of these procedures (as elaborated in the following chapters) may well be ‘absolved’ for Bainimarama and his supporters under something like Clinton Rossiter’s dictum that ‘[n]o sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself.’ But this dictum is problematic in itself, presenting just one arena for the circular argument concerning the justness of ends and means as justifications of means and ends.

Walter Benjamin examines the complex relation of ends and means in terms of law-making and law-preserving violence. One of his primary insights, and taken up in Agamben’s work, is that:

law’s interest in a monopoly of violence vis-a-vis individuals is not explained by the intention of preserving legal ends but, rather, by that of preserving the law itself; that violence, when not in the hands of the law, threatens it not by the ends that it may pursue but by its mere existence outside the law.

But while Benjamin’s inquiry is directed toward the possibility of a ‘divine violence’ or a violence that is absolutely outside the law, which in turn, points to the possibility of a ‘real state of exception’, Bainimarama relied on a more Schmittian approach to the question of violence and its relation to law. Or in other words, he relied on the nexus between sovereignty and the state of exception to absorb or mask the illegality and the illegitimacy of the violence of usurpation. But Bainimarama’s modus operandi adds yet another facet to the already deeply paradoxical topology of liberal democratic sovereignty. That is to say, even when adopting representative, participatory and inclusive mechanisms amidst an extraordinary politics which, from an optimistic point of view (such as espoused by Kalyvas) can still provide for a radical and vibrant democracy, Bainimarama has subsequently (or even previously) surreptitiously or blatantly, disavowed or abandoned such mechanisms. Unlike Shakespeare’s rose by any other name, Bainimarama’s take on sovereignty, by hook or by crook, is very much in the name.

In a way then we are dealing with a type of double exposure of sovereignty with Bainimarama’s disingenuousness riding shotgun on the empty carriage (Agamben would use

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114 Walter Benjamin quoted in Agamben, above n 11, 57.
the word ‘throne’) of sovereignty. For Agamben the empty throne expresses the glory of the sovereign or governmental apparatus that ‘has captured in its empty center the inoperativity of the human essence.’\textsuperscript{115} Because Bainimarama has ostensibly returned that inoperativity or creative potentiality to the people as the free praxis of constituent power, while also a thinly disguised grab for personal power but nonetheless ‘successful’ on its own terms, he has made a particularly spectacular, modern display of the paradox of sovereignty. Indeed, the zone of anomic at the heart of the legal order that has come to light in the modern state of exception, also allows Bainimarama’s disingenuousness to be inconsequential. What is important is that the state of exception or the juridical void it puts at issue, may be ‘absolutely unthinkable for the law’ but ‘nevertheless has a decisive strategic relevance for the juridical order and must not be allowed to slip away at any cost.’\textsuperscript{116} So whether appropriated through ‘state authority (which acts as a commissarial dictatorship) [or] … a revolutionary organization (which acts as a sovereign dictatorship),’\textsuperscript{117} or some other form of authority (such as the military or pretenders to the throne), the state of exception is the device or the sovereign principle through which life is annexed to law and power is joined to authority, and is therefore the refuge of scoundrels, no less than the engine room of ‘the killing machine’ and the ‘ancient dwelling of law’\textsuperscript{118}.

\textbf{The Politician}

In March 2014, when the political machinery was once again readying for parliament and elections, Bainimarama resigned his military post in order to stand for election as required under provisions of the new Government Constitution. In the farewell speech to the outgoing commander, Lt-Col Gadai said Bainimarama had been chosen by God to lead the military and ‘likened him to the biblical king and hero of Israel David, saying he had triumphed over many odds and beaten many different Goliaths.’ He also thanked him for ‘staying the course he had set for himself despite threats and danger to him and his family.’\textsuperscript{119} Curiously the sea-pilot connection followed Bainimarama into civilian life with his somewhat unusual promotion to Rear Admiral (retired) after he had handed over command of the military. Such promotion - after retirement rather than death - is unusual but the President made the announcement at Bainimarama’s farewell (from the military) dinner, in recognition of Bainimarama’s thirty

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\textsuperscript{115} Agamben, above n 14, 246. \\
\textsuperscript{116} Agamben, above n 11, 51. \\
\textsuperscript{117} Ibid 38. \\
\textsuperscript{118} Ibid 86. \\
\end{flushright}
nine years of service and contribution to the nation. A few weeks later Bainimarama launched his new party, FijiFirst.

The choice of the name, FijiFirst, provoked some reaction from those who claimed to have a prior right to the name. A Fiji First Party had been created by a human rights group in the aftermath of the Courtroom battles fought by Chandrika Prasad (the Prasad cases) on behalf of the people of Muaniweni. Nonetheless Bainimarama’s FijiFirst Party opened its headquarters in Suva, naturally campaigning as the party affiliated with the post-coup government, with its leader retaining the office of Prime Minister until the election. By then Bainimarama was spruiking his political achievements in terms of revolution, apparent in statements such as: ‘I am intensely conscious of the solemn duty that rests with me to continue the revolution that we began together seven years ago — to create a new Fiji, a better Fiji for ourselves and for future generations’.\(^{120}\) And by 2013, with the economy in its third year of recovery after ‘coup-induced shrinkages’ and with the Government ‘push[ing] ahead with long-neglected infrastructure development’,\(^ {121}\) as Robbie Robertson describes some of the pre-electoral climate, Bainimarama was poised to fulfil the saviour role that so many had declared was his, years before.

In the following chapters the facts and fictions of Fiji’s state of exception will be further explored in relation to their regulatory environment and the transformation of the relationship between the state and the people.

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Chapter 5
CONTROL AND SECURITY

Introduction

Fiji’s new legal order was secured through a variety of measures including hundreds of decrees promulgated over the five year period leading to the elections. Many of the decrees were concerned with authorising, entrenching and preserving power in the hands of the new legal order’s instigators. Some decrees were clearly aimed at stifling opposition and limiting the capacity of people to act politically while others could be considered ‘good governance’ measures, such as anti-corruption decrees and iTaukei land management decrees, albeit even anti-corruption measures such as the setting up of the Fiji Independent Commission Against Corruption (FICAC) could be seen as serving an ulterior purpose. As Mosmi Bhim writes, ‘the establishment of FICAC was an unnecessary duplication, undertaken to prove the existence of the alleged corruption in government prior to the military takeover’,¹ which was, of course, the avowed raison d’etre of the military takeover.

However, in a ‘society of the spectacle’ (a concept discussed later in this section) appearances are almost everything. This was also borne out in the timing of the promulgation of some decrees - almost split seconds in anticipation of subsequent activities or else in retroactive application - which highlighted the importance of linking (an appearance of) lawful authority to the regime’s acts, regardless of how else it appeared. But why did it matter so much that any decree be officially promulgated at all, one may ask, let alone the raft of authorisations, modifications and removals thereof, given the strength of the military and other support for the regime? Part of the answer lies in what Firth and Fraenkel describe as ‘the crux of Fiji politics; each social force that claims unilateral power for itself almost visibly struggles for a

broader public consent, and cringes in the face of its unacceptability to one or other section of the community.  

Certainly the mantle of legality is the golden fleece in that regard.

Crucial to maintaining the semblance of legality and the rule of law is a functioning legal system, the apex of which, according to Fiji’s largely inherited, common law legal system, is a credible, independent, judiciary. However, judicial participation in an unlawful regime raises the question of judicial integrity and much more. As discussed in Chapter 4, the implications of judges ruling on the legality or legitimacy of a regime under which the judges’ own appointments may have been made, highlight certain logical and doctrinal difficulties. This section focuses on other repercussions of judicial appointment in the new legal order, particularly the function of judicial independence.

**Part A: Judicial Control**

A judge without independence is a charade wrapped in a farce inside an oppression.

**Judicial Autonomy**

As well as the common law system, Fiji inherited and adapted a Westminster style of government. In this regard, Fiji, like other Commonwealth countries, did not adopt many of the classical characteristics of the Westminster model such as an unwritten constitution or parliamentary sovereignty rather than constitutional supremacy. But, a characteristic feature of the Westminster model – the separation of the head of state from the head of government – was observed in the *1997 Constitution*. The question of the precise nature of the powers of the head of state has, however, been problematic in Fiji and other countries that have adapted the concept of the Crown with limited prerogatives or reserve powers, who does not exercise executive powers. While such problems may have contributed to the failure of the

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Westminster model in Africa,\textsuperscript{5} it is interesting that despite the upheavals (and exploitations) of the office of President in Fiji, the Westminster model has ultimately survived in Fiji.

As well as the separation between the executive and legislature (although it is arguable how separate the executive and legislative arms may actually be in any government, let alone in a state of emergency) the separation of powers also involves the separate power of the judiciary. The separateness of the judiciary functions not only to enhance governance through the mutual checking or balancing of power of other arms of government but also to support and advance the rule of law. The concept of a separation of powers between the executive, legislative and judicial branches of government was not directly articulated in Fiji’s 1997 Constitution (unlike the current Constitution), but the concept prevailed in the many checks and balances on power provided for in the Constitution. Prior to the declaration of the new legal order, this involved, among other things, a judiciary with the power to rule on the constitutionality or the lawfulness of legislative and executive activity. As discussed in Chapter 3, judicial review gave the courts considerable jurisdiction to sanction political activity and influence the course of events such as demonstrated in the Prasad cases and (in breach of judgment) with the Qarase case.

However, in the new legal order until the 2014 elections, the separateness of the judiciary (to the extent that it was or appeared to be separate) was not an aspect of the doctrine of the separation of powers since the judiciary certainly did not provide a check on executive or legislative power nor serve the accountability, transparency or validity of government. But instead, to the extent that a sense of the autonomy of the judiciary supported the rule of law in its routine applications, it was an apparatus of government in the new legal order. ‘Apparatus’ here is used in the sense that Foucault, and Agamben following him, refer to the strategic use of a set of practices, mechanisms, ‘bodies of knowledge, measures, and institutions that aim to manage, govern, control, and orient’ the behaviours of human beings.\textsuperscript{6} Clearly, in the first years of the new legal order, the rule of law as constitutional supremacy, was a moot point, as it is with any coup, revolution or state of emergency, however regulated the latter may be; ergo Agamben’s concern with ‘the juridical significance of a sphere of action [in the state of exception] that is in itself extrajudicial’.\textsuperscript{7} And while this thesis shares that concern, including the implications of a permanent state of exception, Fiji’s new legal order also reminds us how

\textsuperscript{5} Ibid.
sovereignty may be ‘tactically produced’,\(^8\) not only through the suspension of the rule of law but through ‘relegating law to an instrumentality of the state.’\(^9\)

In her analysis of Guantanamo Bay as a site of a particular coexistence of sovereignty and governmentality, Judith Butler describes the sovereignty born of the state of exception as ‘animated by an aggressive nostalgia that seeks to do away with the separation of powers … we have to consider the act of suspending the law as a performative one which … reanimates a spectral sovereignty within the field of governmentality.’\(^10\) The result, such as appeared in the military tribunals set up by President Bush, is a Kafkaesque nightmare of the ‘managerial official’ or ‘petty sovereigns’ with pseudo courts and pseudo laws arising in a field of governmentality; ‘a perfect paradox that shows how sovereigns … who are beholden to nothing and to no one except the performative power of their own decisions … are instrumentalized’.\(^11\) Fiji’s courts can, to some extent, be seen in the same light as Butler’s take on Bush’s military tribunals. Nonetheless, in Fiji’s new legal order the courts appeared to function in the ‘old’ way, although with a modified jurisdiction, such that all questions concerning the validity or legitimacy of the new legal order’s foundation or the lawfulness of the acts of any of its instigators have been removed from the realms of judicial oversight.

Thus, the government strove to maintain the appearance of a division between judicial power and the blend of executive and legislative power. And in that process it could assure stability through continuance in the rule of law and its basic structure while avoiding some of the problems concerning judicial integrity, loyalty and independence that were brought into sharp relief with judicial appointments made after the coup in 2006 but prior to the declaration of Fiji’s new legal order (and the abrogation of the Constitution).

Commentary on the role of the judiciary amidst Fiji’s political crises has been deeply divided according to whether accepting judicial appointment could be seen as propping up the legitimacy of an illegal regime or upholding democracy and the rule of law. In the first camp there were many judges who chose to resign or not renew their contract after the coup. Justice Coventry, an Australian expatriate judge sitting on Fiji’s High Court stated in his farewell speech that lawyers should take a stand against such illegality:

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\(^9\) Ibid 83.

\(^10\) Ibid 61.

\(^11\) Ibid 62; 65.
The immediate future is not rosy … Do not accept illegality for the sake of expediency or for any other reason. If you do not draw your line here, then when you do draw your line it will be many steps back. Speak out. Judges cannot. Bring cases, raise the issues. Acquiescence is the friend of illegality.\(^\text{12}\)

On his decision not to renew his appointment as a judge in Fiji’s Supreme Court, Justice French (later appointed Chief Justice in Australia’s High Court) stated that, ‘the implicit bargain involved in accepting appointment to the highest court of that country by a military government, the lawfulness of which is under significant challenge, comes at too high a price.’\(^\text{13}\)

Similar views were advanced by Angie Heffernan and the Pacific Centre for Public Integrity in their complaint against Australian barrister, Jocelynne Scutt, who accepted an appointment to Fiji’s High Court in 2008. In her letter to the Victorian Bar Association Ms Heffernan wrote, ‘Dr Scutt's acceptance of a judicial appointment to the Fiji Bench … undermines Fiji's constitution, threatens a quick return to democracy and erodes the public confidence in a judiciary that is supposed to be independent and has credibility and integrity.’\(^\text{14}\) And responding to the dismissal of that complaint Ms Heffernan wrote, ‘[t]he judiciary is being propped up by Australians … Australian authorities are quite prepared to allow them to undermine constitutionalism in this country.’\(^\text{15}\)

On the other hand, legal commentators argue that the fullest safeguards of democracy and the rule of law can only be maintained or returned with a fully functioning judiciary. As the Australian members of Fiji’s Court of Appeal in the \textit{Qarase} case opined:

\textit{to refuse [judicial] appointments denies the people of Fiji access to justice and the rule of law and undermines the Constitution … It must be remembered that a fair and functioning legal system can substantially alleviate the situation of a people who aspire to democratic rule in times of instability.}\(^\text{16}\)

\(^\text{15}\) Ibid.  
\(^\text{16}\) \textit{Qarase v Bainimarama} [2009] FJCA 9 (9 April 2009) [169].
Appointed, as they were, after the coup, these judges also lent credibility to the view that despite the political upheavals, and even more poignantly, despite the substance of their decision concerning the unlawfulness of the interim government, the judiciary actually remained independent of the legislature and the executive: ‘In Fiji judges are appointed by the President on the advice of the Judicial Services Commission and not on the advice of any government, military or otherwise.’¹⁷ This was in fact the very narrative adopted by the regime in order to maintain an acceptable façade of sovereignty and the separation of powers. It also formed part of the diatribe against French J, when Attorney-General Khaiyum fulminated:

I note that Justice French mistakenly asserts that it is the Government of the day that appoints the judges, when in fact the appointments are made by His Excellency, our President, as Head of State following recommendation from the Judicial Service Commission. The Government may have changed but the Head of State has not.¹⁸

Suffice to say that at the time of Attorney General’s statement, the Fiji Law Society had applied for judicial review of appointments to Judicial Service Commission (JSC) itself, the outcome of which could place the validity of any appointments recommended by the JSC in doubt. Indeed, the appointment of Gates J to Acting Chief Justice and then Chief Justice was just such a case in point. As the International Bar Association pointed out in their report, the fact that Gates ACJ presided over the Qarase case rather than recuse himself from hearing matters that directly related to his own position, was a cause of serious concern.¹⁹ However, this kind of concern was overshadowed by the successful appeal against the Qarase case which precipitated Fiji’s new legal order, entailing, among other things, the revocation of all judicial appointments.

**New Order Judiciary**

As radical a move as it was, the sacking of the judiciary was also a logical step that assuaged the problem of judicial appointments and allegiances. Judicial officers in the new legal order would be appointed under the *Administration of Justice Decree* and all take the oath prescribed in Schedule to that decree. Rather than uphold the Constitution, the new appointments would swear or affirm to ‘uphold the Administration of Justice Decree 2009

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¹⁷ Ibid.
¹⁸ Aiyaz Sayed-Khaiyum, 'An O'er Speaking Judge is Like an Ill-tuned Cymbal' (Press Statement, Office of the Attorney General, 6 May 2008).
and such other laws made or as may be made by the President.’\(^{20}\) As mentioned earlier, the decree also denied the courts any jurisdiction to ‘accept, hear and determine any challenges whatsoever (including any application for judicial review) by any person to the Fiji Constitution Amendment Act 1997 Revocation Decree 2009 (Decree No. 1) and such other Decrees made or as may be made by the President.’\(^{21}\) But while these changes to jurisdiction may have protected the government from unwelcome intrusions of the judiciary, they did not necessarily provide similar protections to the judiciary. Indeed, according to various commentators, including certain members of the judiciary, the integrity and independence of the judiciary were again seriously at risk because of Executive interference.

In 2012 an ex-Resident Justice of Appeal, William Marshall, published online his compendious petition to Prime Minister Bainimarama, outlining his fears of a ‘dark age’ of corruption descending on Fiji. He complained at length about Executive interference with the legal system, particularly under the hand of Attorney General Aiyaz Sayed-Khaiyum. Marshall’s complaints are an interesting indictment on the new legal order, given his unequivocal support for the coup. His shared views on coup-related matters included the imperative to replace Qarase’s ‘corrupt, racist and extractive government’ and his protest about the Court of Appeal decision in the Qarase case which he saw as ‘an act of Australian sovereignty imposed upon the institutions of Fiji.’\(^{22}\) Indeed, with his belief in the rule of law and the possibility of judicial independence and impartiality in post-coup Fiji, Marshall seemed the perfect fit for the new legal order’s law and justice narrative.\(^{23}\)

However, according to Marshall, the Attorney General, through a concerted campaign of ‘lies and deception … made the judiciary a corrupt agency of the Executive’.\(^{24}\) Marshall’s petition gave Bainimarama the benefit of the doubt, appealing to him on the basis that none of the Attorney General’s offending behaviour was authorised by or even known to Bainimarama and the Military Council. But, perhaps unsurprisingly, none of Marshall’s recommendations (for example, the dismissal of the Attorney General, the retirement of the Chief Justice, the termination of appointments of various judges from Sri Lanka) were implemented. And while Marshall’s petition has been dismissed by some, including fellow judges, as a case of sour

\(^{20}\) Administration of Justice Decree 2009 (Fiji) Government of Fiji, Decree No 9, 10 April 2009, Republic of Fiji Islands Government Gazette Vol 10/11, s 19.

\(^{21}\) Ibid s 5(3).

\(^{22}\) The three judges on the Court of Appeal in the Qarase case were all Australian.


\(^{24}\) Ibid.
grapes (because his contract was not renewed), it has drawn attention to other areas of law, such as the law of recusal, that have been instrumental in governmental control of the courts. In fact, in Marshall’s deposition, the recusal application lodged against him by the Attorney General (rather than defence counsel, for example) was a disturbing novelty in his many years as a barrister. As he reasoned:

[T]he Attorney General, who is “The State” when all decisions of the State to prosecute are made … is the top legal adviser to the Government and Cabinet. The reason is that as well as the judiciary being independent of the Executive there is comity between the judiciary and the Executive to ensure that the State runs cohesively. Either the Executive decides to move for a judge’s impeachment or it allows the judge to continue to administer the cases assigned to him. It does not make recusal applications in order to “forum shop” or for any other reason.25

Other laws such as the common law offence of contempt ‘scandalising the court’ have been used to control information in the interests of maintaining public confidence in the authority of the judiciary, simultaneously boosting the legitimacy of the government. While it has been conceded, even by coup apologists, that ‘Fiji has a colourful, not always respectable history of prosecutions for scandalizing the court’,26 this crime has been reinvigorated post-coup. The case in 2012 against the Citizens Constitutional Forum (the CCF case) is one such case which demonstrates the utility of contempt of court cases in securing the new legal order.27

The CCF case concerned the publication of commentary about the Law Society Charity Report – Fiji: The Rule of Law Lost. As its title suggests, the report was scathing in its assessment of the state of Fiji’s legal institutions and processes of law since the coup. Three offending statements were published by the Respondents – the Citizens’ Constitutional Forum and its director, Akuila Yabaki – in their newsletter, which were:

- The Law Society Charity (LSC) in its report, "Fiji: The Rule of Law Lost" provides a stark and extremely worrying summary as to the state of law and justice in Fiji;
- The report highlights a number of fundamental failings of the current judiciary and legal structure in Fiji, particularly in relation to the independence of the judiciary;

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25 Ibid.
27 State v Citizens’ Constitutional Forum; Ex parte Attorney General of Fiji [2013] FJHC 220 (‘CCF’).
The case was heard by Calanchini J after he rejected the Respondents’ request for his recusal. The Respondents claimed in the recusal application that the document written by William Marshall (the petition referred to above) had made reference to Calanchini J implicating him as among Fiji’s compromised judiciary and thereby giving rise to his personal interest in the current proceedings. But Calanchini J reasoned that Marshall’s allegations did not make his a more personal interest in the proceedings than any other member of the judiciary.

The ancient crime of contempt ‘scandalising the court’ has largely disappeared from the United Kingdom and is non-existent in the United States but is recognised in other Commonwealth nations. Its use in Pacific Island countries and small African states as ‘a mechanism for silencing media criticism of the judicial process’ obviously works in tension with or against a right to freedom of speech and expression, but the courts do not necessarily engage with this angle. In his judgment, Calanchini J found that the offending publication was not mere criticism but words that constituted serious, intolerable contempt that had ‘crossed the limits’. That is to say:

the words published in [the newsletter] and thus understood by a fair minded and reasonable reader … have the effect of raising doubts in the minds of the public that their disputes will not be resolved by impartial and independent judges. As a result the authority and integrity of the judiciary in Fiji is undermined.

In sentencing the guilty parties, Calanchini J assessed the level of remorse which could act in mitigation of the sentence. He concluded that there was no genuine remorse and doubted the sincerity of the formal and unreserved apology for the publication tendered by the Respondent. Calanchini J also rejected what was advanced as an opportunity to develop the law of contempt and ‘the appropriate balance between commentary on the court system and the need to appropriately protect the Fiji court system.’ Perhaps entertaining this possibility would have encroached too far into forbidden territory but it was nonetheless a lost

28 Ibid [3].
29 Ibid [39].
30 Mark Pearson, Scandalising Media Freedom: Resurrection of an Ancient Contempt (2008) ePublications@Bond
31 CCF (2013) FJHC 220 [99]. Interestingly, Calanchini J was quoting here from an Indian case concerning Arundhati Roy in 2002.
32 Ibid [77].
33 State v Citizens’ Constitutional Forum Ltd; Ex parte Attorney General of Fiji (2013) FJHC 388 [26].
opportunity to engage responsibly with the monumental task of rebuilding the authority and integrity of the judiciary after the government’s defiant rejection of the Court of Appeal’s judgment in the *Qarase* case.

Filimoni Jitoko,\(^{34}\) on the other hand, wrote in 2010 that judicial independence in Fiji was challenged in many other ways. According to Jitoko, Fiji’s badly fractured judiciary was not the only impediment to maintaining a united front in defence of judicial independence. Jitoko suggests, for example, that:

> The exclusion of the jurisdiction of the Fiji courts from actions and decisions that affect the life and liberties of its citizens that are fundamental rights … guaranteed if no longer under a constitution, then certainly under the Universal Declaration of Human Rights and other international instruments and treaties to which Fiji is a signatory, is of itself …interference with the independence of the judiciary to assert its proper role and jurisdiction.\(^{35}\)

Jitoko is also of the view that the judiciary has a moral responsibility to take a (united) and overt stand in relation to its independence. This is a responsibility to a people ‘which is just getting used to an alien system of government.’\(^{36}\) Presumably Jitoko is referring here to the Indigenous people of Fiji since he speaks of ‘our people’ who need time ‘to change their attitude and begin to entertain confidence in the new system.’\(^{37}\) More will be said on notions of ‘the people’ in the next section but in relation to Jitoko’s comments on human rights it is enough to observe here that once human rights and the idea of security are placed in the same register, such as under the state of exception, security is trumps and human rights are usually sacrificed.

\(^{34}\) Former Indigenous Fijian judge, diplomat and academic, currently Chief Justice of Nauru.


\(^{36}\) Ibid.

\(^{37}\) Ibid.
This story could not be published due to Government restrictions.

Another promise
President reassures nation on 2014 election

The interim Government will hold democratic parliamentary elections in September, PM said, adding he was in no hurry for elections.

Addressing the nation on Government House yesterday morning, Ratu Inoke and the government he was in charge of, would come together and the second to be appointed interim government would ensure a smooth transition.

I am sure you will work with me and we will be the second to be appointed interim government to ensure that this transition be handled smoothly, he said.

He said that the interim Government had put in place the necessary reforms and processes leading to an election. This was a legal order that he said to the nation.

The interim Government's transition plan was submitted to the President on the occasion of December 30.

I should congratulate our Prime Minister and his Cabinet and give them the mandate to achieve that the interim government has been in place for more than two years.

He said given the circumstances, the interim government had performed extremely well and that the interim Government had brought about reforms and created opportunities for new businesses.

It had distributed the mandate to the people in particular the ordinary citizens of the country, he said.
Part B: Media Security

The Security Environment

The same day that he revoked Fiji’s Constitution the President also promulgated the *Existing Laws Decree* which stated that all laws in force before that day, including decrees but not including the Constitution, would remain in force, subject to various modifications if necessary.\(^{38}\) The preservation of certain laws provided a level of stability during the transition of the new legal order and also ensured that the machinery of government could keep up the appearance of business as usual rather than parade the issue of legitimacy. To further secure this stability, avoid scrutiny and silence dissent, the regime relied particularly on decrees granting special emergency powers to the military and police. Public emergency regulations had been renewed each month since the coup in 2006 and continued after the declaration of the new legal order until 2012 when the *Public Order (Amendment) Decree* was issued.\(^ {39}\)

The public emergency regulations authorised police, military and other officers to control persons and their movements, any place, road or waterway, broadcast or publication, in the interests of ‘public safety’.\(^ {40}\) The regulations also granted immunity from criminal or civil proceedings to any authorised officer for their use of harmful or lethal force when acting under the decree. In 2009 Amnesty International published a report, *Fiji: Paradise Lost A Tale of Ongoing Human Rights Violations April – July 2009* which criticised the public emergency regulations for ‘enabl[ing] officials to violate key human rights with impunity’ and called for their immediate removal, a request which was repeated over subsequent years.\(^ {41}\) The report cited a litany of human rights abuses and various accounts of harassment, intimidation and detention, which ‘contributed to a climate of fear in Fiji.’\(^ {42}\) One activist was quoted as saying ‘[p]eople that we have spoken to are very angry about the way in which the authorities are interfering with their freedoms…They say that it is not good and Fiji has


\(^{39}\) *Public Order (Amendment Decree) 2012* (Fiji) Government of Fiji, Decree No 1, 5 January 2012, Republic of Fiji Islands Government Gazette Vol 13/1.

\(^{40}\) See *Public Emergency (Maintenance of Public Safety) Regulations 2007* (Fiji) 6 September 2007, Fiji Islands Government Gazette Supplement No 42 LN No 86, s 6.


\(^{42}\) Ibid 22.
become a dictatorship that will continue to take away their freedoms until nothing is left. People feel helpless.\textsuperscript{43}

These responses are testimony to the logic of securitisation, according to which, human rights ‘must always give way to the exigencies of security’.\textsuperscript{44} Even from some human rights perspectives, such as offered by Michael Ignatieff (when he was Director of the Carr Centre for Human Rights), civil liberties are the rights of citizens in a state, therefore those liberties ‘must depend on the survival of government and must be subordinate to its preservation.’\textsuperscript{45}

But from whatever position it is viewed, securitisation or the rise of the Security State is intertwined with the elements of fear and control. In Agamben’s words, the Security State is durably grounded in fear and maintains it, ‘draw[ing] from it its essential function and legitimacy’.\textsuperscript{46} The Security State also aims ‘to establish a new relation with men and women, which is that of generalised and unlimited control.’\textsuperscript{47}

In this next part, the issue of control will be discussed in relation to the media, particularly with regard to the media’s domination and its role in Fiji’s ‘spectacular society’, a phrase Agamben adopts from the work of Guy Debord. According to Debord’s theory of the ‘society of the spectacle’, capitalism has emptied existence of authenticity and replaced it with representation.\textsuperscript{48} Life thus presents itself ‘as an immense accumulation of spectacles’ which, ‘understood on its own terms’, is the assertion ‘that all human life … is mere appearance.’ For Debord the spectacle ‘is the very heart of society’s real unreality’.\textsuperscript{49} As discussed below, Agamben links Debord’s theory of the spectacle to Schmitt’s notion of public opinion, through a concept of glory as foundation and justification of power.\textsuperscript{50} In the contemporary society of the spectacle, the glorification of power remains central to the legitimation of power and even produces it as such. Agamben describes the contemporary spectacle of the media’s domination of society as a function of glory, which is why control of the media is so important in the political landscape of Fiji (and elsewhere).

\textsuperscript{43} Ibid.
\textsuperscript{45} Michael Ignatieff, quoted in Jessica Whyte, \textit{Catastrophe and Redemption: The Political Thought of Giorgio Agamben} (State University of New York Press, 2013) 57.
\textsuperscript{47} Ibid.
\textsuperscript{48} Sergei Prozorov, \textit{Agamben and Politics: A Critical Introduction} (Edinburgh University Press, 2014) 125.
\textsuperscript{49} Guy Debord, \textit{The Society of the Spectacle} (Donald Nicholson-Smith trans, Zone Books, 1994) paras 1, 10, 6.
\textsuperscript{50} Giorgio Agamben, \textit{The Kingdom and the Glory} (Stanford University Press, 2011) 230.
**Media Glory**

In his book, *The Kingdom and the Glory*, Agamben identifies glory as the central mystery of power, a concept that he traces from glory as part of the ancient history of liturgical acclamations to ‘Glory in the modern form of public opinion and consensus’. For Agamben, glory bridges, veils and maintains the fracture between Kingdom and Government, between being and praxis, between a transcendent and immanent order, between a constituent and constituted power. Or as Zartaloudis puts it, ‘Glory maintains the distinction … by being itself the point of indistinction where the two coincide.’

With his insights into the essential, constitutive function of acclamation or public opinion in public law and democracy, Schmitt provides Agamben with the link to contemporary modes of glorification. Agamben quotes him as saying, ‘[t]here is no democracy and no state without public opinion, as there is no state without acclamation.’ Joining Schmitt’s ‘constitutive nexus of people-acclamation-public opinion’ with Debord’s spectacular society, Agamben is lead to pronounce on the transformation of democratic institutions by media:

> what was confined to the spheres of liturgies and ceremonials has become concentrated in the media and, at the same time, through them it spreads and penetrates at each moment into every area of society … Contemporary democracy is a democracy that is entirely founded upon glory, that is on the efficacy of acclamation, multiplied and disseminated by the media beyond all imagination.

As Prozorov states, the media, as conduit of power, vehicle of acclamation and disseminator of glory is implicated in the ‘principle of government [that] by acclamation or consent … establishes states of consensus that reproduce our subjection to the apparatuses of government.’ Which political force would not prefer to have such apparatuses of glory at its disposal and thereby bathe its government in the glory of sovereignty? The rhetoric of this question should not immediately import media conspiracy theories or imply the gross manipulation of public opinion. However, Fiji’s media control orders in the new legal order

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31 Ibid xii.
32 Ibid.
33 Ibid 230.
35 Agamben, above n 50, 255.
36 Ibid 256.
37 Prozorov, above n 48, 48.
can easily be seen as just that. And yet this is not simply a matter of pretending to the throne (of sovereignty).

From Agamben’s point of view, as discussed by Prozorov, government is a ‘bipolar’ system in which:

the transcendence of sovereignty and the immanence of the economy perpetually refer to each other: in the absence of economic government, sovereign power would be incapable of producing positive effects, while in the absence of the transcendent locus of sovereignty, the immanent activity of government would lack a foundation … the contradiction between sovereignty and economic government … must be located within the concept of the state itself as the problematic and fragile attempt to reconcile transcendence and immanence, negativity and positivity, being and action. … such a reconciliation between inoperative sovereignty and the unfounded work of government in the Western tradition takes the form of glory.58

The manipulation of the media in Fiji’s new legal order is thus also linked to what McLoughlin refers to as ‘the more quotidian problem of administration and regulation,’59 wherein the very banality of government machinery becomes the strategy and prize of sovereignty and its usurpers.

In Agamben’s analysis, manipulation of public opinion ‘according to the strategies of spectacular power’ is, of course, part of the whole structure, logic and modus operandi of the governmental machine that needs to be exposed. The key to that endeavor, as Zartaloudis observes, ‘is the conception of law where mundane life and law are neither merely coupled (through absolutist sovereign claims) nor merely uncoupled (through equally absolutist critical claims).’60 It is in relation to the complexity of this task that the analysis of the media in Fiji’s new legal order is structured around the paradoxes generated in the manipulation and control of and by the media.

With the imposition of public emergency regulations after the coup in 2006, Fiji’s media was subject to what Fiji Sun publisher, Russell Hunter, described as a brutal, pervasive intimidation by the military.61 As a matter of survival (rather than as an issue of responsible

58 Ibid 92.
60 Zartaloudis, above n 54, 306.
61 Russell Hunter, 'State Control and Self-Censorship in the Media After the Coup' in Jon Fraenkel, Stewart Firth and Brij Lal (eds), The 2006 Military Takeover in Fiji: A Coup to End All Coups?
journalism), the media increasingly resorted to self-censorship. Despite this ‘fateful retreat’ the government continued to exercise a growing control over the media, visible in acts such as the deportation of three ex-patriot newspaper publishers who were removed from the country, ostensibly for breaching work permit conditions.\(^\text{62}\) Court orders staying the deportation of Russell Hunter and Evan Hannah were disregarded while a decree removing judicial review of decisions of the Minister for Immigration was promulgated the day of Hunter’s arrest.\(^\text{63}\) Evan Hannah, publisher of the Fiji Times, was deported two days before World Media Freedom Day in 2008, for which Bainimarama had issued a statement affirming Fiji’s constitutionally-guaranteed media freedom. Rex Gardner, Hannah’s replacement, was deported less than a year later in January, 2009.

With the abrogation of the Constitution and the declaration of the new legal order in 2009 came a renewed set of emergency regulations and an even more strenuous control of the media. Censors accompanied by police officers were installed in each newspaper office and journalists were told to adopt a ‘journalism of hope’ or ‘only doing positive stories.’\(^\text{64}\) Initially some media protested by publishing blank spaces in the place of stories, with notices stating that the government restrictions prevented their publication. Some media published sarcastic front page reports on what people ate for breakfast or a man getting onto a bus. Recalling those ‘bold’ tactics Fiji Times editor, Netani Rika said,

[I]t was a sensation and drove home to the people of Fiji the point that we were powerless to tell the truth, we were powerless to tell the country what it needed to know, and we were powerless to carry out our duty to the nation and provide free speech. And it brought home to them the fact that media freedom is intrinsically linked to their right to know and their freedom of expression.\(^\text{65}\)

However, the Permanent Secretary of the Ministry of Information, Lieutenant-Colonel Leweni, responded to those efforts and other media resistance to censorship, stating that under the public emergency regulations no white space or ‘silly’ articles were allowed, even censorship could not be mentioned, and newspapers risked being shut down if they did not comply. Leweni referred to the ‘irresponsible bent’ in Fiji’s news media that made it highly

\(^{62}\) Ibid 281.
necessary to extend the public emergency regulations and take some people in for questioning by the police. Leweni opined:

You feed the public good things and shape public perception with positive things, they will react accordingly. When you dish out negative issues and a lot of other things like crime, etc, it gets to people and in the end they produce those sorts of activities themselves.  

But the obvious and stated reason for the media clampdown was the government’s reform agenda. As Bainimarama said, ‘those reforms will never happen if we open everything out to every Tom, Dick and Harry to have their say’. Bainimarama was clear about the need for censorship and how it related to the state of emergency. According to Bainimarama, freedom of speech was the cause of Fiji’s political troubles:

That was how we ended up with what we came up with in the last couple of days … If we [the government and the media] had worked together from 2006, we wouldn't have had that happen to us … We [the government] now decide what needs to be done for our country, for the reforms that need to be put in place for us to have a better Fiji … We want to come up with these reforms and the last thing we want to do is have opposition to these reforms throughout … So that was the reason we've come up with emergency regulations.

Unlike the notions of revolution to which some Latin American regimes appeal, the Fiji Government preferred a ‘business as usual’ approach for its reform agenda. The apparent willingness of the media to support this view of events has generated criticisms such as the official complaint lodged by Losalini Dulakiverata to New Zealand’s Broadcasting Standards Authority. The complainant argued that Bainimarama had been allowed to inaccurately portray the situation in Fiji as cheerful, normal and business as usual, in a ‘friendly chat’, as well as numerous other interviews that uncritically allowed Bainimarama to ‘spout his military propaganda’. Similarly, journalist, Samisoni Pareti, remonstrated in 2009 that the media should not turn its eyes the other way and stated, ‘it can no longer be “business as

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67 Philippa McDonald, Interview with Fiji’s Interim Prime Minister, Commodore Frank Bainimarama (Television Interview, 3 August 2012) <http://www.abc.net.au/foreign/content/2010/s2972478.htm>.
usual”, for the simple reason that it is NOT business as usual in Fiji right now.\textsuperscript{70} And the ongoing renewal of the emergency regulations was one reminder of that.

The use of familiar terms of office such as ‘prime minister’ to refer to Bainimarama’s non-parliamentary office was undoubtedly a useful device to inscribe legitimacy in the government. However, the Fiji Times persistent characterisation of post-coup government and office-holders as ‘interim’ challenged the sense of permanence or establishment that the government sought. These strategies were thorns in the side of a government keen to avoid the portrayal of its ascendancy to power as a coup.

Perhaps because, ironically, the public emergency regulations may have served more as reminders or symptoms of the country’s crisis than its remedy, the government began moving towards lifting the emergency regulations and replacing them with other decrees. The Media Industry Development Decree promulgated in 2010 after brief and restricted public consultation was a major step in that direction.\textsuperscript{71} Described as ‘the first of its kind in the South Pacific … [bringing] to an end the tradition of media self-regulation’,\textsuperscript{72} the decree also introduced limitations on foreign directorship and ownership of media (forcing the sale of the Murdoch-owned Fiji Times); established a powerful, government-appointed Media Industry Development Authority (MIDA) and tribunal; and imposed hefty fines and prison terms for those in breach of the decree. The decree met with strong national and international condemnation but the government and supporters of the decree insisted that ‘Western media models do not sit easily in democratically fragile, multiethnic societies such as Fiji’.\textsuperscript{73}

In January 2012 the Fiji Government finally lifted the public emergency regulations and replaced them with the Public Order (Amendment) Decree, which Bainimarama promoted as ‘an important step toward the public consultations for a new constitution under which truly democratic elections can be held.’\textsuperscript{74} Human Rights Watch disputed this characterisation of the decree:

\textsuperscript{73} Ibid 148.
In short the new provisions exaggerate and permanently codify some of the most abusive provisions of the emergency laws ... [The] government has used the regressive Public Order (Amendment) Decree to control those it perceives to be critical of the government, particularly representatives of civil society groups, trade unions, and political parties.75

However the Public Order (Amendment) Decree was championed by Bainimarama as the modernisation of the long standing Public Order Act and ‘necessary to effectively address terrorism, offences against public order and safety, racial and religious vilification, hate speech, and economic sabotage.’76 In this way the Government also appealed to contemporary, counter-terrorism sentiments generated in the international arena, in countries such as the USA and Australia which ‘have placed limitations on rights where warranted and deemed necessary to safeguard society’,77 albeit, not without criticism.78

Contesting Bainimarama’s claims, President of New Zealand’s Law Society, Jonathan Temm, pointed out that the Public Order (Amendment) Decree was markedly different from any public order you would find in Australia, New Zealand or any other western democracy, largely because it also applies in private homes and occasions and in regard to which, the military as well as the police can act with impunity.79 However, given that some of the powers granted in Australia’s anti-terror legislation have been criticised by Constitutional scholars such as George Williams as ‘rotten at their core … more consistent with the apparatus of a police state, such as General Pinochet’s Chile, than the laws of a modern democracy’,80 the issue is not so much the difference between these laws but the relation between these laws and any political arena. In relation to media control, such laws reflect, among other things, a government’s keen sense of the political function of the media. And Agamben’s work shows us that the contemporary spectacle of media domination, is the sphere of public opinion and acclamation essential for democracy, and a coveted glory.
Under certain conditions of threat to the social order such as terrorism or insurgency, governments are more likely to require a collaborative role of the media, and even insist upon it. Collaborative roles may vary according to the way they are instituted, for example, collaboration as acquiescence or acceptance, or ‘calibrated coercion’ such as describes the way Singapore’s media industry is made to cooperate with the authoritarian Singapore Government and its national agenda. Indeed Singapore’s cooperative or collaborative media model, including the legislation underpinning it, impressed the Bainimarama government, inspiring the formulation of Fiji’s Media Decree.

The ‘collaborative’ role for the media, preferred by the government can, however, overlap uncomfortably with alternatives to western conflict or adversarial models of journalism such as the ‘peace’ journalism or ‘development’ journalism advocated by various Pacific journalists. While Shailendra Singh distinguishes ‘responsible conflict reporting’ which is ‘predicated on a free media environment and open dialogue’ from Bainimarama’s ‘journalism of hope’ which ‘restricts media to positive coverage’ of his government, Bainimarama’s government has at different times, conflated the goals of these different approaches. Of course, it is arguable that any government would prefer to go about its business in as unhindered a manner as possible, in which case the rationale of peace journalism, for example, is as easily appropriated by an authoritarian regime as any other.

David Robie cites practices of peace journalism to include: avoiding reporting on divisions between parties; revealing areas of common ground; avoiding ‘victimising’ language; avoiding reporting wrong-doings of one side only; all of which can easily become complicit with, exploited or overwhelmed by, any political force, in the short term at least. This is especially so when the government narrative stakes so much of the success of its political reforms and the nation’s unity and harmony on a responsible journalism that resembles ‘not rocking the boat’.

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82 Ibid.
83 Ibid 90.
84 Ibid 85.
As Fijian journalist, Ricardo Morris, observes, ‘the call to practice “responsible journalism” often becomes a barrier to investigative journalism or holding the powers-that-be to account for their actions or promises.’\footnote{Ricardo Morris, "Journalism of Hope' Realities in Post-Election Fiji' (2016) 22(1) Pacific Journalism Review 25, 36.} That ‘chilling effect’\footnote{Ibid 26.} on journalistic practice is part of an array of news filters that also includes media ownership and advertising, which can be interpreted according to the Foucauldian notions of disciplinary and security mechanisms. As Foucault points out, disciplinary mechanisms and security apparatus (and juridico-legal structures) are not mutually exclusive: ‘a technology of security, for example, will be set up, taking up again and sometimes even multiplying juridical and disciplinary elements and redeploying them within its specific tactic.’\footnote{Michel Senellart (ed), Michel Foucault: Security, Territory, Population: Lectures at the College De France, 1977-78 (Picador, Palgrave Macmillan, 2007) 23.} Disciplinary techniques act to produce what Foucault calls ‘docile bodies’, or political anatomies in which a ‘constricting link between an increased aptitude and an increased domination’ is established through ‘disciplinary coercion.’\footnote{Michel Foucault, Discipline and Punish: The Birth of the Prison (Alan Sheridan trans, Penguin Books, 1991) 138.} Surveillance and punishment (or the threat of it) are two of the disciplinary techniques that contribute to the internalisation of disciplinary individuality or self-discipline. Such techniques have acted on Fiji’s media to produce self-censorship, for example; a phenomena also discussed in Chapter 7. Here the focus is more on the intended widespread (side) effects of that disciplinary power: the creation of loyal subjects of a government that sets its own media agenda, propagating the sense of its care for the welfare and security of the people.

It is in this paradoxical nature of a so-called democratic media that Bainimarama’s government can find refuge from criticisms levelled at its undemocratic processes and have its apologists armed with the defences available to any democracy, as well as appeals to Fiji’s unique situation and special needs. Especially after the new constitution was signed into law in 2013, the chairman of MIDA could, for example, insist that, ‘If people have issues with the Media Decree, fight it against the constitution. Exercise reason. Use it catastrophically.’\footnote{Radio New Zealand, 'Media Freedom Day Marked in Fiji', Dateline Pacific, 7 May 2014 (Ashwin Raj).} But the critically robust and democratically deliberative arena that could sustain such challenges was far from that which was defended by the chairman a couple of months later when two expatriate academics criticised the government for intimidating journalists: ‘These reckless
academics are trying to instil fear among ordinary and decent citizens of Fiji and it constitutes yet another feeble attempt to keep us in a perpetual state of crisis. 92 And elsewhere he stated:

The political situation in Fiji maybe less than ideal but a lot has been achieved since 2006 and we must move beyond the tireless debate between legality and legitimacy and instead focus their energy on moving Fiji towards full democracy. 93

In response, first, it is the government with its security measures that strenuously maintains the state of crisis and this technique of government is precisely what focuses energy and attention on the question of legitimacy and legality. Secondly, as understandable as frustration with vicious cycles may be, and even as desperate as the attempt of modern democracy may be to link together the two poles of the machine (legitimacy and legality, Kingdom and Governance etc), 94 as Agamben points out, ‘the real problem – the secret core of politics is … the governmental machine that functions through the complicated system of relations that binds this two poles together.’ 95

The failure to confront both poles of the machine or the reluctance to expose the frailty of the system (an exposure, which described by Steven DeCaroli ‘appears as the potential of establishing a new law or, more profoundly, the potential of being a law unto oneself: a living law, a god among men’) condemns us to reproducing the apparatus in question and the shortcomings of democracy. 96 In the following chapter the apparatus in question is the constitution-making process of Fiji’s new legal order.

95 Ibid.
96 Sergei Prozorov, 'Living a la Mode: Form-of-life and Democratic Biopolitics in Giogio Agamben's The Use of Bodies' (2017) 43(2) Philosophy and Social Criticism 144, 146.
Figure 5 "Politicians Out: PM". Fiji Sun, 4 March 2010, Page 1.
Chapter 6
CONSTITUTION-MAKING AND THE PEOPLE

Introduction
In this chapter the concept of ‘the people’ will be analysed in relation to the crises of democracy marked by Fiji’s new legal order. The crises arise in the problem of legal and political foundation and the relationship between the sovereign people (popular sovereignty), the government, and the law or constitutional reason that gives voice to the democratic will. These crises are perhaps better understood as paradoxes that force us to contend with, among other things, temporal or causal loops, the perplexing figure of ‘the people’ and the possibilities of their representation.

The chapter focuses on the constitution-making process in Fiji’s new legal order to gain an understanding of how the people of Fiji have constituted and have been constituted in the new legal order, and how, despite what may be construed as its democratic potential, Fiji’s constitution-making process has contributed to what Agamben refers to as the ‘devastating experiment’ of contemporary politics, ‘that disarticulates and empties institutions and beliefs, ideologies and religions, identities and communities … so as then to rehash and reinstate their definitively nullified form.’¹

Not all theorists subscribe to such nihilism. As Kalyvas reads in the work of Hannah Arendt and Carl Schmitt, for example, the revolutionary spirit or the essence of democracy may be formative in the development of a radical politics emanating from extraordinary events or new beginnings. Kalyvas engages the ideas of both these theorists to reconceptualise a democratic legitimacy ‘that goes beyond a limited approach to free electoral procedures of elite

circulation and the study of public opinion”\(^2\) and that ‘breaks with the reductionism of pure legality and formal proceduralism.’\(^3\) As Kalyvas also points out, this is a legitimacy measurable according to whether and how much the ‘existing practices of political and new beginnings … approximate or depart from its participatory and inclusive attributes.’\(^4\)

For Arendt the success of the American Revolution could be measured in the new American concept of power which was based on mutual promise and on the strength of which people combined (and had done so since the Mayflower Compact) to form political societies. In Arendt’s analysis one of the striking features of these new bodies politic lay in their ‘formation of a political realm that enjoyed power and was entitled to claim rights without possessing or claiming sovereignty.’\(^5\) As law-making bodies these political societies or popular councils ‘correspond to the institutionalization of the constituent power’, allowing citizens to act on their own as they had during the revolution, to actively participate in the decision-making processes.\(^6\) For Arendt this was an ongoing process that adhered in the notion of augmentation which ‘depended on the vitality of the spirit of foundation’.\(^7\) What she was concerned to elaborate was a way through the perplexity of revolution and its achievements, or the distinction between revolutionary and constitutional government that haunted revolutionary thinking.\(^8\) In her terms the problem was:

If foundation was the aim and the end of revolution, then the revolutionary spirit was not merely the spirit of beginning something new but of starting something permanent and enduring; a lasting institution, embodying this spirit and encouraging it to new achievements, would be self-defeating. From which it unfortunately seems to follow that nothing threatens the very achievements of revolution more dangerously and more acutely than the spirit which has brought them about. Should freedom in its most exalted sense as freedom to act be the price to be paid for foundation?\(^9\)

Schmitt, on the other hand, embraced a concept of sovereignty to accommodate both constituent (revolutionary) power and constituted power in his work on sovereign dictatorship. He nonetheless also recognised the people in a democracy as bearers of constituent power, and certainly as powerful and productive as Arendt’s covenanting citizens.

\(^3\) Ibid 297.
\(^4\) Ibid 296.
\(^5\) Ibid 296.
\(^7\) Kalyvas, above n 2, 277
\(^8\) Arendt, above n 5, 201.
\(^9\) Ibid 233.
\(^9\) Ibid 232.
But, as Schmitt states, ‘in order for the people to undertake the constituting act in all its sovereignty’,\(^\text{10}\) thereby providing ‘the only legitimate source of a modern democratic order’,\(^\text{11}\) certain conditions must prevail. Andrew Arato draws five procedural steps from his reading of Schmitt that go toward a model of democratic constitution-making that speaks to a concept of radical democratic sovereignty:

- The dissolution of all previously constituted powers;
- A popularly elected or acclaimed assembly with a plenitude of powers;
- A provisional government rooted entirely in this assembly;
- A constitution offered for a national, popular referendum;
- The dissolution of the constituent assembly upon ratification of the constitution that establishes a duly constituted government.\(^\text{12}\)

These and related expressions of the democratic ideal of public participation in the creation of its own laws will be considered in relation to Fiji’s constitution-making process. And while the Arendtian notion of an active public participation in the ongoing processes of government may recommend itself to an assessment of democratic legitimacy in a new legal order, in this thesis it is mainly only in relation to the 2014 elections that public participation beyond and including constitution-making will be considered.

Arendt’s attempts to think of a politics beyond the suffocating straitjacket of sovereignty resonates with Agamben’s critique of radical democratic politics. For Agamben, the problem of constituent power is that whether embodied in the people, their councils or assemblies or revolutionary parties, it is also part of an ‘unresolved dialectic between constituting power and constituted power’\(^\text{13}\) that is captured in the concept of sovereignty. The ‘real state of exception’ is Agamben’s way (following Benjamin) of thinking himself clear of sovereignty (pace Schmitt), both as a political and ontological task. Benjamin suggests that only through a ‘pure’ violence can the real state of exception come about, that is, through a violence or ‘divine’ power ‘purified of an instrumental relationship to legal ends and political

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11 Kalyvas, above n 2, 115.
12 Ibid 114.
domination.’¹⁴ In this schema, constituting or constituent power and constituted power correspond to law-making violence and law-preserving violence, respectively, and which, according to Benjamin, present ‘law’s interest in a monopoly of violence.’¹⁵ Benjamin explains law’s interest not as in ‘the intention of preserving legal ends but, rather, by that of preserving the law itself; that violence, when not in the hands of the law, threatens it not by the ends that it may pursue but by its mere existence outside the law.’¹⁶

What this means, in terms of Agamben’s work, is that the function and structure of sovereignty as a mode of law and politics, language and indeed the entire Western metaphysical tradition, must be recognised and rethought in order to open a space for human potentiality and political action. In the rest of the chapter the more humble aim is to show how the figure of the sovereign in Fiji’s new legal order captured the potentiality and actuality of the life and politics of the people in an ostensibly democratic process of constitution-making. While the mandate of the Constitution Commission and the scale of public participation attested to a democratic sensibility, the almost constant undermining of the credibility of commissioners and various participants plus revisions of procedure and ultimately the dumping of the entire project, paint a different picture. And yet a new constitution was ultimately created.

As Agamben points out, ‘democracy’ is an ambiguous term that ‘designates both the form through which power is legitimated and the manner in which it is exercised.’¹⁷ Thus democracy may refer to public law or administrative practice, a way of constituting the body politic or a technique of governing, and an overlapping of both.¹⁸ Agamben identifies this ambiguity or ‘amphibology’ in play even in Aristotle’s Politics in which Aristotle attempts to resolve or heal the difference between political activity and political outcome through the figure of kyrion or sovereign power.¹⁹ In more modern terms of power, the division is between constituent power and constituted power, or legislative power (constitution) and executive power (government). Sovereignty can thus be understood as ‘at the same time one

¹⁶ Ibid.
¹⁸ Ibid.
¹⁹ Ibid 3.
of the two terms being distinguished, and the indissoluble link between constitution and government.'

However, ‘democracy’, in ‘contemporary political discourse’, usually refers to government or ‘a technique of governing’, and the mistake in Western politics, according to Agamben, has been to ‘think of government as simple executive power’ rather than addressing ‘the central question of government and its articulation … to the sovereign or locus of sovereignty.’ In the situation of Fiji’s new legal order in its first few years, without a constitution or with one in the making, with the sovereign of popular sovereignty possibly represented in a President (powerless to govern), but also voicing in the (thwarted) participatory process of constitution-making, the question of government is indeed the mystery. As will be discussed in this chapter, the voice of the people was rendered silent (even if reserved for a future hearing), and thus the legitimacy of the union between the people and the constitution, or between the people and the government, was guaranteed by an incoherence, which is hardly a guarantee at all. This should not come as a surprise if Agamben’s diagnosis of sovereignty has been heeded. As he argues, ‘between the two elements and two rationalities – a politico-juridical rationality and an economico-governmental rationality, there is no possible articulation’ and sovereignty is a screen behind which such truths lie, or is, in Agamben’s words, ‘a fiction designed to conceal the fact that the centre of the machine is empty.’

**Participation**

In 2006 Qarase’s Government was returned to power after commanding an overwhelming majority in the general election held that year. But according to Bainimarama and the coup supporters, this appearance of democracy was ‘a cloak’ which hid ‘corruption and abuse of office, economic downturn and uncontrolled debts, foreign influence and discriminatory policies’. The ‘genuine democracy’ that Bainimarama and the President sought to enforce would entail not just a reform of laws and the machinery of government but also a change in social attitudes. This ‘genuine democracy’ was a vision of a democracy to come, an idea that the nation could move towards, even through the most authoritarian, repressive or undemocratic of measures.

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21 Ibid.
22 Ibid.
23 *Qarase v Bainimarama* [2008] FJHC 241 (9 October 2008) [45].
24 Ibid [69].
With the birth of Fiji’s new legal order ‘the people’ on whose behalf such a radical politico-legal rupture was claimed to be made, seemed to be cast into a dense and shadowy landscape: at once beloved people of the President but infantile or stunted by the system, or else the friends and enemies (real or potential) of the (new) State. The new legal order was ordained not just to deliver ‘the people’ from a corrupt and undemocratic system but to sever the nation from those amongst it whose interests were served by the old regime. And yet the voice of ‘the people’ had to be heard, or at least, seen to be heard, in order for democracy to be delivered to the nation (according to democratic convention). But significantly in Fiji, that voice had to sing in tune with a certain rendition of democracy.

To orchestrate the reforms and changes necessary for the ‘genuine democracy’, Bainimarama announced, two months after the coup, that the Cabinet of the Interim Government (IG) had approved a ‘Road Map’ for the return to parliamentary democracy. The three-year plan involved a review of the 1997 Constitution, a census report and redrawing of constituencies and their boundaries, as well as land reform, budgetary changes and the continuation of a ‘clean-up’ to rid the country of corruption. Bainimarama’s threat to hold the elections to ransom was only part of the complex politico-legal landscape. Until 2009, the 1997 Constitution was still in place and it contained clear guidelines for its amendment. But, in fact, neither legislation nor judge-made law could or would halt the juggernaut of the Interim Government on its mission to democratise the nation. In October 2008 the High Court declared the President’s actions ratifying the coup were valid and lawful which, in effect, endorsed the validity of the Interim Government. Bainimarama ‘called on all citizens to respect the declaration by the High Court favouring the regime’ and ‘invited registered political parties to meet, discuss and agree on an agenda for the way forward towards constitutional and sustainable democratic governance’.


In July 2009 Bainimarama unveiled the ‘Strategic Framework for Change’ which according to some commentators was more ‘a blueprint for economic reforms to entice international financial institutions and donors to re-engage with Fiji’ rather than a strategy to engage the country in democratic reform. But a commitment to having elections in September 2014 and a new constitution by 2013 was announced, even if it was a cause of concern that given the extensive consultations already undertaken by the NCBBF, as well as the insistence on political dialogue coming from many parties, public consultations for the new constitution would not commence for another three years.

However, the way the country was being governed, including the restrictions and the delays, did not present major obstacles for many people. In Voices of the People, a study conducted in 2011 and 2012 under the auspices of the Pacific Theological College, a group of iTaukei men stated, ‘[t]here are protests from other countries about our government, but we are not suffering in any way. Everything is moving along fine. There is no problem.’ Or, as a group of rural iTaukei women expressed, ‘it makes no difference whether a government is democratic or not because village life remains the same.

Research for Voices of the People was designed ‘to present the perceptions and visions of the people of Fiji for future democratic development as well as their opinions as to the preconditions for this development.’ The authors contend that ‘liberal Western understandings of legitimate democratic governance’ can provide only a limited understanding of Fiji’s hybrid political order with its combination of introduced Western models of governance, local Indigenous traditions and other influences associated with ‘societal fragmentation’. Many of these influences, traditions and legal features are discussed in Chapters 2 and 3 of the thesis.

The Voices of the People study identified different types of legitimate authority that ‘co-exist, compete and interact with rational-legal legitimacy leading to the hybridization of legitimate authority.’ So, for example, interviewees distinguished between the legal and legitimate

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29 Manfred Ernst and Felicity Szesnat (eds), Voices of the People: Perceptions and Preconditions for Democratic Development in Fiji (Institute for Research and Social Analysis, Pacific Theological College, 2013) 35.
30 Ibid.
31 Ibid x.
32 Ibid 5.
33 Ibid.
exercise of power by the government.\textsuperscript{34} Explored further as a question of leadership, legitimacy was differentiated according to the notions of ‘process legitimacy’ and ‘performance legitimacy’:

Process (or procedural legitimacy)...stem[s] from procedures which are believed to constitute the right to lead, e.g. elections, legal procedures, rules, accountability mechanisms...but also heredity of royal or chiefly status, and divine selection. Performance legitimacy...is concerned with the outcomes of acts of governance which are believed to constitute the right to lead, e.g. security for citizens in their everyday lives, a functioning health and education system, economic and social well-being of the populace.\textsuperscript{35}

This breakdown of legitimacy resonates with Agamben’s account of the fracture in politics between the juridico-political and the economic-managerial, and in that regard it is perhaps not surprising that the study found that the Government ‘enjoy[ed] widespread performance legitimacy’ in the eyes of the interviewees and mixed results regarding its ‘process legitimacy’.\textsuperscript{36} As Agamben writes, ‘today we behold the overwhelming preponderance of the government and the economy over anything you could call popular sovereignty – an expression by now drained of all meaning.’\textsuperscript{37} This does not mean that sovereignty loses all relevance or significance but rather that the old European model of a ‘transcendence-suffused’ sovereign power is absorbed into the bipolar machine of government.\textsuperscript{38} However, as discussed in Chapters 1 and 4, that bipolarity is itself an effect of the oikonomic model of an effective, managerial governmental power that works in mysterious ways to render the old style sovereignty a non-governing power (the king reigns but does not govern), and the managerial, administrative apparatus, a governing non-power.\textsuperscript{39} As Thanos Zartaloudis remarks, the model of governing non-power, currently dominant in the world, ‘does not require an epistemic or authorial centre in order to issue effective imperatives and measures.’\textsuperscript{40} Rather, ‘in the pressing presence of looming catastrophes, terrorist threats arising “everywhere”, economic crises of immense proportions, epidemics, intense urban crime waves’ (and here we might add the crises surrounding Fiji’s new legal order), the model of governing non-power is:

\textsuperscript{34} Ibid 87.
\textsuperscript{35} Ibid 103.
\textsuperscript{36} Ibid.
\textsuperscript{37} Agamben, above n 17, 4.
\textsuperscript{38} Thanos Zartaloudis, Giorgio Agamben: Power, Law and the Uses of Criticism, Nomikoi: Critical Legal Thinkers (Routledge, 2010) 51.
\textsuperscript{39} Ibid 54.
\textsuperscript{40} Ibid 52.
one of continuously adaptive care for the tackling and prevention of crises... [which] renders crises its own condition of possibility or virtual core that reproduces crises after crisis to the point of becoming, not a management of the exception, but the crisis infused norm.\(^{41}\)

Thus, the *Voices of the People* report speaks to Agamben’s bi-polar machine with the Bainimarama Government ‘act[ing] in the name of a performance-related caring of the household (*oikos*) in the presence of precarious circumstances and emergencies.’\(^{42}\) The study concluded that ‘for many people…the fact that this government delivers in areas such as road construction, electricity, and bus fares for school children, weighs more than the fact that it is not elected and came to power illegally.’\(^{43}\)

These local appraisals of legitimacy are also reflective not only of certain material realities of Fiji’s social life but also other values, institutions, and practices that structure the society and the way that democracy may take hold. The procedures or processes of liberal representative democracy which embrace an individualistic ethos and promote liberal freedoms are considered by many scholars and advocates of the ‘Global South’ as fundamentally different to ‘the values of communal solidarity, equality, and consensus that are at the root of indigenous democracy.’\(^{44}\) Thus, researchers involved in *Voices of the People* report argue that,

> the win-lose logic of elections contradicts the consensus-orientated mentality of Pacific Islanders, who strive, whenever possible, for outcomes that allow everybody to ‘save face’ and maintain good relationships (that is, not to “lose” an election contest and be forced into opposition).\(^{45}\)

However, while such observations may go some way towards a rethinking of the democratic project in the context of a post-colonial, Pacific island country like Fiji, too romantic a view of communitarianism and consensus may obscure the machinations of authoritarianism. As discussed earlier in Chapter 2, Fiji’s dubious history of communalism has, for example, fed into the consolidation of chiefly power often at the expense of the self-determination of other Indigenous Fijians, provoking class and racial tensions.

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\(^{41}\) Ibid.

\(^{42}\) Ibid.

\(^{43}\) Ernst and Szesnat, above n 29, 104.


\(^{45}\) Ernst and Szesnat, above n 29, 33.
Arguing along similar lines, Arato points to ‘revolutionary dictatorships that...use substantive democratic claims of legitimacy to justify their creation of entirely new political regimes.’

Carlos de la Torre takes up this contention in his analysis of patterns of democratization and the productive but sometimes dangerous tensions between procedural and substantive approaches to democracy in Latin America. De la Torre discusses the revolutionary projects of democratization in some South American countries that were launched in reaction to racist and colonial forms of domination including liberal democracy and the excesses that liberal democracy had failed to curb: clientelism, corruption and politicians’ instrumental use of laws. However, as de la Torre points out, for Ecuador’s President Correa, an understanding of democracy in substantive terms such as social justice and ‘notions of the need for a total rupture with the existing order to bring meaningful and long lasting change’ have meant not only a redistribution of wealth (welcomed by the poor) but also the flouting of various legal processes and ‘the war against the media, the defamation of former allies, and the attacks on “corporatist” social movement organizations.’

Under Correa, with his top down organizational approach, de la Torre sees the state as ‘colonizing autonomous model citizenships’ and eschewing the values of pluralism, and ultimately producing ‘a competitive authoritarian regime’ rather than a democracy.

This problematic is discussed below in relation to the trials and tribulations of the Constitution Commission and the constitution-making processes in Fiji.

The Commission

Five people – two internationals and three locals, three women and two men – were appointed as Constitution Commissioners: Professor Yash Ghai, Dr Christina Murray, Taufa Vakatale, Penelope Moore and Dr Satendra Nandan. The Commission was tasked to prepare Fiji’s new constitution, taking into account the results of wide-ranging public consultations as well as a set of ‘non-negotiables’ as determined by the government. The eleven non-negotiable principles - the main principles enshrined in the People’s Charter - were: a common and equal citizenry; a secular state; the removal of systemic corruption; an independent jury; elimination of discrimination; good and transparent governance; social justice; one person, one vote, one value; the elimination of ethnic voting; proportional representation; and voting

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46 de la Torre, above n 44, 152.
48 Ibid 160-1.
49 Ibid 162, 165.
Bainimarama stated that it was imperative that all Fijians be given access to the consultation process and contribute their views and to that end an extensive civic education programme to educate the people on the constitution-making process, prior to the consultation process, was also included in the plans as Stage 1 of the Process. The three other stages were consultation, preparation of initial draft and the Constituent Assembly.

Despite the fact that many saw Fiji’s 1997 Constitution in need of amendment, regime critics saw the new constitution-making process as problematic. Ratu Tevita Mara (a military asylum seeker), remarked, ‘[t]he consultation process is loaded … All indications are that the regime has already made its mind up; they want a charade of consultation to give it legitimacy.’ But Ghai appealed to the Fiji public to reserve their skepticism over the Commission’s work as they embarked on their ambitious assignment. And early concerns about Ghai’s lack of independence from Bainimarama’s government should have been put to rest when, before long, the relationship between Bainimarama and Ghai visibly soured. Nevertheless, as many were aware, it was also true that Ghai had had significant previous encounters with Fiji’s politico-legal system and the process of constitutional change involved in the creation of the 1997 Constitution (as well as supervising the Attorney-General, Aiyaz Sayed-Khaiyum’s thesis, years before). As noted by Jill Cottrell and Ghai in their 2004 case study on Fiji’s constitution building process, Ghai had been instrumental in establishing the Citizens’ Constitutional Forum, a non-politically aligned, civil society group devoted to ‘constitutionalism, national unity and racial amity’ in Fiji. And also, in 1995 he had prepared the joint submission of the Fiji Labour Party and the National Federation Party for the Reeves Commission (the constitution commission responsible for the review of the 1990 Constitution and the creation of the subsequent 1997 Constitution).

Cottrell and Ghai state that the issues confronting the Reeves Commission mainly revolved around ethnicity and, as the submissions of the main political parties showed, views were polarized between upholding the hegemony of the Indigenous Fijians and the encouragement of cross-ethnic collaboration. A few weeks after the first elections under the new 1997 Constitution, a coup and an attempted abrogation of the constitution indicated serious

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51 Ibid Sch 1.
52 Ibid.
55 Ibid 28.
problems with the constitution or the commitment to it. Cottrell and Ghai laid most of the blame for that with ‘the rather secretive, or at least not fully participatory way in which the whole [constitutional] process was carried out.’ They cite the lack of public discussion on the draft constitution and the lack of education programmes before and after the Constitution came into effect, as significant contributory factors. These criticisms were leveled at the Commission but mostly at the politicians and Parliament.

Public Consultation

When announcing the new constitution-making process in 2012, Bainimarama explicitly referred to the work of Cottrell and Ghai to support the goal of public participation and the measures to achieve ‘true consultations.’ But also, by then, as Cheryl Saunders (among others) had noted in her public lecture in Fiji in 2011, there was ‘effectively, universal acceptance that the authority for a Constitution must derive, in one way or another, from the people of the state concerned.’ Saunders links the people’s involvement not only to the legitimacy and durability of a constitution but also to the inclusiveness required of the constitution-making process for nation building in multicultural societies.

However, as Michele Brandt et al argue, it is not easy to evaluate the impact or nature of public participation. For a complete picture it is necessary to look at both formal and informal processes, some of which may be hidden. Plus, the criteria for assessment of impact of public participation depends on the focus, that is, whether a good or bad constitution was created or, beyond the actual document to the dynamics of the process, ‘whether the process was healing, whether it stimulated constructive public debate, whether it led to a more informed and activist citizenry.’

Depending on its emphasis, public participation may also pose other risks for the constitution-making process. As some critics have observed, romanticisation of ‘the people’ can obscure the fact that people may be ungenerous, disingenuous and prone to manipulation, and other

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56 Ibid 32.
57 Ibid 35.
60 Ibid 17.
less edifying realities. Brandt et al discuss how public participation in a divided society may also lead to a deepening of divisions, along ethnic lines for example, or a silencing of those less well-placed in a particular order, or a devaluing of individual rights in the interests of ‘constitutional recognition of the community as an important bearer of rights.’

In terms of numbers of submissions, the Ghai Commission clearly fostered public participation, processing over seven thousand individual and group submissions (compared to less than one thousand in the Reeves Commission). Indeed, the workload of the Ghai Commission, in terms of both input and output was extraordinary given the short eight months in which it operated. But Romitesh Kant and Eroni Rakuita argue that an unprepared public resulted in oral submissions that lacked substance: ‘Most of the oral submissions dealt with public policy issues such as access to water, roads, health, education, wages, work conditions, land and so on rather than institutions of state.’ Kant and Rakuita also criticise the Commission for failures in its consultative process: ‘In its endeavour to reach as many people as possible and to allow easy access to people, the commission unintentionally missed the opportunity of bringing the different ethnic groups together.’ Rather than hearing submissions separately or in different discrete group hearings, Kant and Rakuita suggest the Commission could have heard from different sides at the same time, ‘and thus set the groundwork for inter-ethnic discussions.’ However, in view of other controversial aspects of the constitution-making process, including unilateral changes made by the government, it is difficult to assess the impact that such opportunities, if taken, would have had. The framework for the constitution-making process provoked one such controversy.

The First Draft Ghai Constitution

Although Ghai had been involved in negotiations about the legal framework with Attorney-General Sayed-Khaiyum, the Constitutional Process decrees promulgated in July 2012 caused the Constitution Commissioners some concern. In their joint press statement the Commission voiced three main objections: the degree of control that the Prime Minister could exercise

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62 Ibid 87.
63 Ibid 88.
65 Ibid 12.
66 Ibid.
over the Constituent Assembly meant that ‘the essential principles of democracy are ignored and the independence of the Assembly is negated’; the grant of prospective immunity for the government and coup makers until the elections, ‘is most unusual, perhaps unique, and, we believe, undesirable’ and better dealt with as part of the constitution-making process; and the wide reaching powers of the security forces plus lack of redress for actions taken against citizens in this regard ‘are particularly worrying’ given that ‘it should be an occasion for national reconciliation’.  

Responding to the Commission’s concerns Sayed-Khaiyum retorted that in making these ‘broad sweeping statements’ the Commission was ‘in fact undermining the rule of law in Fiji. They’ve taken advantage of their independent position.'  

Similarly, Bainimarama questioned the independence of the Commission, asserting that Ghai ‘had been pressured by opposition politicians, trade unionists and non-government organisations to make statements about the situation in Fiji without grasping the complexities of the situation.’ Responding to local vocal NGOs such as the Fiji Women’s Crisis Centre, the Fiji Women’s Rights Movement and FemLink Pacific with their similar concerns about the selection process for the Constituent Assembly, Bainimarama criticised their tone of self-importance. He said that only ‘credible people who think positively about Fiji’s future’ would be in the Constitutional Assembly and ‘tell Shamima Ali [director of the Women’s Crisis Centre] from me that she is not in that league.’  

At the end of October and the last month of public consultations, a decree amending three main aspects of the constitution-making process was promulgated. To the chagrin of the Commission which ‘had already spent considerable time and resources on a detailed analysis of the post-2009 Decrees’, the Commission was relieved of its duty to examine all previous decrees and recommend any changes to existing laws necessary to give full effect to the draft

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71 Ibid.  
Constitution. In Ghai’s assessment, however, there were many decrees that needed to be amended or repealed:

[T]here are hundreds of decrees passed since the coup which have stripped the rights of access to courts, the media is under pressure, subject to heavy penalties, trade union rights have basically been removed, civil servants have no protection… I do not see how Fiji is going to have a free and fair election unless these decrees are cleaned up.74

The amendment decree also seemed to remove an avenue of public participation with the deletion of words providing for the Commission to hear the views of the public on the draft Constitution before the Constituent Assembly stage.75 In his interview with Radio Australia Ghai lamented that this meant there would be ‘no opportunity for the people or indeed members of the Constituent Assembly to absorb the recommendations and think about them individually, in groups and organisations before the process of debate in the CA [Constitutional Assembly] starts.’76

The third aspect of the constitutional process affected by the decree concerned the accountability of the Commission. Section 4 required that the Commission publish in the daily newspapers, on a monthly basis, a list of all its staff and all remuneration as well as a backdated financial report.77 This change occurred on the back of one of the more pointed attacks on the Commission which concerned the former Vice President and paramount chief, Ratu Jone Madraiwiwi. The Commission had appointed Madraiwiwi as a consultant but at the time he also supported (but did not present) a submission to the Commission on behalf of his community. In its submission, the community advocated for a Christian state, which ran against one of the Government’s non-negotiables. And while Madraiwiwi was well known for his own more secular views, he nonetheless supported his community’s right to submit a different view, which in combination with his role as consultant on the Commission, constituted a conflict of interests as far as the Government was concerned.

Possibly of greater concern to Bainimarama was the fact that in July, Madraiwiwi had provided testimony supporting Laisenia Qarase in the case brought against him for nine corruption-related offences. Qarase’s conviction and incarceration for matters occurring twenty years before, would effectively remove him from the political arena and the future contestation of political office. Madraiwiwi testified that Qarase had always been polite, respectful and professional, even when sharing differing views with others on important government matters. Despite Madraiwiwi’s and other pleas in mitigation, Qarase was sentenced to twelve months imprisonment.

Ghai believed that it was Madraiwiwi’s testimony that upset Bainimarama leading to his demand for Madraiwiwi’s resignation from the Commission as well as making the Commission ‘pay’ in added accountability. In any case Ghai expressed his puzzlement that ‘a government which is so wedded to secrecy should suddenly be converted to transparency’ especially given the formal audit that the Commission was committed to at the completion of its work the following month. In Ghai’s perceptions the Government was involved in ‘massive interference’ in the constitutional process.

By the end of the Commission’s work in December, Ghai’s incendiary relationship with the Government terminated in literal and symbolic fire. According to Ghai’s explanation of events, the participation of the people was crucial in the constitution-making process and the Commission was bound to show manifest respect for that. Although the amending decree may have removed public consultation on the Draft Constitution before it reached the President and the Constituent Assembly, Ghai maintained (disingenuously, according to critics) that it did not prohibit publishing of the Draft and the Explanatory Report and, in fact, publishing was imperative ‘[i]f the overall objective of the process…[was] to be respected.’

Ghai proceeded on this assumption and the day after the Commission presented the Draft Constitution to President Nailatikau, printed six hundred copies of the Draft and was about to publish other material when he was unceremoniously stopped. The police confiscated the six

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79 Fijivillage.com, Qarase to be Sentenced at 11.45am Friday (1 August 2012) <http://fijivillage.com/news/Qarase-to-be-sentenced-at-1145am-Friday-5k92rs/>.
83 Ibid.
hundred copies and shredded the final proofing documents which they proceeded to douse in kerosene and set alight. In his account of the incident to Radio Australia Ghai said:

Well I was of course extremely upset and I thought that this was some sort of symbolic act on the part of whoever gave the orders to tell me that this is how we will treat your work. And I felt extremely sorry, not for myself, but for the people of Fiji, if this was indeed an order from the government then it shows such contempt for our work, and in turn contempt for the people who had come out in their thousands and thousands to give us their views, participate in the process. And I felt really not just a betrayal, I just felt will Fiji ever have a democratic constitution.84

Others expressed similar misgivings about the confiscation. Shamima Ali of the Fiji Women’s Crisis Centre stated on Radio Australia:

A lot of people have come on board - people who actually did not believe in the process but participated because they saw this as a way forward...However much we criticised it...this seemed to us to be the only way out - and we have gone in in good faith...and now we are now questioning the intentions of such actions and whether there is a true commitment, as the regime has said before, to taking us forward.85

However, in the eyes of the Government and Fiji’s Land Force Commander, Colonel Tikoitoga, Ghai’s efforts to publish the Draft Constitution were illegal. Tikoitoga told the media that Ghai had breached the decrees and should face charges. He also said that anyone distributing the draft was doing so illegally.86 But as Tikoitoga knew, by January 2013 the Draft Constitution and Explanatory Report were circulating on internet sites that had successfully avoided sanction or shutdown.87

87 Bruce Hill, Interview with Mosese Tikoitoga, RFMF Land Forces Commander (Radio Interview, 1 January 2013) <http://www.radioaustralia.net.au/international/program/pacific-beat/fiji-military-says-seized-constitutions-were-illegally-printed/1068104>.
The Second Draft Bainimarama Constitution (2013 Constitution)

According to the decree the Constituent Assembly was scheduled to begin its work debating the Draft Constitution and Explanatory Report by the second week of January 2013. By the 10th January hundreds of people had expressed their interest in becoming a member of the Assembly. Representatives from civil society groups including faith-based organisations as well as political parties and government had been encouraged to apply. An expectant public, primed with updates from the Permanent Secretary for the Prime Minister waited for the announcement about the Assembly but the joint press conference of Bainimarama and the President on the evening of 10 January heralded an important change of plans. Criticising the Constitution Commission for its partisanship, President Nailatikau stated,

Unfortunately many of the provisions of the Ghai Draft positions us in the past. It has unfortunately perhaps succumbed to the whims of the few who have an interest in perpetuating divisions within our society. A Constitution cannot be drafted simply with the view to negotiate between different political interests. It would appear that the Ghai Draft is such. It would appear that it was prepared to be seen as an appeasement. Rather, it should be positive, future-based and enduring. It also neglected many of the fundamental principles of true democratic representation as presented through the Peoples Charter which I have endorsed. The Peoples Charter, as you will recall, was endorsed by over 60% of the Fijian population.

However, the President did acknowledge there were a number of positive aspects to the Ghai Draft which should be extracted and included with ‘key elements of the Peoples Charter and internationally accepted practices and standards [to] formulate a new Draft Constitution’. For his part, Bainimarama announced that the new draft should be available by the end of the month and a new constitution in place by the end of March. Bainimarama also assured the nation that the Constitutional Assembly would play its part:

92 Ibid.
To those who have been commenting on the Ghai Draft, these are readily available through the internet and indeed all the 599 copies that were printed by the Ghai Commission will be distributed during the Constituent Assembly process. Of course, the Constituent Assembly will deliberate the new Draft.\(^93\)

But, as the regime would have it, the whole idea of a constituent assembly was abandoned or at least transformed into an invitation that Bainimarama extended to his ‘fellow citizens’: ‘you will be the new constitutional assembly’.\(^94\) This meant that after their perusal of the new draft constitution released at the end of March, interested members of the public had a month to send a written comment to the Attorney General’s Office. While promoting the appearance of public participation and testing public support, the new arrangements (including the preparation of the draft through ‘internal government procedures that have not involved anyone from outside’) presented certain barriers to public scrutiny of the draft.\(^95\) As the Citizens’ Constitutional Form (CCF) reported, those living in rural areas and ‘informal urban settlements’ such as the squats, for example, were unlikely to have ‘access to either the text itself or to technical assistance to help understand it … [or] ready access to internet and other mechanisms needed to make submissions.’\(^96\) But according to Bainimarama, in a statement made to Naitasiri villagers at the time, ‘Fiji’s people weren’t interested in politics; they “were more concerned on developments like electricity, water and education”’.\(^97\)

Over one thousand submissions were actually made, none of which was made public but the revised draft, released four months later, contained some changes from the earlier draft, indicating ‘signs of responsiveness to domestic criticism, particularly regarding protection of indigenous land rights and the concentration of powers.’\(^98\) However, significant doubts have been expressed about the possibility of any new Constitution emerging from the constitution-making process which would either ‘be … “owned” [or] …seen as legitimate by the people of Fiji.’\(^99\) And many reservations have been voiced concerning sections of the constitution itself.


\(^96\) Ibid.

\(^97\) Bainimarama quoted in Fraenkel, above n 94.

\(^98\) Ibid 481.

On the list of non-negotiable principles demanded for the new constitution\(^\text{100}\) and the Government’s commitment to ‘free and fair’ elections, the Government’s own constitution and constitution-making process fell far short, according to the CCF.\(^\text{101}\)

Among the criticisms in their analysis of the Constitution, the CCF points to: the weak protection of rights; an enormous concentration of power in the Prime Minister, ‘perhaps unprecedented in modern constitutions’;\(^\text{102}\) wide-ranging powers of the Attorney-General, ‘far wider than under other Commonwealth constitutions’;\(^\text{103}\) a lack of accountability and power-balancing mechanisms for the executive; a lack of independence in the judiciary; an ‘unusually expansive’ role for the Republic of Fiji Military Forces;\(^\text{104}\) less restricted emergency powers; absolute immunity provisions covering the 1987 and 2006 coups ‘which seemingly exceed the permissible scope of amnesties under international law’;\(^\text{105}\) a lack of transition or caretaker government provisions for the period leading up to elections; the continuation and over-riding validity of all decrees until amended or repealed by parliament, ‘[t]he decrees, in short, are “super laws” that trump the Fiji Government Constitution’;\(^\text{106}\) and difficult amendment procedures that make the Constitution ‘one of, if not the, most difficult constitutions in the world to amend. There is every likelihood that the Fiji Government Constitution will never be changed from its current form.’\(^\text{107}\)

And with those bleak and rigid prospects, as Fraenkel wryly observes, ‘[t]he “coup to end all coups” had found for itself a new legal framework that was only ever likely to be changed by illegal action.’\(^\text{108}\)

\(^{100}\) The non-negotiable principles were: an expansive range of rights; open-list proportional representation replacing communal voting; a secular state; independent commissions and offices to check abuses; an impartial judiciary to uphold the constitution; and a transition to democratic government.


\(^{102}\) Ibid 28.

\(^{103}\) Ibid 29.

\(^{104}\) Ibid 36.

\(^{105}\) Ibid 41.

\(^{106}\) Ibid 45.

\(^{107}\) Ibid 42.

\(^{108}\) Fraenkel, above n 96, 480.
Chapter 7

ELECTION TIME WITH THE PEOPLE

Introduction
In this chapter, I present the views of six people I interviewed in Fiji, who could be considered as offering expert opinion or insight into questions of legitimacy. At the time, all of the interviewees were professionals working in the fields of law, politics and the media as practitioners, academics or both. I have taken excerpts from their interviews and arranged them under a variety of headings, most of which tie back into points discussed in earlier chapters. And since this is a more ‘conversational’ chapter, I have also included commentary on some of my own experiences in Fiji at the time.

Broadly speaking, the chapter is organised around the two poles of the political realm — sovereignty and governmentality — that Agamben sees as functioning in relation to one another in the bipolar machine, but which, as the interviews indicate, continue to influence conceptions of legitimacy in their separate forms, however problematically. This problematic is taken up in a variety of contexts such as the nexus between ends and means; the unity and particularity of identity; security measures, media control, and legality. The chapter concludes with views on reconciliation that I suggest can be situated, however tentatively, alongside Agamben’s affirmative vision of a coming politics.

September 17th 2014 was the day nominated for Fiji’s first general election since the military coup in 2006. I was most eager to be in Fiji for this day that would mark a significant transition in Fiji’s politics and also set some of the parameters for my research question. For the purposes of the analytical timeframe of my case-study, the election is the final event in the new legal order as continuum. It also provided a site for the fieldwork undertaken in my research. Most significantly for my work, the elections and their outcome present a seminal moment in the mysterious unfoldment of the new legal order. As Fraenkel notes, electoral
issues have featured prominently in the wake of the coup and throughout the new legal order’s first years ‘as instruments in the ideological justification of the military takeover; as internationally required stepping stones on the “roadmap” back to democracy; and as predominant features of the interim government’s vision for social transformation.’ Indeed, for the President heralding the new legal order, ‘the holding of true democratic and parliamentary elections’ was the raison d’être for his abrogation of the 1997 Constitution and the new legal order.²

Several key electoral changes were brought in under the new 2013 Constitution including the introduction of an open list proportional representation system and a single nationwide constituency.³ These changes were designed partly to ‘promote trans-ethnic voting, multiethnic political party membership and national unity’ that Fiji’s previous electoral systems had failed to deliver.⁴ However, as some critics have pointed out, there is nothing in the 2013 Constitution that restricts ethnic voting or provides a check against the return of communal politics.⁵ That said, the elimination of communal rolls did change the focus on ethnic divisions and besides, there were certainly more realistic expectations of the Constitution and the electoral decrees. For example, some commentators pointed to the fact that the 5% threshold of votes necessary to qualify for a parliamentary seat did not meet the government’s own criteria of ‘one person, one vote, one value’ in a parliament reduced to 50 members, where ‘each seat should correspond to 2% of votes.’⁶

However, it was when the general election was finally staged that hopes and expectations for the new legal order, its laws and processes including the election itself, could be read more clearly. For many, the general election was held to be a marker of democracy and legitimacy, for those who were cynical about Bainimarama’s interim government no less than for Bainimarama supporters cynical about Western liberal democratic structures. Those, for

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⁶ Ibid.
example who thought that the order of things was not important or only to the extent that a certain logic may have been radically and commendably turned on its head.\(^7\)

While reflective of a broad range of political persuasions and legal perspectives, these endorsements may also be interpreted as the casualties of the collapse of distinctions and differences between the institutions and apparatus of sovereignty and governmentality that Agamben speaks of in relation to the state of exception. In search of a language that has yet to be created, these opinions thus inhabit the old political categories that have been rendered empty or meaningless. However, maybe because, like Agamben, I am an optimist, it also appears to me that in Fiji the conditions for the possibility of a new life and political language are also sounding.\(^8\)

Depending on one’s perspective, the electoral victory meant any of many things. It emerged from a levelled playing field or was the product of unfree, unfair conditions. It was a victory for the people of Fiji and their transcendence of liberal binary oppositions. It was the way out of fear and insecurity and better the devil you know. It was the answer to bread and butter issues. It was the promise of new political horizons for an inspired or enfeebled imagery. But for all the interviewees — lawyers and politicians, judges, journalists, academics — and for so many others caught up in the same conditions of possibility, it presented a way forward, however pragmatically, fatalistically or euphorically that was embraced. The electoral victory for Bainimarama and his FijiFirst Party thus provides a critical juncture for an assessment of legitimacy in Fiji’s new legal order.

**The Big Day**

Just before I left Brisbane for the Fiji elections, I met some old colleagues from the University of the South Pacific. They warned me that they had heard that unrest was fomenting and Election Day would be dangerous. They recommended that I lie low in my hotel on that day. Leading up to the elections the Police Commissioner, Ben Groenewald, expressed his concern about the number of election-related reports that showed a level of ‘political intolerance to the

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\(^7\) An opinion noted from a private conversation in Fiji, 2014.

\(^8\) Agamben is often regarded as despairing and nihilistic but responds with assertions of his optimism. In an interview in Verso for example, Agamben draws on Marx to claim the optimism of his thought: ‘Thought, for me, is just that: the courage of hopelessness. And is that not the height of optimism?’ Juliette Cerf, *The Endless Crisis as an Instrument of Power: In Conversation with Giorgio Agamben* on Verso (4 June 2013) <https://www.versobooks.com/blogs/1318-the-endless-crisis-as-an-instrument-of-power-in-conversation-with-giorgio-agamben>. 

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election process”\textsuperscript{9} and assigned three thousand police to an elections task team.\textsuperscript{10} And given the watershed moment of a general election in a militarily-instigated, new legal order, the possibility of disruption in the public space was foreseeable.

I arrived in Suva the day before the elections. My first meetings with friends were alive with excitement. One young friend, a recent recruit to the public service, shepherded me into a noisy restaurant where her political commentary could blend inconspicuously into the din. Echoing the popularly adopted slogan, ‘move the country forward’, she welcomed the probability that Bainimarama and his FijiFirst Party would be voted into government. Her furtive air was a little confusing, since she did not seem to be suggesting any kind of resistance to the government. But then, such is often the social climate in Fiji: brimming with intrigue.

Later, at a local café, another friend attended frequently to his phone that buzzed with messages from international media organisations, while a steady stream of lawyers and journalists greeted him. He was busy policing the pre-election media blackout and also confident of victory for Prime Minister Bainimarama and his FijiFirst Party. Two days before the elections, in compliance with the Electoral Decree, a media blackout on political campaigning, ‘debate, opinion or interview on any election issue or on any political party or candidate’, came into effect.\textsuperscript{11} However, in its announcement of the blackout, the \textit{Fiji Sun}, one of the two major daily newspapers, delivered a ringing endorsement of the elections, and a more veiled endorsement of first time parliamentarian, Bainimarama and his FijiFirst Party. The newspaper stated:


\textsuperscript{11} \textit{Electoral Decree 2014} (Fiji) Government of Fiji, Decree No 11, 28 March 2014, Government of Fiji Gazette Vol 15/28, s 118(1).
Some politicians who graced our previous parliaments forgot their core role. They forgot the people who elected them. Some have been in Parliament before but have failed to impress...This election campaign has been intense and ugly in some respects. A major concern is the manipulation of the minds of ordinary people through fear-mongering, and divisive race-based and religion-based politicking. The great thing is that there is so much goodwill around that we must remain resolutely on the path moving forward. Our people, from the two major ethnic communities (the iTaukei and Indo-Fijians) have much more in common than is consciously realised. This election should be a celebration because we are having a truly genuine democratic election for the first time.12

And despite the blackout also applying to social media and the internet, blog sites were active. Fiji Media Wars, a blog site managed by journalist Marc Edge, announced a record number of hits after the blackout, ‘and the hits just keep on comin’, Edge blogged.13 He distinguished his postings at the time as personal or factual accounts rather than political commentary or political advocacy.14 On his blog site, Fiji: The Way it Was, Is and Can Be, Croz Walsh opined during the blackout, ‘I am saying vote FijiFirst and don’t waste your vote by voting for any any [sic] of the minor parties. This could put the "old gang" back in power.’15 He defended his post as ‘a clarification of an already published article that opponents have deliberately distorted, and used to their advantage during the blackout period.’16

The next morning I decided that unless there was a palpable sense of danger on the streets, I would not bunker down in the hotel but go to my friends’ house for Election Day. In keeping with the public holiday that had been declared for the election, there was a holiday feeling in the air, almost celebratory, as we made our way across town in the crowded minibus. On the way we saw long queues forming outside polling booths and were daunted by the prospect of lining up for hours in the burning sun. Interviewing members of the general public was not part of my research agenda but still I welcomed the opportunity to immerse myself in the general ambience of Election Day.

12 Maika Bolatiki, 'This Election Should be a Truly Democratic Elections', Fiji Sun (online), 14 September 2014 <http://fijisun.com.fj/2014/09/14/this-election-should-be-a-truly-democratic-elections/>.  
16 Ibid.
At my friends’ place, a ten year old boy, the youngest child in a household of seventeen, was urging his mother to vote for Bainimarama, chanting, ‘279, 279’ (which was Bainimarama’s number on the ballot paper). I was curious about the child’s political predilections which he said he learnt from his teacher at school. Bainimarama had to win, he said, otherwise there would be a coup and he would not get free schooling or milk.

The family decided to wait until the afternoon to go to the polling booth, by which time the long queues had disappeared. We walked together slowly up the hill behind a crippled old man, obviously an enthusiastic voter, who was leaning heavily on his supporters. On the way, my friend whispered that there was talk of an uprising at Naboro Prison involving George Speight who was incarcerated there for his involvement with the coup in 2000. A policeman was watching us as my friend’s son objected loudly to his mother’s taunts that she was voting for SODELPA (the Social Democratic Liberal Party) rather than Bainimarama’s party, but there was no other disturbance around the polling booth. The voters came and went, quietly dipping their fingers into a pot of indelible ink, a stain meant to prevent voting fraud containing silver nitrate that turned to dark brown in the light.

In the evening I decided to take a friend’s advice and go to the Holiday Inn to sit in cool comfort and watch the election results on the big screen there. I anticipated a room full of journalists and excited others but the bar was quiet. Peter Reith, a former Australian minister in the Howard Government, who was an official observer of the Fiji elections, walked by without looking at the screen while one animated expat was jumping to false conclusions about polling results. But within two hours it was clear that Bainimarama was polling well and with no sign in the bar of any response to that political phenomenon, I decided to watch the rest of the broadcast back at my hotel. The streets were quiet, like any Sunday night in Suva.

The following day the Fiji Times described Voreqe Bainimarama as ‘poised to take Fiji into a new era of democracy.’ The provisional results indicated that Bainimarama and FijiFirst had overwhelming majority support, gathering over 60% of the vote. Most of my interviews were conducted in the ten days after the election while the reality of the ‘new era’ was beginning to sink in. During this period Government opposition was united in claims of electoral fraud. However, even if found to be true, the irregularities cited could not account for the size of the

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majority commanded by Bainimarama and the FijiFirst Party. As Jon Fraenkel commented, ‘the scale of FijiFirst’s victory suggests that there has probably been more support all along for Rear Admiral (Ret) Bainimarama than many envisaged.’

The next part of the chapter presents the various perspectives of the interviewees on the electoral processes and results, and the wider implications for legitimacy that follow. To provide a minimal contextualisation for their views, the participants have been given an initial that corresponds with their field of expertise:

- $A_1$ and $A_2$ = academics
- $J_1$ and $J_2$ = judicial officers
- $M_1$ = media person
- $P$ = politician

**Electoral Means and Ends**

While Agamben talks of the ‘false alternative between ends and means that paralyzes any ethics and any politics’, political experience is often perceived and couched in such terms. And while the electoral outcome in Fiji, was not, or not for everyone, a simple equation between ends and means — the ends justifying the means or the means justifying or guaranteeing the just ends — some form of that logic certainly shaped most assessments of the elections and ultimately the equivocal sense in which the notion of ‘moving Fiji forward’ was felt and expressed.

For $A_1$ who believed in Bainimarama’s vision of equality and harmony, the ends, though they might remain a futural possibility, justified the means. $A_1$ took the view that even before the 2006 coup Fiji’s politics had suffered from a long term deficit in legitimacy. In contrast, $A_1$ saw Bainimarama’s military intervention as a legitimate response to the Qarase Government’s policies which were provoking racial tensions. For $A_1$ it was the breadth of Bainimarama’s

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vision for equality and a more harmonious future that justified his actions. A1 stated that, ‘if one has to go to a certain extent or take certain actions to try and achieve this harmonisation, then why not.’ And these measures also included the electoral processes: ‘if they [the regime] have installed their own people in various pocket institutions, I find that to be still within the confines of what the regime needed to do to achieve equality and fairness.’

J2 could not share the view that the ends justifies the means. ‘The process for any administration that gets into power is, as I always understood, in accordance with the law.’ And for J2 none of the decrees qualified as law and the regime ‘could never be accepted as the legitimate authority of the country’, especially after the Court of Appeal had ‘decided that it was wrong … and had proposed a way forward that was in keeping with a legitimate process.’ And yet there were was more to the legitimising process in J2’s eyes than the Court’s decision. In J2’s assessment, legitimacy was also concerned with the governance of the country being in accordance with international law: ‘My belief is rooted in the idea that what we are doing here is acceptable elsewhere.’ So after the elections, when Australia, New Zealand, the European Union and others had a shift in policy to restore a full relationship with Fiji, ‘now the legitimacy part comes in.’

J1 expressed a similar view, finding the measure of legitimacy and legality in the reviewability of the situation. Thus, because they could not be challenged in the courts the decrees were only lawful by default. And until the courts can give an opinion ‘as to where the 1997 Constitution sits in relation to the 2013 [Constitution] … the jury is still out as to whether we do have a new legal order or not’. In J1’s opinion, ‘ever since we became wiser with the Chandrika Prasad decision, the 1997 Constitution is still sitting there and someday somebody somehow will get to look at it … to have the issue determined once and for all. Is it completely dead and buried or can it be resurrected?’ In the meantime, because ‘these decrees are being upheld by the courts’, J1 was resigned to a pragmatic view of law ‘for the time being’.

For J2 the legitimacy that came with international recognition was not any triumphant procession either, and not least because of the perception that the Constitution was ‘just thrust down our throat and without any consultation whatsoever, notwithstanding the provisions that may be attractive or otherwise to some segments of our communities. … It is the process itself that lends legitimacy to the government.’
The lack of consultation on the prospective electoral system was cited by \( P \) as one of the factors that detracted from the legitimacy of the elections. ‘The electoral decree itself needed to involve a lot of stakeholders … but it didn’t. It just involved two or three people … [who] made the decree. … Talking to a diverse range of people they would have realised it would have improved a lot of things.’ Like other interviewees, \( P \) maintained that elections involve more than what happens on Election Day, and argued that the ‘freedom and fairness’ of elections, which contribute to the legitimacy of the outcome, are part of a wide-ranging process. According to \( P \), fairness demanded the appointment of a caretaker government because ‘there was a big use of government resources, there was a lot of manipulation of resources and employees and information.’ And in regard to the latter, ‘the media needed to be free, free from all kinds of censorship and regulation.’ And the electoral process also needed to be free from police intimidation:

None of the FijiFirst people – they are the police in a way – none of them got surveillance by the police, plus they have the whole military behind them. That is the perception. But for us the police were everywhere … calling different people around me asking where I’m going, what’s my schedule. They called my volunteers and harassed them … I couldn’t openly advertise where I was going for meetings because people weren’t feeling safe because police would come and sit there … they used to come to record. I saw some on the phone recording, on the video camera … even I felt really uncomfortable, I was scared.

In the observations of \( P \) and other interviewees, the field was stacked against any opposition to Bainimarama and the FijiFirst Party. This was apparent not only in relation to FijiFirst’s political and financial position (virtually as incumbent government) which facilitated inducements and vote buying. It was apparent in the relative ease of FijiFirst’s registration compared to difficulties faced by other new (and old) parties, and also in regard to the voting system of proportional representation. This system relied on the d’Hondt method to allocate parliamentary seats to parties in proportion to the number of votes received. And while all parties and independents needed a 5% threshold of votes to gain a seat, Bainimarama’s personal popularity ensured that his party received enough votes for thirty two (of the fifty) seats, some of which went to party members who received less than 5% threshold of votes. According to \( P \) it was obvious that this ‘was a very well thought out move, and the reason why they [the regime] rejected Yash Ghai’s recommendation for the electoral system in the [Ghai] Constitution.’ But there was much more to Bainimarama’s commanding majority of votes and parliamentary seats than the system of proportional representation that made it hard for small parties or independents to get a seat in parliament.
The New Fijians

M1 spoke of a sense of national or common identity that was key to the success of Bainimarama and the FijiFirst Party. As M1 stated, ‘for many years the concept of national identity has divided a lot of us’ but now it was ‘undeniable that he [Bainimarama] has given everyone a national identity.’ Nonetheless, for M1, the decision to name all Fiji citizens ‘Fijian’, as part of the new identity-forming strategy, was problematic. ‘Generally a lot of people accept that, even a lot of iTaukei people accept that, yes that’s the way to go. But the processes that led up to this point, there was no consultation. We were just told one day there was this decree and … we were given the name Fijian.’

There was no doubt that identity politics in Fiji had taken a turn with the 2006 coup. Bainimarama’s stated desire to make Fiji a more equal and harmonious multicultural society resonated with both Indo-Fijians and iTaukei, but for different reasons. In relation to Indo-Fijians, P described a change in the narrative rather than in any ‘tangible rights’, which was largely due to ‘the way that Frank [Bainimarama] has spoken about it’, expressing and engendering a stronger sense of belonging to or ‘ownership of the country’. On the other hand, M1 spoke of a different understanding of ethnicity among younger voters. ‘Yes you have your own ethnicity but that doesn’t mean someone else is going to come and take it away, there’s no way someone is going to come and take it away.’ M1 was referring here to the insecurities of Indigenous voters who feared their ethnicity being swamped by others, a fear targeted by the Social Democratic Liberal Party (SODELPA).

Under Bainimarama’s electoral reforms, all parties in contention for the 2014 elections had to have English names. Consequently the Soqosoqo Duavata ni Lewenivanua Party (the SDL) which was founded by Prime Minister Qarase as a successor to the Alliance Party and largely representative of certain Indigenous interests, changed its name and partially retained its acronym in SODELPA. It was this party that posed the most significant challenge to FijiFirst’s chances of success. However, under its leader (and paramount chief), Ro Temumu Kepa, SODELPA retained what seemed to be an anachronistic politics of ethno-nationalism and according to M1 ‘badly misjudged the ordinary peoples’ feelings … a lot of young people have no time for that kind of rhetoric going round and round in circles. People are like, “get over it, we are all Fijians, move onto something more substantial.”’ P, too, saw SODELPA’s strategy as slippage into racism rather than a clear statement of respect for all ethnicities, which meant that SODELPA ‘gave their votes to FijiFirst on a silver platter.’ P remarked that using Islamophobia for example, to gain support from Indigenous Fijians, badly backfired
‘because they thought everyone is dumb and uneducated in Fiji. They thought we are still twenty years back. They forgot that people are in the information age now, that there is social media. They relied on the rural areas but they forgot there is a lot of drift.’

If FijiFirst attracted many of its votes on the strength of its successful branding, as $P$ maintained, that was due in no small part to the divisions in other sectors of society. The Christian churches, for example, were divided in their support of the regime with the largest division between the Catholic and the Methodist churches (the former seen as more sympathetic to the regime, the latter punished for not being so). 20 The labour movement too was divided, indeed, in $A2$’s view ‘the labour movement totally collapsed.’ The breakaways and factionalism seemed to be signs of bigger changes in the political arena, where the ‘old’ categories like ‘labour’ and ‘liberal’ and ‘democratic’ no longer mattered, and that definitely worked in favour of FijiFirst.

$M1$ noted that the erosion of union influence possibly coincided with global changes but, just as significantly, was an effect of regime measures: ‘people would rather go straight to their employers and that’s what the decrees have encouraged. They encourage individual contracts and no more collective bargaining.’ Similarly, $A2$ saw a general failure of opposition forces to unite and ‘push things forward’. This in turn, ‘allowed the regime to consolidate itself over time.’ Appealing too, was the regime emphasis on multiculturalism and ‘an ethnically-blind, non-discriminatory Fiji’ in contrast to ‘previous coups which had emphasised exclusiveness and affirmative action policies.’ But according to $A2$ there were other factors at work on a deeper level: ‘Behind it all, the ideological front, would be the same old same old [sic] in order to repress the people who are opposing, and openly divide the opposition and then consolidate yourself in power, and that’s what happened.’

**The Media**

As outlined in the previous chapter, measures of control that could be perceived as repressive, affected the media. But as some interviewees indicated, control in the media was not necessarily effected in the most straight forward, or (to use Foucauldian descriptors)

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‘homogenous, continuous and exhaustive way possible.’

In other words, repression was not an immediate effect of prohibition and passive obedience. And in some ways the security controls on media actually produces a type of freedom. If we stay with the Foucauldian analysis of biopower and security apparatuses for a minute, this freedom can be understood in the context of ‘the mutations and transformations of technologies of power … as nothing else but the correlative of apparatuses of security.’

As Foucault’s work shows, in the realms of governmentality (as distinct from the sphere of sovereign or juridical power) the deployment of mechanisms of security corresponds to ‘making possible, guaranteeing and ensuring circulations … of people, merchandise, and air, etcetera.’ And this circulation is ‘profoundly linked to the general principle of … liberalism’ and freedom as a technology of power.

However, in the immediate experience of a less straightforward repression, MI spoke of the ‘red tape’ that was a consequence of ‘the way they [the regime] governed’:

> journalists were an irritant to them, so even asking basic information was difficult … even if you go to an official in any government department … you need to get permission from this person, this person says you have to get permission from that person, and then everyone was on their own little power trips. So even if there were no specific rules or regulations they would just cite things saying why they can’t give information … sometimes it’s just things that would be on the public record, if they would have updated their website. And so it was hard. Over seven years I noticed and it filtered right down from the top to the lowest civil servants … it kills a lot of vibrancy, journalists just didn’t bother any more.

Or, as A2 observed, the reluctance of government officials to respond to media questions made it difficult for the media to present a balanced account that would accord with the decree and not invite censure: ‘Sometimes when you get one side of the story, you have to keep calling government permanent secretaries for a response, their side of the story, and they do not respond. So what side of the story are you going to write? You can’t write the one side.’

Another effect of media control concerned media ownership and, according to MI, there was more to the curbing of foreign ownership than met the eye. At the time the only foreign-owned media company was the Fiji Times (owned by Murdoch), and so the media decree was

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22 Ibid 71.

23 Ibid 40.

24 Ibid 70.
‘first and foremost aimed at curbing the influence that they [the owners] had.’ But rather than targeting the sort of news the newspaper might publish (which could, after all, be controlled by other regulations) the influence that concerned the regime, in M1’s view, was ‘the big backing of resources [that enabled the paper to] function independently so they didn’t have to worry about legal challenges, because that would be taken care of, whatever cases they had to fight.’ The decree forced the sale of the Fiji Times but it also impacted on smaller media companies. As M1 lamented, if smaller media companies cannot now ‘source funding from locals, then that’s it.’

But, according to M1, if the media was stifled, then the media industry itself was partly to blame:

[There] was the code of conduct. If anything, the media could be blamed for … not enforcing those codes meaningfully, not regulating ourselves meaningfully enough so the public could see that we take issues and complaints seriously. That was what the Bainimarama Government capitalised on and jumped in and said “if you can’t do it for yourself we’ll do it for you”. And that was where we fell down.

A2 also voiced no doubt that Fiji’s media had been irresponsible, and in that regard, had been instrumental in creating or contributing to racial tensions and political upheaval. A2 referred to research which:

shows quite clearly that the Fiji Times was very biased against Chaudhry [during the time of the Chaudhry Government]. And if you look at the violence committed by ethno-nationalists against Indo-Fijians from Natasiri and Rewa, some of the behavioural patterns were reminiscent of what was happening in Zimbabwe, and that was reported in the Fiji Times on a regular basis.

And it was suggested even more strongly that some people thought that if the media had been more responsible, the coup would not have happened in 2000, ‘because a lot of it started with the media’s representation of ethnicity and stereotyping.’

But if an unregulated media had something to say about Fiji’s society, a heavily regulated one was perhaps even more revealing. Commenting on the Media Decree and what was perceived as its heavily punitive approach, P said that rather than have MIDA or the Media Decree, ‘we should have just created more awareness of what existed and put more resources there to further enhance it.’

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However, as A2 perceived, not only were ‘punitive measures … put in place which are draconian and which create fear in peoples’ minds’ but also the media’s ‘self-censorship … [that] continues to this day’. And in A2’s view, the fact that ‘some of the media are very pro-Government and the rest … have to follow suit otherwise they might get into trouble’, contributed to ‘a climate that is not conducive to media freedom.’ And as much as the notion of self-censorship may say something about the extent to which prohibition can be internalised to emerge as freely self-directing, it is also an effect of an imposition from above and thus raises important questions about that authority.

**Authoritarian Structures and Modes**

As discussed in Chapter 4, the question of authority ties in with the structure of sovereignty and what Agamben describes as the oscillations between ‘kingdom’ and government and the figures of authority who rule or govern. These oscillations materialise amidst historical continuities and contingencies and discursive conditions that enable authority to be authoritative. For A2 the character of authority in Fiji’s new legal order begged the question of ‘how this government [was] able to continue, even though lots of people saw it as illegitimate, the legal fraternity saw it as illegitimate?’

P partially addressed that issue in terms of Fiji’s authoritarian culture:

> They [the people] wanted an authoritarian, aggressive, assertive, militaristic type of approach. They said, ‘that’s how we control our boys. You know we can’t teach them anything. We have to punish our children, why can’t we beat them up now?’ They used to ask me that because they think that fear and violence is the only way to run this country. Generally everyone thinks this. There is only a small percentage of us that don’t. Look at parents and the way they treat their children.

Similarly, A2 directed people with their complaints about the lack of democracy towards their schools:

> I’d often quote Steven Ratuva [political sociologist] who described primary school teachers as a pack of little Hitlers with their authoritarian culture. Students are discouraged from asking questions, or to speak up even if teachers are teaching the wrong things. And there is no exercise of democracy, committees and student participation, etc. And so people wonder why there is a culture of silence. Some of the things that happen in Latin America where people come out with their pots and pans and bang them loudly. There’s no such culture here. People are so repressed.
Figure 6 “Methodist Ultimatum”. Fiji Sun, 27 May 2010, Page 1.
However, Fiji’s authoritarian culture links in with the culture of silence in uneven ways, especially if that silence is interpreted in the context of obedience to authority in iTaukei culture. In that regard J2 comments:

[Fijians] in their own setting, no matter what, they will always obey authority, whatever nature rules over them. And that contributed a lot to the way people succumbed to the authority that came over them … the President, himself, was always one of those chiefs, and that in fact emphasises the point I’m trying to make … in a way Fijian culture did come in to help, even though Bainimarama did his best to get rid of it.

Indeed, as A2 observed, the Great Council of Chiefs, ‘seen as a traditional body and legitimating institution for the rest of the State … seemed to have basically gone with the wind … [without] widespread objections from the grassroots that the chiefs have been subject to disrespect.’ For A2 this marked quite a contrast to the past when in 1982 Jai Ram Reddy made comments about Ratu Mara which were ‘sold as insult to a high chief and apparently provoked a lot of emotions. But now with Bainimarama’s coup, all that is gone. So it’s quite interesting.’

But as discussed in Chapter 2, traditional Fijian culture, like every tradition, was never frozen in time, even if ‘we often forget that tradition … is always being made and remade.’ As Madan Sarup reminds us, ‘tradition is fluid, it is always being reconstituted. Tradition is about change – change that is not being acknowledged.’ So the authoritarian currents in Fijian culture may not only derive from the mists of time but may have also intertwined (sometimes very strategically) with other influences and with a decisive impact on contemporary conditions. This is not simply a chicken or egg issue but for A2 goes to ‘the heart of the matter.’ The regime’s situation, ‘where you had a largely patriarchal and authoritarian setup … goes back to the colonial period when the governor ruled. If you like, put him in the modern context, he’s a dictator. And that condition prevailed with the chiefs largely holding power.’

While he was not a chief, Bainimarama, like so many Fijians, was, of course, significantly connected to the military, which J2 also took into an account of cultural obedience:

26 Ibid.
There is a kind of glamour and admiration that always attracts our people to the military, and coupled with the fact that almost every Fijian family would have someone in the military at any one time … the situation is such that not only does Fijian culture come into it but also the relationship with the military adds to that dimension of the people being swayed and persuaded easily.

But as A2 adds, this has not happened without also creating ‘a great deal of ambivalence and confusion’ when it comes to getting into power amidst the cycle of elections and coups, and the sense that, whether it is through an election or the barrel of a gun, ‘over time it all seems to be legitimate in the eyes of the people.’

P also maintained that dictatorship thrived in Fiji as a form of government because of popular endorsement: ‘Indigenous people and a lot more Indo-Fijian people feel that being in a dictatorship is better for our country. They don’t think democracy works for our country. They think it’s legitimate to have a dictatorship.’ Significant, too, was Bainimarama’s part in that dictatorship, because of what P saw as the persistence in the Indo-Fijian psyche of reliance on an iTaukei saviour:

They [Indo-Fijians] still feel like they have no place in this country. The only time they have a place is if there is an iTaukei there protecting them. They can’t stand up for themselves, they can’t fight for their rights, they can’t claim ownership of the country. They just want someone to do it for them, who is Indigenous.

Bainimarama did not only play the saviour role, according to P, but he also was the mouthpiece for voices repressed and silenced by cultural norms and political pressures. When his style of leadership involved what M1 saw as ‘ridiculing’ or ‘railroading’ people like [paramount chief] Ro Temumu Kepa, so that ‘she had her head down all throughout [the televised debate] and wouldn’t look at him, P saw that ‘many Indo-Fijians gleed’ in Bainimarama telling someone they perceived as being racist and nationalist to shut up on a national broadcast. And ‘the way he treated Australia and New Zealand … people loved that … because it showed Bainimarama was in authority, that he was a leader, he was strong, he can handle anyone. He can handle racism, he can handle SODELPA. So it was a very strange dichotomy.’
The Farce and Many Faces of Legitimacy

The interviews are expressive of the paradoxes of legitimacy that each of the interviewees has contended with in relation to Fiji’s new legal order, with even the mere existence of a new legal order suggesting a measure of its legitimacy. Its existence is not only a question of time — when it began or how long it has lasted — but its legal qualification, whereby through the confusion of law and politics that has attended its first five years, it can nonetheless be recognised as the legal order it claims to be, rather than some other political arrangement.

The issue of recognition is itself multilayered. P, for example, talks of legitimacy as something people started believing because they were told it was so, regularly and for so long. ‘So whether the rule of law was there or not, whether there was legal order or not, whether our basic human rights were protected or not, that didn’t matter in our country.’ The ‘sad’ truth for P was that because ‘the decrees are in place and most of them will remain in place’, ipso facto ‘we’re in a kind of legitimacy’, and the longer it goes on ‘the more solid it becomes.’ And one of the problems inherent in that configuration is that the security mechanisms which have been relied on so intensively to secure the regime to legitimacy, are also chief among those strategies which have appealed to the poorest people (as well as the middle classes), not because they change material conditions of poverty but because they distract from its burden. ‘People didn’t think poverty was any better but they felt there was a sense of security which made it all better.’ Whereas for P, security did not overtly trump poverty but was a bogey man that thwarted the sort of changes that the bread and butter issues needed. And yet P noted that fear and insecurity echoed in the voice and the choice of the people, and that choice had to be accepted: ‘it’s something we all have to take responsibility for because civic society organisations and political parties did not do enough to deal with that insecurity and create confidence in the people.’

In P’s observations, fear and insecurity for Indo-Fijians involved the threat of political instability and the threat to personal safety. These were the fears that Bainimarama would stage another coup if he lost the elections or that if SODELPA won then Indo-Fijians would be put on a boat and sent away or else lose whatever rights they had. But from J2’s perspective, fear was ‘not part of the equation’ for the Indigenous people. ‘It was more a bread and butter question.’ And that question was mired in a false sense of security. ‘For the moment it is all glamour and business but I know that around the corner there is going to be trouble.’
In A2’s account, bread and butter issues preoccupied the people as concerns for income security. But the regime had:

come up with a minimum wage of $2 an hour, which is equivalent to perhaps a dollar or less than a dollar Australian an hour, and we import Australian prices in most of the goods and services that our people consume. So this is a huge issue but people have accepted that. And all the road building and extension of power and little bridges built here and there, they have all provided the necessary bulwarks to support the government.

The new legal order’s track record of maintaining state institutions strongly recommended it. However constrained the government departments might have been, as noted by A2, ‘they nonetheless existed … no one could say that Fiji was a weak or fragile state.’ But the forces of constraint were also very significant for the interpretation of authority and legitimacy in the new legal order: ‘Authority came less from acquiescence and a kind of acceptance of rightful authority … it came more from fearing what the forces of state institutions in the form of the military, if unleashed on civil society, might do.’ And as A2 observes, given the success of the various measures of control, especially the inculcation of fear and apprehension of violence, ‘in terms of legal legitimacy, who would ask these kind of questions?’

In J2’s view, part of the responsibility for questioning legitimacy rests with the judiciary but the judiciary had been ‘strait-jacketed’ or prevented from exercising its ‘authority to arbitrate or decide on whether things should be done this way or that, … clear[ing] the way for the government to go on merrily with what it needs to do.’ J2’s concern was that, ‘during all this time in the last eight years since the coup … the judiciary itself sat back and did not do anything to assist the plight of the people.’ Rather than judicial intervention in the courts (which J2 saw as impossible and inappropriate anyway) J2 believed that the judiciary could have made its voice heard in a variety of other fora. Significantly, this position did not revolve around the question of safety although J2 conceded it could have, or should have: ‘Maybe I should have thought more about it [the safety of the family] but it never entered my mind. The principle to me was more important.’

At the time that principle of the rule of law was also an issue for the USP’s School of Law. Shortly after the Constitution was abrogated, the Head of School came over to Fiji from Vanuatu because of the concern that he and the other staff in Vanuatu had for us, their law colleagues at the Fiji campus. There was no telling how things might pan out for the law school in such circumstances. He also wondered how the staff felt about taking a stand or making a public statement about the legal state of affairs. While some staff were willing to
take a public stand, the majority was not, partly because of fears around personal safety and job security and partly because some actually endorsed the new legal order. I wrote a note at the time, crisply aware that I was in a different position to many others. Being an expat, for example, I could easily leave (or be removed) from the country, and return to family, friends and different prospects:

22 April 2009

Dear Colleagues

I am sending word back with our beloved leader because the information superhighway can be a shadowy place where messages get intercepted and used against us.

Our situation is tormentingly calm and all too easily construed as a willingness to embrace the New Order. The challenge is how to craft this silence into something worthy of being called resistance to oppression and flagrant disregard for what is good in the rule of law.

In some ways I am sorry that the worst strain I can report is the strain of one eye being glued to Raw Fiji News [a blog site active at the time] while the other is on the work at hand.

Thank you for your solidarity….I hope I can recognise the opportunity to be worthy of it.

In the end the main concern of the Head of School was for the safety of the staff and students and any public statement was left for the Australasian Law Teachers Association to make.

Reconciling Legitimacies

Over the course of writing the thesis I considered many ways to make sense of the title, ‘Taking Exception to the Rule’, but it was not until I was finished with the interviews that I discovered a sense in which such a title would suitably conclude my analysis. Amongst the interviews the question of legitimacy lurched and sputtered between means and ends, processes and outcomes, the past and the future, artifice and edifice. But regardless of where the answers lay, it seemed that all were subsumed or brought under a rule or a principle as the pursuit of a possibility. While there was no mutual understanding in knowing how to go on, there was, at least, a mutual understanding of the imperative to go on, made manifest in the ‘Move Fiji forward’ mantra adopted by coupsters and constitutionalists (and others) alike.
It is true that not everyone agreed on the way forward but most of the interviewees supported the idea of a truth and reconciliation commission as one way to get through the impasses of broken or abandoned law, and historical wounds frozen into the social psyche. Despite welcoming the prospect of truth and reconciliation, *P* was adamant that a truth commission would have to involve more than truth telling: ‘We need some kind of legal accountability, we cannot just have truth and then move on. There has to be some form of justice.’ *J2* also recognised the need for a reconciliation commission to ‘at least account for what has happened’. They stated:

> The disruption and harm that it has created has marred our lives. There have been deaths and there’s been unaccounted actions taken against our people. We have to reconcile that with ourselves, with our people and I don’t see any way out unless we really sit down and do the truth and reconciliation set up.

The Bainimarama Government had entrenched the provision for immunity in the 2013 *Constitution* guaranteeing a comprehensive, unreviewable and irrevocable limitation of liability for prescribed political events for a large group of prescribed persons (any public office or service), but this immunity did not approach the concept of conditional amnesty as provided for in the South African Truth and Reconciliation Commission, for example. While amnesty may grant immunity from prosecution it involves the forgiving or forgetting of an offence. Immunity, on the other hand, suspends the application of law to provide carte blanche for certain actors, an ideal companion to the state of exception. However, the immunity provision in the 2013 *Constitution* was a cause of consternation for *M1* who asked, ‘why amnesty for some and not for others?’ This was in reference to the fact that various perpetrators of the Speight coup in 2000, unlike the perpetrators of the 1987 coups or the 2006 coup, languished long in prison for treason. The *Ghai Constitution* had attempted to create an amnesty-like immunity in a provision granting immunity, on condition that each person signs and swears or affirms the Oath or Affirmation of Reconciliation and Allegiance. This oath acknowledged past unlawful acts and promised submission to democracy and the rule of law. Perhaps unsurprisingly this feature was not reproduced in the immunity section of the 2013 *Constitution*.

*J1* welcomed the prospect of a truth and reconciliation commission in lieu of the question that hangs over the status of the 1997 *Constitution* that may never be answered because of the lack

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of political will or because of the difficult issues of judicial loyalties and frames of reference. And besides, J1 thought a truth and reconciliation commission ‘a very good idea’ because ‘we’ve had coups here since 1987 and … there are those who actually want to come out and talk and get things off their chest.’

M1 suggested that ‘a lot of our problems stem from’ a failure to deal adequately with the past. ‘People keep using the past as a reference for what they’re doing now and I think a lot of healing on all sides needs to go on … otherwise we will be constantly bogged down by these issues.’ However, M1 voiced concern that Bainimarama’s style of governing, ‘with his iron fist’ and a rather too uncompromising pace (‘Bainimarama would just say “no, we need to move Fiji forward, that is just going to bog us down’’) was not conducive to staging a truth and reconciliation process. But without it, M1 thought, ‘really … we are selling ourselves short … [although] it might not be easy and it might be painful.’

P also spoke of the need for a national healing process, apparent in the intergenerational experience of injustice:

I come from the Indo-Fijian community, even till today my father carries so much resentment right from 1987. And the parents pass it to the children and the children pass it to their children. It’s a never-ending quest. All the people of my generation and one generation down carry their parents’ hurt and injustice. They are so resentful of 1987 [the time of Rabuka’s coups and interethnic violence] and they weren’t even born then. It shows that we really really need a national healing process.

And as P pointed out, the sense of injustice was not exclusive to the Indo-Fijian community:

From 2006, all those civilians that got murdered and tortured at the military base, they are also seeking justice. We … [know a relative of] one of the boys that got murdered at the barracks. And nothing has ever happened. And till today they talk about it, till today [they] carry that anger and hurt … that’s the kind of hurt in all the communities now.

The fact that many people seem to have embraced the ‘move Fiji forward’ mantra without a backward glance or a concern for how they were moving forward, said something to J2 about a desire to escape the trauma of the past. And while the people may be labouring under misapprehensions now about ‘what we’re really in for’, J2 thought that ‘four years down the track’ it might be possible to come back, ‘to revisit [the past] later.’

As much as any of these views on a truth and reconciliation commission may place such a process within a juridical structure (such as the demand for legal accountability does) it is also
possible to appreciate another dimension in which such views may emerge. And this possibility is conditioned by the very mode through which the new legal order was founded, or more precisely, by what those founding activities revealed about the institutions and apparatus of government and the life they produced. The ongoing (true or fancied) crisis brought the more or less permanent state of emergency or exception to the law, whereby the distinction between law and non-law, public law and political fact dissolved. For example, who could say, especially during the early post-coup days, whether Bainimarama or his opponents were traitors? But more importantly, at least for this part of the discussion, what does it matter?

The point is that in the new legal order the veil has come down, exposing the political machine in which sovereignty and government are ceaselessly separated and joined. But while it has meant the death, imprisonment or the deportation of some, Fiji’s new legal order has not meant the creation of concentration camps or protracted bloody upheaval. Instead, as has been discussed in previous chapters, Fiji’s new legal order takes its place, often quite banally, amidst the capitalist society of the spectacle as another form of contemporary biopolitics. And the life of those caught up and fractured in the sovereign exception, is not necessarily exhausted there. Indeed, the turn towards truth and reconciliation or healing, understood not as an attempt to reform or repopulate the apparatuses of government but as a subtraction from them, signals the possibility of a ‘real state of exception’ where ‘every fiction of a nexus between violence and law disappears’, 28 a possibility that I discuss below.

Conclusion

This chapter presents different views on the notion of legitimacy from people professionally engaged in Fiji’s law and politics as practitioners and academics. They articulate what can be interpreted as a confrontation with the structure of the exception and the difficult task of distinguishing (or not) between exception and rule. These views echo some of the main concerns taken up in previous chapters but most importantly, contribute a personal and lived sense in which meaning takes shape. Thus, they illuminate multiple and conflicting beliefs, interests and allegiances, risks and sureties conditioning the emergence of Fiji’s new legal order, eschewing a simple notion of domination. Mechanical or unilateral coercion (as a mode of installing and consolidating the new legal order), for example, is radically offset or textured

by accounts of Indigenous notions of authority, or self-censorship by the media. Security measures employed by the government as a tactic of control are welcomed by those fearful of repetitions of past instability, whether politically motivated, militarily instigated or racially targeted. Democratic aspirations crowned by electoral outcomes are affected by government manipulation of public opinion or undemocratic practices deeply embedded in various institutions. Legitimacy is cast through the spectrum of a weary pragmatics or an optimistic release from the past, or not at all. But a new legal order persists, however overflowing or emptied of meaning are its institutions.

The beginning of the thesis and the beginning of Part Three talk about an incoherence or a pathos of absence that haunts my attempt to articulate the problem of legitimacy in Fiji’s new legal order. There is no doubt that part of my disquiet is due to the reluctant shedding of the democratic-revolutionary tradition, which as Prozorov remarks, ‘in continental thought … opposes the constituted power of the state in favour of the constituent power of the people, the proletariat, the multitude’. 29 One of the first signs of that ‘shedding’ occurred with the arrival of Fiji’s new legal order when, surprisingly, I found myself reaching for the legal pedigree of constituted power in order to distinguish legitimacy; and then, more predictably, attempting to distinguish the demos from the deliverers of Fiji’s new legal order. But, under the circumstances of crisis and emergency, neither of these approaches could even assure the possibility of distinguishing between constituent and constituted power, or more chillingly, between state and terrorist. But this is not an altogether bleak outcome.

Turning to Agamben’s work on the state of exception and the bipolar governmental machine to probe the mysteries of foundation and legitimacy in Fiji’s new legal order, we are led to ever deepening perceptions of the ‘zone of indistinction’ where ‘traditional political distinctions (such as those between Right and Left, liberalism and totalitarianism, private and public) lose their clarity and intelligibility.’ 30 To that zone may be added legitimacy and legality, law and anomie (and a host of bipolarities) where what is at stake is the relation between them. Agamben’s focus on the presuppositional logic of this relation, implicated in concepts such as Kelsen’s grundnorm, the Schmittian concepts of commissarial and sovereign dictatorship and ultimately the western metaphysical question of being, is thematised in Agamben’s work through the ‘relation of exception … by which something is included solely

29 Sergei Prozorov, ‘Living a la Mode: Form-of-life and Democratic Biopolitics in Giogio Agamben’s The Use of Bodies’ (2017) 43(2) Philosophy and Social Criticism 144, 146.
through its exclusion.’\textsuperscript{31} This relation permeates legal and political structures so that now it has become the rule or a technique of government. Thus, this relation is what Agamben, following Benjamin, shows us must be deactivated if the modern world is to recover the sense of wholeness and authenticity, fluidity and possibility or ‘the “beautiful day” of life’\textsuperscript{32} that has been lost in the apparatuses of securitisation and the bipolar machine of governance. And it is in this regard that Agamben contemplates and welcomes the ‘real’ state of exception.

The proximity of the ‘real’ and the ‘fictitious’ state of exception brings home the pathos of absence or exclusion. The fiction of the state of exception is its lawfulness, which in the absence of law is maintained vicariously through the notion of a force of law or authority. In other words, a nexus (or a relationship of inclusive exclusion) is formed and presented as ever thus or the way it will be, between law and anomie or acts or violence outside law. But the possibility that things could be otherwise is close by. No matter how quickly, ruthlessly or historically the bonds may have been formed, the brief appearance and then disappearance of an anomie, brought into light during the crisis of beginnings in Fiji’s new legal order, is suggestive of what Agamben refers to as a ‘pure violence … attested to … as the exposure and deposition of the relation between violence and law.’\textsuperscript{33} This is the modality of the ‘real’ state of exception in which human action ‘has shed … every relation to law.’\textsuperscript{34}

What transpires in Fiji’s new legal order, however, (as occurs in every state of exception) is the relentless effort to ‘reinscribe violence within a juridical context’.\textsuperscript{35} But with the foundations of Fiji’s new legal order embedded in the presupposition of a transcendent righteousness or absolute authority, it is to the other side of this foundational structure or that which is claimed as its secondary effect — the governance or administration of law — that Agamben and Foucault directs our attentions. And after all that is all there ever was.

\begin{footnotes}
\item[31] Ibid 18.
\item[32] Ibid 11.
\item[33] Agamben, above n 29, 62.
\item[34] Ibid 59.
\item[35] Ibid.
\end{footnotes}
PART FOUR:
THESIS CONCLUSIONS
I began this thesis with a series of questions concerning the legitimacy of Fiji’s new legal order. These questions arose as challenges to the logic and conceptual integrity of notions of authority and power that accord with western politico-legal traditions. My task has been to probe the mysteries of legitimacy and elucidate the conditions of possibility through which Fiji’s new legal order has taken root by creating a nexus between critical theory, legal doctrine and the specificities of Fiji’s social and political institutions. As part of the process I have constructed a genealogy of power extending from pre-colonial times to the beginning of Fiji’s new legal order that sheds light on what has enabled its founding fathers and recent figures of authority, to be authoritative. At the other level of the interpretive process I have shown how that authority can be understood as a function of the governmental machine. Threaded together reflexively, these different approaches have also allowed narratives from fieldwork interviews and personal observation to expand the critical horizon of praxis. Through this interpretive grid the thesis has thus brought an understanding of Fiji’s unique circumstances and the work of Giorgio Agamben together, demonstrating the local and global implications of a permanent state of exception.

The question of legitimacy is itself a loaded one that calls its own logic into account revealing its intimate relation with ways of knowing. Thinking the question through Agamben’s lens, the legitimacy of Fiji’s new legal order is staked upon various elements of a presuppositional logic that function in relation to each other. The state of exception is one of the paradigms of presupposition that Agamben deconstructs to articulate the structure and operational logic of a legal system. While Agamben’s argument applies to a legal system at any stage of its existence or in any of its components, the advent of a new legal order is the quintessential ‘show time’ for the state of exception and its analysis.

In Agamben’s work the concept of the state of exception is also developed as ‘completion’ of Foucault’s thesis which,1 while admitting of a system of correlation between juridico-legal, disciplinary and security mechanisms is more focused on the latter (and its shift to ‘governmentality’).2 Agamben is also deeply concerned with governmentality but he insists on the importance of recognising the relation between governmentality or the biopolitical and the juridical. According to Agamben, juridical and biopolitical models of power cannot be separated and have always been entangled in a functional relationality which Agamben names

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a ‘relation of exception’. The structure of this relation which takes the form of the state of exception in a politico-legal order is contiguous with the concept of sovereignty as advanced by Carl Schmitt. Agamben takes that concept further to finds its relevance in the governmental machine as a political legitimation and technique of government that does not necessarily return the system to the status quo ante as Schmitt envisaged.

Agamben’s thought on the permanent state of exception in which the exception has become the rule, challenges Schmitt’s rationale and recontextualises Foucault’s concept of biopower. Agamben shows us that this power functions as a bipolar machine that involves a split between, and a suturing of, sovereignty and government. Indeed, in Agamben’s view, ‘the history of western politics is the history of the crossing and the intertwining of [these] two divided and yet unseparable paradigms: Reign and government, Kingdom and governance, the father and the son, Sovereignty and economy, law and order, legitimacy and legality.’

Foucault’s approach, with his emphasis on the continuities and disjunctions in relations of power and the myriad mechanisms of power as part of a ‘grid of intelligibility of the social order’, thus provides part of the prism through which to view the state of exception in a particular context. And in this thesis it was brought to bear on the discussion of certain historical events in Fiji that inform part of the network of power relations through which the new legal order took hold. In these parts of the thesis, Agamben’s bipolar governmental machine runs more quietly in the background. In Part Three, however, Agamben’s thought is prominent in the analysis of Fiji’s new legal order. Indeed, the events, processes and structures of the new legal order can be understood as speaking back to Agamben, demonstrating his relevance to the study of both legal and social praxis.

Part Two (Chapters 1-3) was largely concerned with an historical account of politics, law and social life in Fiji up until the declaration of the new legal order. The discussion focused on a series of events selected to highlight the fluidity of power relations over time as well as to document some of the more surprising twists that continue to elicit (among other responses) the sometime bemused public rejoinder: ‘only in Fiji.’ Chapter 2 looked at the interface between Indigenous traditions and the British colonisation of Fiji which brought the British

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3 Agamben, above n 1, 18.
legal system into play through policies of indirect rule and the importation of indentured Indian labour. The chapter also discussed the specificities of Fiji’s post-colonial circumstances. With the emergence of independent nationhood, party politics aligned on axes of race and class. These elements were also interwoven with an interventionist military, which produced periods of stability punctuated, especially since 1987, by coup-related ruptures in the political fabric.

As becomes apparent in Part Two, Fiji, since colonisation, is no stranger to politico-legal crises such as coups. These crises have impacted on the constitutional framework and the introduced common law which, in turn, have fed back into the structure of government and the tide of events. The Court’s decision in the Prasad cases, for example, claims the unique distinction of being instrumental in ‘the first time after a coup that the law … [has brought] about a restoration of democracy under an abrogated constitution.’ Chapter 3 looked at these and other coup-related cases and the development of the common law doctrines of necessity, effectiveness and the prerogative in Fiji.

The coup-related jurisprudence under discussion, enters the conundrums that a lawless power or authority poses for a legal system, questions that resonate in the realms of political thought and philosophy more generally: can a court assess the lawfulness of a power that is exercised outside the framework of a constitution and legislative authority and if so, how does the common law recognise the authority to exercise that power? And what is the scope of that power? Or, how can it be limited? In a democracy some of those answers may lie with ‘the people’ or in accordance with the good of the people and the necessity to safeguard it. But, as Agamben points out, ‘[n]ot only does necessity ultimately come down to a decision, but that on which it decides is, in truth, something undecidable in fact and law.’ So we are not only confronted with the subjective nature of the decision (made in the court or by the ‘sovereign’ decision-maker) but also by the paradox of a ‘self-referential circularity’. Fiji’s new legal order complicates the problem even more, or poses it differently. Our attention is focused on the normally veiled mysterious dimensions of foundation, but they tend to remain so, despite the newness of the legal order.

A search for the source of a legitimate authority, whether in the realms of ‘the people’ exercising a constituent power or in the law (or ruler) as constituted power, will always draw

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9 Zartaloudis, above n 6, 128.
the seeker (and various proponents) into a paradox. As Zartaloudis observes, while appearing ‘arbitrary and mysterious’ this paradox:

obeys a juridical and political logic that always-already aims to assume a ground of sovereignty within itself that precedes the law but remains of the law, in order to render the law (its force) absolutely potential and to self-legitimate the capture of everything inside its sphere on the basis of an ‘as if’ outside.10

Thus the common law can only look at the foundations of a new legal order in relation to what has followed or else in relation to what came long before. With the emergence of democracy in the modern world and the shift of the locus of sovereignty from the monarchy (or its equivalent) to the people, a great weight of legitimacy turns on the nature of the relationship between the people and their leaders; and in the courts, between the legal limitations of a leader’s office and the actual exercise of power. Or else the courts have entertained the possibility of the validity of successful revolution, measurable in terms of the effectiveness of the new government. But on either count the moment of foundation of a new legal order is inaccessible to law except as an attribution of an ancient prerogative (such as found in the High Court Qarase case, admittedly overturned in Fiji’s Court of Appeal) or as the presupposition embedded in the effectiveness of what comes after. In Fiji, that conundrum has been removed from the jurisdiction of its courts but outside the courts the question of legitimacy encounters similar limits in the mode that legitimacy is claimed and challenged.

Part Three (Chapters 4-7) analysed Fiji’s new legal order with the benefit of hindsight (as presented mainly in Chapters 2 and 3 with the discussion of the socio-legal conditions pertaining before 2009), and a more rigorous interpretation of Agamben’s thought on the state of exception as an apparatus of law and governance. In Chapters 4, 5 and 6, the implications of a permanent state of exception which Agamben develops in his work on the bipolar, biopolitical machine, were traced out in the polar interweavings of three possible figures of sovereignty and governance in Fiji’s new legal order: the leaders, the politico-legal apparatus and the people. The task has been to demonstrate how the distinction and the dialectical oscillation between sovereign or absolute power and an administrative power of government serve to maintain the double structure of the machine of government while concealing the emptiness of sovereignty at its centre.

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10 Ibid 127.
According to this schema, in Chapter 4, President Iloilo and Commander Bainimarama personify the sovereign and government poles respectively, while their correlation blurs the structure and justification of their authority as founders of Fiji’s new legal order. The fact that President Iloilo featured at all in the delivery of Fiji’s new legal order to the nation, given his frailty and the strength of the military, is testament to an enduring importance and meaning attached to figures of sovereignty in Fiji. This is not only an importance with regard to who the sovereign is (or was) as a paramount chief and president but also how that sovereignty functions in relation to governance. In this chapter, President Iloilo was cast in Schmittian terms as the sovereign dictator who is no longer authorised by a constituted organ (since the Constitution was abrogated) and ‘exists only quoad exercitium (in relation to what [he] … does)’, appealing to the ‘ever present people’. But that is only part of the story because Agamben, following Benjamin, exposes the Schmittian ‘correspondence between sovereignty and transcendence, between monarch and God’ as a ‘theological apparatus dressed up as political legitimation.’ Recast as a feature of the bipolar character of the governmental machine, this sovereign is analogous to the wounded or mutilated king who ‘reigns but does not govern’. Or, even less impressively, as Fraenkel observes, Iloilo was reinstated after the 2006 coup as a ‘puppet figurehead’. It is difficult to assess just how important President Iloilo’s seal of approval and appeals to the people for patience and understanding were for the relatively smooth transition to the new legal order, but it is clear that he constituted a necessary face of the machine of power. And this was so even if Iloilo was no longer the constitutional president and the Great Council of Chiefs was about to be dissolved.

If Iloilo can be seen as one of those faces then Bainimarama can be seen as another face of the same machine. But with Bainimarama the fictions multiplied. Proceeding with his preparations for the new legal order, Bainimarama preferred the euphemism of ‘clean-up campaign’ rather than revolution or coup d’état or military dictatorship. This more banal, managerial speak (and activity) was useful for effecting a sense of stable government in the same way that presidential endorsement was useful for the sense of sovereign authority; together, the two articulated the governmental machine. But lest this government be questioned or challenged, there was also no hiding of the military might behind it and permeating it. This military carried historical links with Fijian Indigeneity, from the pre-

12 Agamben, above n 8, 57.
14 Ibid 69.
colonial warrior caste through colonial and post-colonial military formations and campaigns. Under Bainimarama’s command, however, the military became a new *vanua*, no longer serving the chiefs or the elected government.

Muscling into the field of government, Commander Bainimarama made many concerted efforts to dress his interventions in the garb of democracy and legality and the rhetoric of equality and multiculturalism and respect for tradition. But the most effective of his strategies, in terms of consolidating his power in the new legal order, was the use of security mechanisms. Bainimarama’s grasp of Fiji’s ‘milieu’ meant that a sense of crisis or emergency could readily be excited, exploited and managed in various dimensions of vulnerability: the fear of racially-motivated violence; the strain of poverty; and the frustrations of economic mismanagement, to name a few. And then, of course, there was the threat of violence posed by the military itself and keenly appreciated by all. These circumstances were evidence of a politics described by Agamben as ‘secretly working towards the production of emergencies’ or, in this case, a blatant politics that was simultaneously directed toward the control of (select) conditions of the emergency. Thus, Bainimarama was able to capitalise on the fracture between authority and execution, Kingdom and Government, as ‘the necessary condition for the proper functioning of the governmental machine’ and take his place at the helm of government as its chief minister and manager of (dis)order.

In Chapter 5 the analysis shifted to the judiciary and the media and how they are implicated in the bipolar machine of government, as apparatuses of government that also perform a sovereign function. The concept of judicial independence serves to uphold the separation of powers in the Westminster system of government as well as to maintain the principle of the rule of law. In Fiji’s new legal order, disputes about the independence of its judiciary are indicative of the (sovereign) authority that attaches to the law and its courts. In this chapter the rule of law is exposed as a notion that sits more comfortably with the ‘normal’ or routine state of affairs but only rules the new legal order, especially its founding fathers, from a (functional) distance.

In the second section of Chapter 5, the form and function of sovereignty in the media was discussed from Agamben’s perspective of Glory. According to this view, Glory is the blinding light that hides the indescribable mystery of sovereignty, thereby functioning as a

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17 Agamben, above n 13, 102.
bridge between sovereign authority and government. In modern politics, glorification or acclamations of Glory occur through public opinion, and the media ‘enable the control and government of public opinion … [and] manage and dispense Glory’. In Fiji’s new legal order the control of the media was a priority of government and this section of the chapter discussed how the tactics of media control functioned as self-glorifying, legitimating apparatuses of government.

In Chapter 6 the functioning of democracy and popular sovereignty in the bipolar machine of government was analysed in the context of constitution-making in Fiji’s new legal order. Agamben’s thought on the ambiguity inherent in the nature and function of ‘the people’ and the concept of democracy helps to illuminate an understanding of the bipolarity at work in the notion of democratic or popular sovereignty. Like the independence of the judiciary, the participation of the people in the constitution-making process performs a legitimating function. In the new order, the voice of the popular sovereign, like the king (or the President) who reigns but does not govern, made the necessary but brief sovereign appearance while it was drawn into showy consultation and participation, only to dissolve into the field of government. This exasperating process was documented in the chapter as we are drawn to Agambenian conclusions.

What Agamben emphasises is that while we have been blinded by the glory of sovereignty or its empty reflections in abstractions of Law or popular sovereignty, we have neglected the problem, ‘which is from every point of view decisive: that of government and its articulation with the sovereign’. As he writes in The Kingdom and the Glory:

> What our investigation has shown is that the real problem, the central mystery of politics is not sovereignty, but government; it is not God but the angel; it is not the king, but ministry; it is not the law, but the police – that is to say, the governmental machine that they form and support.

Chapters 4-6 use these ideas to untangle the mystery of Fiji’s politics, identifying empty reflections of sovereignty in the president, the people, and an independent judiciary and media. These elements perform a crucial function in the bipolar machine of government. The

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18 Ibid 242.
19 Ibid xii.
21 Agamben, above n 13.
fact that these same elements were often contrived or thwarted actually reinforced the contention that the throne of sovereignty is indeed empty.

In Chapter 7 excerpts from six interviews conducted in Fiji in the first weeks after the General Election in 2014 have been selected to highlight several of the main issues contended with in the previous chapters. While not articulated in the language of exception each of the interviews engaged with the problem of legitimacy in Fiji’s new legal order, ultimately as the fait accompli of the Bainimarama Government. In this regard the interviewees (some more than others) recognised a politics devoid of mythical or mystical foundations. Even the most committed of Bainimarama’s supporters knew that the strength or durability of the new legal order relied on security measures that avoid judicial sanction, even if sometimes cast in the hazy light of sanctification. These perspectives bear out a lived sense of legitimacy that can be claimed on the grounds of sheer durability, neither a case of the ends justifying the means nor vice versa but simply the fact that regime has prevailed.

Reflecting on the interview material I recognised how these perspectives brought home a reality, a breakthrough inflecting the conceptual realms of legal doctrine and Agambenian thought. I had my first inking of it in the response of my student who, as I reported earlier, suggested we should not cry over spilt milk. And, as I discovered, something like this opinion was shared by all the interviewees who are the elites or experts in legal and socio-political matters. And what these authorised knowers, who have the power to construct knowledge, could see was that legitimacy was not worth fighting for, at least not for the sake of a principle or paradigm and certainly not in the form of revolution as counter-resistance. Here then the new legal order could be felt as hastening the decay of an outmoded law and politics that had never really had its day in Fiji, and assuming the familiar contours of a permanent state of exception. This is a familiarity that stems not only from Fiji’s experience of British colonisation but also the globalised movement of capitalism which has long been a part of Fiji.

What these views also made clear was how, despite the best of intentions, my own baggage of western law and philosophy had led me to a personal sense of disappointment. I was disappointed by what appeared to be a ‘state of acceptance’, or an accommodation of the state of exception. But, while my sense of the vacuity of the sovereign throne has been formed by my perceptions of (sometimes violent) coercion, sham and disingenuousness of the claims

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22 Thanks to Greta Bird for this phrase.
to sovereignty, more importantly, what the Fijian incarnation of a new legal order shows us is that in the state of exception, nothing matters except the link between law and violence, however that may be forged. And that is why the severing of that link, such as hinted at in the urge toward reconciliation as a healing process (free from law or use as governmental apparatus), is one way to think about a ‘real’ state of exception and a ‘real’ legitimacy.
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APPENDICES
Appendix A Ethics Application

Human Research Ethics Committee (HREC)
Human Research Ethics Sub-Committee (HRESC)
(Lismore, Gold Coast, Coffs Harbour)

EXPEDITED REVIEW APPLICATION FORM
LOW and NEGLIGIBLE RISK RESEARCH

NOTE: ALL attachments to ethics applications must be included in one document.
You can do this at Section 6.
The HREC or the HRESC will not accept applications which have many separate attachments/files.
Insert your answers appropriately.

Applicant/Researcher’s Name:
Kirsten Jane Pavlovic

Supervisor’s Name (if applicant is a student):
Professor Philip Hayward; Dr Jennifer Nielsen; Dr Erika Kerruish

Date of submission:

INSTRUCTIONS – HAVE YOU READ AND
DO YOU UNDERSTAND THE FOLLOWING?
Completing the form should be simple, by clicking on the fields, as indicated.

1. Before completing this application form, have you read the National Statement on Ethical Conduct in Human Research? (National Statement or NS)

2. An ethics application for ‘Expeditied Review’ can be submitted at any time to the ethics office at the Lismore or Gold Coast /Tweed campuses. Addresses listed below.

All applications which are expedited and approved by the delegated HREC authority are ratified by the full HREC. If there are any queries from the full HREC, the researchers are obliged to comply with these.

3. Information specific for participants to consent to research, (NS 2.2)
Specific information about a research project MUST ALWAYS be provided to participants so that a person’s (NS 2.21) decision/consent to participate in research is to be voluntary, and based on sufficient information and adequate understanding of the proposed research and the implications of participation.

This requires an adequate understanding of the purpose, methods, demands, risks and potential benefits of the research.
This information must be provided specifically for the particular research project. For example, some inclusions might be:

- The name of the project;
- An introductory paragraph including details of who you are, what you are studying (if applicable) and your position within the University (current status - eg lecturer, student, Honours student, PhD, Masters);
- An explanation (in plain English) about the subject of your research, its purpose and aims;
- Explanation of what will be required of the participants in this research;
- Any risks, inconveniences, discomforts which participants may experience;
- Details of the estimated time that it will take the participant to complete the research (including the opportunity of taking a break if required);
- Details about the likelihood and form of publication of the research results;
- That participation in the research is voluntary;
- Advice to the participant that he/she may withdraw at any time without any negative consequence to him/her;
- Provision of services to participants adversely affected by the research (if applicable to your research project);
- Details of how the anonymity / or confidentiality of any information provided by participants will be ensured;
- Details of how adequate security will be provided for the research data and that information gathered by the University is kept for 7 years at the University;
- Inclusion of the researcher(s) and supervisor’s (if applicable) contact details;
- The ethics approval number – once it has been received;
- Details of the Ethics Complaints policy.

Sample information sheets and consent forms available from the website.

4. One copy must be sent electronically to the appropriate ethics office. Electronic signatures are acceptable. Use fax or scanned signatures if necessary.

5. You must not make contact with any participants or begin the data collection component of your research until you receive an ethics approval number.

6. Email addresses are:
   - ethics.lismore@scu.edu.au
   - ethics.goldcoast@scu.edu.au
   - ethics.cooffs@scu.edu.au

7. Send mail to:
   - Sue Kelly
   - Human Research Ethics Office
   - Division of Research, R3.15
   - Lismore NSW 2480
   - P: (02) 6626 9139
   - F: (02) 6626 9145

---

Expedited Ethics Application Form June 2014 2
## SECTION 1 – ETHICAL CONSIDERATIONS
Please answer the following questions.

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<th>1.</th>
<th>Reason for Expedited Approval</th>
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<td>Please select the reason/s why you consider this application can be given expedited review for approval (please mark all the relevant boxes – more than one may apply):</td>
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<td>(a) Data obtained is anonymous or will be held confidentially.</td>
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<td>(b) The research plan is safe and poses low/negligible risk to participants.</td>
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<td>(c) The research plan is safe and poses no risk to the researcher.</td>
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<td>(d) The research does not involve the participation of vulnerable groups.</td>
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<td>(e) Other (please specify)</td>
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<th>The nature of this project is most appropriately described as involving:</th>
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<td>• Questionnaire/s, Survey/s (please attach a copy)</td>
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Do you consider this research Low/Negligible Risk to participants? (Refer to the National Statement on Ethical Conduct in Human Research) (NS Section 2) [http://www.nhmrc.gov.au/guidelines/publications/n272](http://www.nhmrc.gov.au/guidelines/publications/n272)

(If your answer is NO, then your research is not suitable for expedited approval. You must submit the National Ethics Application Form [NEAF], available at www.neaf.gov.au)

|    | Yes |

<p>|    | Is this a new project? |
|    | If NO, please advise relevant details of the previous project, such as the name of the Ethics Committee, the Ethics Approval Number and the month/year of review. |
|    | Yes |</p>
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<th>Question</th>
<th>Answer</th>
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<td>3.</td>
<td>Is this a project which has received external ethics approval and now requires Southern Cross University ratification? Please use the Minimising Duplication of Ethical Review form, available at the Research Ethics website as a Downloadable Form.</td>
<td>No</td>
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<tr>
<td>4.</td>
<td>Is this project currently before another ethics committee? If YES, which committee?</td>
<td>No</td>
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<tr>
<td>5.</td>
<td>Does the research involve any other institution (such as a hospital or school)? If YES: (a) What is the name of the institution? (b) Does the institution require ethical approval from its own ethics committee? (c) If YES, has that approval been obtained?</td>
<td>No</td>
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</table>
SECTION 2 - ADMINISTRATIVE DETAILS

6. Title of project: Taking Exception to the Rule: A Poststructural Analysis of Legitimacy in Fiji’s New Legal Order

7. Estimated commencement date: 1 September 2014

8. Expected duration of the project (months) and/or completion date: 26 September 2016

APPLICANT/S

9. Principal Researcher/Investigator (Main Researcher/Student/Staff Member and applicant)
   
   Name: Kirsten Pavlovic
   
   Qualification/Status: PhD Candidate
   
   School and degree being undertaken (if applicable): School of Law and Justice, PhD
   
   Phone No: 0431778722
   
   SCU Email: kirsten.pavlovic.11@student.scu.edu.au

   Additional Researcher/Investigator
   
   Please list with details of their role in the research, their name, qualification/status, phone number and email address.

10. Supervisor/Person Responsible*: (NS 5.1.2) (Not required where the Principal Researcher/Investigator [above] is a staff member of the University)
   
   (*This should be a member of the full-time staff of the University; they should be adequately experienced and qualified).

   Name:
   
   Position:
   
   Qualifications:
   
   School/Centre:
   
   Phone No:
   
   SCU Email:

11. FUNDING (NS 5.2.7)
   
   Have you (or your supervisor if applicable) received or applied for external funding or sponsorship for this research?  
   
   No
If YES:
(a) What is the name of the funding organisation?

(b) What are the details of the funding or sponsorship (including details of any in-kind contribution)?

(c) Amount of external funding/sponsorship: $

(d) Value of in-kind contribution: $

(e) Other details:

11.1 Are there any conditions or restraints on the research as a result of the funding arrangements (NS 5.2.11) Yes/No

(a) If YES, please state the nature of the conditions and/or restrictions:
SECTION 3 - PROJECT DETAILS

12. AIM or PURPOSE of the research: (NS 1.1 – 1.13)
Include a concise and simple description, in plain language, of the aims and/or purpose of this project.

The purpose of this study is to provide a socio-legal analysis of legitimacy in Fiji’s new legal order, which weaves local Fijian perspectives with legal theory, thereby contributing a dynamic regional understanding of the common law and the jurisprudence of revolutionary legality to the project of democracy. While the project is an exegesis in legal theory, it is designed to produce knowledge about what law is and does as social phenomena (Cotterill, as cited in Salter & Mason, 2007) in the context of Fiji’s nascent democracy.

13. RESEARCH
(e) Background and Rationale – Refer to National Statement (NS 1.1). Research Merit and Integrity. Be concise and summarise. Include literature reviews. Do not just copy and paste a complete research plan.

The qualitative methodological approach applied in this project engages critical analytical strategies to interpret legal doctrine, political theory and aspects of Fiji’s socio-political order, and to provide an understanding of how Fiji’s law resolves the often paradoxical and contradictory attributes of sovereignty and democracy.

The doctrinal context of the study is the jurisprudence of common law approaches to law-making power in times of crisis and revolution. The scope of emergency powers and the lawfulness or legitimacy of revolutionary government have been determined in Fiji’s courts according to the interpretation and development of three main common law doctrines - the doctrine of necessity, the doctrine of effectiveness and the ultimate prerogative. The judicial consideration of these doctrines or principles, rarely required in more stable democracies, demands difficult negotiation of legal theory and non-legal factors including the assessment of popular democratic change effected through politico-legal decision-making. As legal scholars such as Farooq Hassan point out, “It would be helpful if jurists of other legal systems analyzed with more depth and insight such phenomena” (Hassan, 1984, p. 192).

The project’s methodology is underpinned by a constructivist paradigm so that the research is driven by an understanding of reality and knowledge as “constructed intersubjectively through meanings and understandings developed socially and experientially” (Guba, as cited in Denzin & Lincoln, 2011, p. 102).

The theoretical perspectives reflected in the methodology largely derive from the poststructural insights afforded by philosophers such as Jacques Derrida. By making more visible the structure of law or a legal system and its relations with what lies outside it, Derrida’s deconstructive strategies expose instabilities and incompleteness which open up the possibilities of new and renewable discursive limits that an inclusive justice or democracy demand (Derrida, 1992). Much of the relevant politico-legal debate in contemporary scholarship has been generated through the work of continental thinkers such as Giorgio Agamben (Agamben, 1998, 2005) Carl Schmitt (Schmitt, 1994, 2005, 2007) and Hannah Arendt (Arendt, 1965, 1998) who have each explored the
conceptualisation of law and politics in relation to foundings and emergencies or the extraordinary and the exceptional (Kalyvas, 2008).

This project pursues those ideas in terms of a nexus between legality and legitimacy. To articulate that nexus and take account of multiple levels of meaning-making, the project will engage a multipronged strategy of inquiry, interpretation and explication. Political theory and legal doctrine will be interpolated by reflective accounts of individual experiences at the local and personal level. The voices of experience offer what Nick Couldry refers to as a “privileged site for asking important questions about the social” (Couldry, 2000, p.122). Rather than providing causal explanations these voices will be engaged in the research in cultural dialogue through which a critical understanding of social structure, as constructed by human action and ordered by intersubjective meanings, may be produced (Comstock, 1982). This type of understanding reveals correlations and disjunctures between social structures and systems of meaning (Comstock, 1982).

The project relies on data gathered through library-based research and fieldwork. The fieldwork envisaged for the project occupies the two week period around the Fiji’s general elections in September 2014. The election period marks a significant milestone in Fiji’s democratic process and provides a unique constellation of symbol and event through which the complexity of meaning-making may be read. Interviews and conversations conducted during this period will be well-timed to explore the ways various socio-political processes and structures give rise to particular understandings. The fieldwork data will be collected through semi-structured interviews. The interviews will take up the thematic concerns of the project through open-ended questions allowing for flexibility and dialogue with the interviewees. Thus the prospective participants, selected on the basis of their legal and political expertise rather than their political bias, will be asked questions concerning the role of the judiciary, the ascendancy of the constitution, the authority of the political leaders and the effectiveness of the election process, in relation to the establishment of democratic legitimacy.

(b) Participants
(b.1) Recruitment/Source of participants
Give details of how the participants are to be recruited/selected.
For example, include details of how you propose to:
• Initially select and contact your participants.

The participants will be key informants selected on the basis of their legal expertise or political experience. Links that I have from the time I lived and worked in Fiji (2008-2010) will be used to help identify suitable informants. Other prospective participants are politically active public figures. The participants will be contacted via email with a standard letter of introduction (attached); an information sheet (attached) and a consent form (attached).

• How you will obtain their contact details:
All email addresses are publicly available from various institutional or political party websites,
• Include all copies of documentation you intend to use (letter, advertisement/flyer, script for telephone, email, internet, personal or organisation contact).
• Provide details of any permission you are required to obtain, or have obtained, from organisations (e.g. university, company, government department) where you are seeking to access staff or other members of that organisation.

(b.2) Intended number of participants: 10
Explain how and why you have chosen this number:

The number of participants is a purposive sample consistent with a qualitative research emphasis on the meaning, purpose and value that key informants ascribe to law or the legal features of the democratic process, that they are involved in or affected by. The rigour of the study is dependent on a reflexive analysis of the individual accounts rather than an empirical generalization.

(b.3) Age range of participants:
Adult
Explain why this age range is selected:

.........Adults will be selected who have had the professional or academic experience and exposure to the legal and political issues I am interested in canvassing.

(b.4) How will research participants be affected?
If applicable, provide answers under the following headings.
(i) What procedures will participation in this research involve for your participants?
Participants will be involved in minimal procedures of interview and voice recording.

(ii) What time commitment will the research involve for your participants?
.........Each participant in a semi-structured interview will be involved in a one hour conversation which may be extended depending on the interest and flexibility indicated by participant.

(iii) What travel (if any) will the research involve for your participants?
.........Participants may be involved in minimal travel at the discretion of the participant to a mutually agreed venue.

(iv) Where will the research/data collection take place?
.........The interviews will take place at a location recommended by the participant which is mutually agreed upon and which may include the participant’s workplace.

(v) Please include any additional information you feel is relevant; e.g. will any refreshments be provided to the participants? Will participants be reimbursed for travel costs?
.........Depending on the place of interview, beverages will be provided to the participants and taxi fares will be reimbursed as reasonable out of pocket expenses.

(c) Data analysis (NS 3): Provide details.
.........Verbal interview data will be collected with a digital voice recorder. Recordings and typed up notes will be stored on computer and back up devices. To protect confidentiality, the audio recordings and transcripts will rely on a password-protected system for filing and storing the data. At no stage of the data's collection, storage, analysis or dissemination will the participants be identifiable by name or other information, unless they specifically request or agree to be identified. Each participant will be given the opportunity to verify the accuracy of the interview transcript before further analysis is undertaken. A transcript of the interview will be sent by mail or email as indicated by the participant.
(d) **Expected Outcomes (NS 1.6-1.9):**

It is expected that the incorporation of local perspectives on law and legitimating processes will highlight the importance of understanding the relationship between law and society.

14. **BENEFITS (NS 1.6-1.9 and 2.1)**

What are the expected benefits of this research?

(a) To participants:

Participants may derive a scholarly benefit from insights generated through this research. Each participant will be given the opportunity to access the thesis and any published material flowing from the research.

(b) To the broader community:

The research may be of indirect benefit to the broader community as an academic contribution to the legal and democratic debates in Fiji.

(c) To increasing knowledge:

The research will benefit legal theory by providing a critical appreciation of key jurisprudential concepts through their localised interpretation in Fiji.

15. **RISK (NS 2)**

Describe the level and nature of the risk to the participants in this research.

The research process poses negligible risk to the participants. There is no foreseeable risk of harm or discomfort and the only foreseeable risk is the inconvenience of reading the information and consent forms and giving up some time to participate in the interview. As indicated on the Information Sheet and by the prerequisite signature of participants on the Consent Form, participants will be involved in the interviews on a voluntary basis and may withdraw at any time.

16. **REVIEW PROCESS (NS 1.2)**

Please give a brief description of the process of review and quality assessment for your research proposal. (eg. has your supervisor or an external reviewer assessed the research plan?)

My research proposal has been approved by the confirmation panel which included my supervisors, the school’s postgraduate research co-ordinator and an external panelist (Professor William MacNeil). The preparation of my ethics application after my confirmation of candidature has been closely monitored by my supervisors, Dr Nielsen and Dr Kerruish. We have had regular meetings and exchanged emails in relation to the proposal.

17. **FEEDBACK**

All participants are entitled to receive the results of research in which they participated. Usually, participants are advised, in the Information Sheet, as to how they can obtain results of research. If there is a consent form, participants can also indicate on the consent form that they would like to receive research results.

How will you advise participants that they can obtain feedback on the results of the research?
18. **INFORMED CONSENT (NS 2.2)**

Is Informed Consent necessary?  

Yes

How will you obtain the consent of the participants?  

Participants will be provided with a Consent Form when the letter of introduction and Information Sheet is emailed to them. The consent form can be filled in and returned by email or I will collect the consent form in person prior to the interview.
SECTION 4

19. RESEARCH CONDUCTED OVERSEAS (NS 4.8)
19.1. Are you conducting research in an overseas country? Yes
If NO, go to Section 5.

If YES, please answer the following questions.

19.2. Are you familiar with the NS 4.8: "People in Other Countries"? Yes
In particular:
In what country will the research take place? Fiji
Does this country have ethical approval processes that would be relevant to this research? No
If there are such processes, are they mandatory or voluntary in relation to this research? Yes/No

If no processes are in place, then the researchers need to ensure the
HREC that research participants are accorded no less respect
and protection than is mentioned in the National Statement.
Do you guarantee that this will occur? Yes

Is the language of the country being used in all information provided
to participants? Yes

What is the language? English

Do the researchers have expertise in this language? Yes

Are translators being used in this research? No

If you are subject to academic supervision, how will you keep your Supervisor fully informed about the progress of your research? Please explain.
My supervisors will be kept in regular email contact with progress reports during my absence. I will also make phone contact with my principal supervisor on scheduled days. When I return to Australia my regular supervision arrangements will be resumed.

Are you recruiting co-researchers in the overseas country? No
If YES, what expertise and capacity do they have to bring to this research?
National Statement, Section 4.8.11 – 4.8.13
Please refer to this section and make a statement relevant to your research.

National Statement, Section 4.8.14 – 4.8.18
In particular, will there be a local, readily accessible contact, should the participants have complaints about the research? Researchers should be able to ensure that there is a process independent to the researcher for dealing with complaints. Please give your explanation of how this will occur.
Participants are advised in the Information Sheet that if they wish to make a complaint they can access SCU’s complaint mechanism that is independent of the researcher. Contact details are
provided on the Information Sheet. In addition participants will be provided with my supervisor's contact details.

In particular, Risk. Please elaborate on any risks in this research. That is, is there any risk to the researcher or the participants.

National Statement 4.8.19 – 4.8.21
Please address this section with a concise answer in relation to your research.
There is negligible risk involved for the researcher and the participants. Having lived in Suva, Fiji for 3 years (2008-2010) while I was a lecturer in the School of Law at the University of the South Pacific (USP) I am well acquainted with local protocols and laws and remain so through ongoing contact with some of my friends in Fiji. My enculturation in Fiji, during the significant political events in the aftermath of the 2006 coup involved, among other things, extensive travel throughout the Fiji Islands promoting USP in villages and towns and engaging with diverse communities. My tenure as an expatriate teacher in the law school was acknowledged by my supervisors as culturally sensitive and suited to the local conditions. So I return to Fiji with an informed understanding and enthusiasm for my prospective encounters with participants in my research and with Fiji life in general. My research will be conducted discreetly and confidentially on a person to person basis as indicated on the Information Sheet and Consent Form. Participants are key informants with local legal and political expertise who will be approached in a professional manner in regards to the timing and place of the interview. Appointments will be prearranged and mutually agreed upon and designed to minimize any inconvenience for those involved.

19.3 You are advised that overseas travel may require approvals other than ethics approval. For example: Is your research to be conducted in a country which is subject to Australian Department of Foreign Affairs and Travel (DFAT) warnings? Yes

If so, the Supervisor and you should ensure that the Head of School is aware of your travel and has given approval for the research to be conducted in a country which may be subject to DFAT warnings. Please inform the HREC here if this has been necessary. Otherwise, put N/A. I will be monitoring DFAT advice before and during my time in Fiji. This is available at: http://www.smartraveller.gov.au/zw-cgi/view/Advice/Fiji
At present Australians are advised to exercise normal safety precautions in Fiji overall and to exercise a high degree of caution in Suva. According to DFAT this is because of "the prevalence of crime and potential for civil unrest."

Are you aware of appropriate requisite visa/entry permits for the country in which you will be conducting your research? Yes

If YES, what is required?

...... As per information from the Fiji High Commission which can be accessed on their website at: http://www.fijihighcom.com/index.php?option=com_content&task=view&id=40&Itemid=45
Australians do not require a visa before arriving in Fiji but will be issued a visa on arrival provided that the person has a passport valid for 6 months after arrival date in Fiji and also a return or outbound ticket.

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SECTION 5 - CERTIFICATION

20. The applicant (and, if relevant, the research student’s Supervisor), certifies that:

- Information provided in this application is truthful and complete.
- I have read the National Statement on Ethical Conduct in Human Research (National Statement) www.nhmrc.gov.au
- The research will be conducted in accordance with the National Statement.
- The research will be conducted in accordance with the ethical and research requirements of the institutions involved.
- I have consulted any relevant legislation and regulations (such as the Privacy Act 1988), and the research will be conducted in accordance with these.
- I will immediately report to the HREC anything which might warrant review of the ethical approval of the proposal (NS 5.5.1 – 5.5.10), including:
  - Serious or unexpected adverse effects on participants;
  - Proposed changes in the protocol; and/or
  - Unforeseen events that might affect continued ethical acceptability of the project.
- I will inform the HREC, giving reasons, if the research project is discontinued before the expected date of completion (NS 5.5.1 – 5.5.10).
- I will not continue the research if ethical approval is withdrawn and will comply with any special conditions required by the HREC.
- I agree to adhere to the conditions of approval stipulated by the HREC and will co-operate with the HREC’s monitoring requirements. At a minimum, annual progress reports and a final report will be provided to the HREC. (NS 5.5.1 – 5.5.10).
- I acknowledge that failure to complete all details of the form may lead to delays for which I am therefore responsible.

21. Full Name of Applicant/Principal Researcher/Investigator (Researcher/Student):
Kirsten Jane Pavlovic

Email: kirstejane@gmail.com
k.pavlovic.11@student.scu.edu.au

Telephone: SCU Office: 66269272
Mobile: 0431778722

Signature of Applicant/Principal Researcher/Investigator:

Date: 25/08/2014

22. Full Name of supervision/mentor responsible:
Professor Philip Hayward

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Position: Principal Supervisor

Email: |

Telephone:

Signature of Supervisor/Person Responsible:

Date:

Other supervision: Dr Jennifer Nielsen

Email:

Telephone:

Signature:

Date:

Other supervision: Dr Erika Kerruish

Email:

Telephone:

Signature:

Date:
Please complete the following checklist to ensure you have correctly completed the Expedited Ethics application form.

**CHECKLIST**

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Have you read the National Statement on Ethical Conduct in Human Research?</td>
<td>Yes</td>
</tr>
<tr>
<td>Have you answered all the questions?</td>
<td>Yes</td>
</tr>
<tr>
<td>Have you attached the Information Sheet? Have you attached a Consent Form?</td>
<td>Yes</td>
</tr>
<tr>
<td>Have you attached a copy of any proposed Questionnaire? Alternatively, have you included sample Questions, which may be asked of participants?</td>
<td>Yes</td>
</tr>
<tr>
<td>Do you have ALL the required signatures? Signatures can be electronic, or the hard copy signature pages can be faxed, scanned and emailed.</td>
<td>Yes</td>
</tr>
<tr>
<td>One electronic copy to be sent to the appropriate ethics office. (See page 2 &amp; 3 of this form for addresses)</td>
<td>NOTED</td>
</tr>
<tr>
<td>Have you proof-read your application? Have you checked your spelling and grammar? Have you used the SCU Logo to identify participant documents?</td>
<td>Yes</td>
</tr>
<tr>
<td>Have you included page numbers at the foot of your application and all attached documents (information sheet, consent form, questionnaires)?</td>
<td>Yes</td>
</tr>
</tbody>
</table>
SECTION 6
ATTACHMENTS
You must include any relevant attachments in this area. Do not send MULTIPLE documents to the ethics office. This expedited form and all attachments can be integrated as one document. Thank you.

Letter of Introduction (Email)

Dear Prospective Participant (Name to be inserted)

I am writing to ask if you would consider being interviewed as part of my postgraduate research project. I am currently a PhD candidate in the School of Law and Justice at Southern Cross University and I am hoping to conduct a series of interviews with academics and politicians in Fiji during the election period in mid September. I am interested in interviewing people with legal and political expertise who can provide local perspectives on the democratic process and how it gives effect to the legitimacy of Fiji’s new legal order.

The research has been vetted and approved by Southern Cross University’s Ethics Committee which ensures that your contribution will be treated with respect and confidentiality. I have attached an information sheet about the research project as well as a consent form.

I would be grateful if you could reply to this email as soon as possible to indicate whether or not you are interested in being involved with the research. If you would like to participate in an interview I will contact you again to arrange our meeting.

Thank you for considering this request and I look forward to hearing from you.

Yours sincerely,

Kirsten Pavlovic
Information for Participants in the Research

I am conducting research for my PhD in Law at Southern Cross University (Lismore, NSW, Australia). Information about the university is available online at http://scu.edu.au/.

My research project is concerned with Fiji’s new legal order and how its legitimacy has been established. As a significant expression of the government’s commitment to democracy, the elections in September 2014 also present a valuable research opportunity. I am interested in interviewing people with legal and political expertise who can provide local perspectives on the democratic process and how it gives effect to the legitimacy of the new legal order.

I have taken an interest in this topic since living and working in Fiji as a lecturer in law at USP (2008-2010) and recognise that perspectives on Fiji’s social and political circumstances can make a unique contribution to the common law world of which Fiji is part. The instituting of a new legal order such as is occurring in Fiji offers a rare glimpse of Law’s founding moments. My project is designed to study Law in context which means that I am concerned to bridge the gap between Law in books and Law in action. I hope to contribute to the field of critical legal scholarship by providing an analysis of the social dimension of law and the way law has taken hold in Fiji’s new legal order.

You are invited to participate in this research by taking part in an interview. Your participation is completely voluntary and reliant on your consent to be interviewed. You will be given a consent form to complete before the interview. The form is attached to the email which you can sign and I will collect prior to the interview. All interviews will be private and confidential and you will not be identified by name in the data collection or identifiable by information used in the data analysis unless you request.

I hope to conduct the interview at a time that is convenient for you, during my stay in Fiji from 14 September to 22 September 2014. The interview will be held at a mutually agreed venue and should take approximately one hour. Our conversation will be recorded on a digital audio recorder. The interview will be loosely structured rather than adhering to a strict question and answer format.

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Southern Cross University

You will be asked for your perspectives on various aspects of the installation of the new legal order in Fiji, such as how you view the electoral process, the new Constitution or the role of the judiciary and other decision makers, in relation to your understanding of democracy.

I can provide more information about the research if required before you consent to being involved. I am also happy to discuss my work at any later stage in the research process. I am contactable by email or phone in Australia (details provided below) and you will be provided with my phone number in Fiji once I have arrived. You are also entitled to feedback from the study. A transcript of the interview will be made available to you and the consent form contains a section for you to request online access details for the thesis once it has been submitted and/or links to any material published from the thesis.

If you have any complaints regarding the ethical conduct of the research you can access an independent complaints mechanism at Southern Cross University by writing to the following:

The Ethics Complaints Officer
Southern Cross University
PO Box 157
Lismore, NSW 2480
Email: ethics.lismore@scu.edu.au

All information is confidential and will be handled as soon as possible.

You can also contact my supervisor, Dr Jennifer Nielsen by phone: +6126620 3081; or email: jennifer.nielsen@scu.edu.au

Thank you for your interest in this research and I look forward to meeting with you in the near future should you decide to participate in an interview.

Kirsten Pavlovic (PhD Candidate)
T: +61266209277
E: kpavlovic11@student.scu.edu.au

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Gold Coast
Locked Mail Bag 1, Coomera Post Office, Gold Coast, Qld 4208, Australia
T: +617550 2000 F: +617550 8700

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Appendix B Interview Question Guide

Question Guide

The Courts have looked at legitimacy of a new legal order in terms of a doctrine of effectiveness, which essentially requires consideration of evidence indicating that the people have acquiesced in the new governmental arrangements. I am interested in various ways that acquiescence (or legitimacy) may be interpreted or implied; the ways that the new legal order makes a break with the past and/or stakes authority and legitimacy on a relationship with the past; the relationship between legitimacy as justified through a means or an ends.

Q: Do you think ‘effectiveness’ is a relevant measure of legitimacy in the new legal order?

Q: Do you think that ‘acquiescence of the people’ is evidence of legitimacy in Fiji’s new legal order?

Q: How would you interpret or explain that acquiescence?

Q: What have been the most important factors establishing legitimacy in the new legal order?

Q: Is the way the new legal order came into existence significant for your understanding of its legitimacy?

Q: Does the establishment of legitimacy involve a reconciliation with the past or a break with the past? Or is legitimacy something that is gradually installed?

Q: Do you think that the new legal order’s legitimacy was enhanced or ensured because of the people who occupied the roles of president and military commander?

Q: Did President Iloilo’s chiefly status contribute to the effectiveness of the transition to the new legal order?

Q: What does the concept of democracy mean to you?

Q: How do you perceive the relationship between democracy and law?

Q: Is democracy better measured by the means through which it is established?

Q: Do you think that the legitimacy of the new legal order is dependent on having elections?
Q: Is the process of the election relevant to your answer?

Q: Is any part of the election process more important in establishing democratic legitimacy?

Q: How has the Constitution and the Constitution-making process contributed to democratic legitimacy?

Q: Is the outcome of the elections more important/relevant to legitimacy than the ‘means’ or processes leading to the elections?

Q: What aspects of the ‘ends’ either justifies or supplants the ‘means’ as establishing democratic legitimacy?

Q: Does international recognition of the new legal order play a part in establishing legitimacy?

Q: Does judicial review of legality/legitimacy play a part in establishing legitimacy?

Q: Has the advent of the new legal order altered your understanding of law?
Appendix C Interview Information and Consent Forms

Information for Participants in the Research

I am conducting research for my PhD in Law at Southern Cross University (Lismore, NSW, Australia). My research project is concerned with Fiji’s new legal order and how its legitimacy has been established. As a significant expression of the government’s commitment to democracy, the elections in September 2014 also present a valuable research opportunity. I am interested in interviewing people with legal and political expertise who can provide local perspectives on the democratic process and how it gives effect to the legitimacy of the new legal order.

I have taken an interest in this topic since living and working in Fiji as a lecturer in law at USP (2008-2010) and recognise that perspectives on Fiji’s social and political circumstances can make a unique contribution to the common law world of which Fiji is part. The instituting of a new legal order such as is occurring in Fiji offers a rare glimpse of law’s founding moments. My project is designed to study law in context which means that I am concerned to bridge the gap between ‘law in books’ and ‘law in action’. I hope to contribute a nuanced account of the institutionalisation of law to the burgeoning field of critical legal scholarship.

You are invited to participate in this research by taking part in an interview. Your participation is completely voluntary and reliant on your consent to be interviewed. You will be given a consent form to complete before the interview. The form is attached to the email which you can sign and I will collect prior to the interview. All interviews will be private and confidential and you will not be identified by name in the data collection or identifiable by information used in the data analysis unless you request.

The interview will be held at a mutually agreed venue and should take approximately an hour. Our conversation will be recorded on a digital audio recorder. The interview will be loosely structured rather than adhering to a strict question and answer format. You are welcome to make further inquiries about the research before you consent to being involved. I can be contacted by email or phone in Australia (details provided below) and you will be provided with my phone number in Fiji once I have arrived. You are also entitled to feedback from the study. A transcript of the interview will be made available to you and the consent form contains a section for you to request to be considered for the transcript once it has been submitted and/or links to any material published from the thesis.

If you have any complaints regarding the ethical conduct of the researcher, you can access the complaints mechanism at Southern Cross University by writing to the following:

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Southern Cross University
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Email: ethics.lismore@scu.edu.au

All information is confidential and will be handled as soon as possible.

Thank you for your interest in this research and I look forward to meeting with you in the near future should you decide to participate in an interview.

Kirsten Pavlovic (PhD Candidate)
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T: +61 266263000 E: +61 266263300

Coffs Harbour
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T: +61 266593777 E: +61 266593051

Gold Coast
Locked Mail Bag A, Coolangatta QLD 4225 Australia
T: +61 7 5569 3000 E: +61 7 5569 3700
CONSENT FORM

The Consent Form is given to and retained by the Southern Cross University researcher for her records.

The participant may request a copy of their consent form.

Title of research project: Taking Exception to the Rule: A Poststructural Analysis of Legitimacy in Fiji’s New Legal Order

Name of researcher: Kirsten Pavlovic

Tick the box that applies, sign and date and give to the researcher

I agree to take part in the Southern Cross University research project specified above. Yes ☐ No ☐

I understand the information about my participation in the research project, which has been provided to me by the researchers. Yes ☐ No ☐

I agree to be interviewed by the researcher. Yes ☐ No ☐

I agree to allow the interview to be audio-taped. Yes ☐ No ☐

I understand that my participation is voluntary and I understand that I can cease my participation at any time. Yes ☐ No ☐

I understand that my participation in this research will be treated with confidentiality. Yes ☐ No ☐

I understand that any information that may identify me will be de-identified at the time of analysis of any data. Yes ☐ No ☐

I understand that no identifying information will be disclosed or published without my permission. Yes ☐ No ☐

I understand that all information gathered in this research will be kept confidential for 7 years at the University. Yes ☐ No ☐

I am aware that I can contact the researchers at any time with any queries. Their contact details are provided to me. Yes ☐ No ☐

I understand that this research project has been approved by the SCU Human Research Ethics Committee Yes ☐ No ☐

Participants name: ____________________________

Participants signature: ____________________________

Date: ______________

Please tick the box and provide your email or mail address below if you wish to receive feedback about the research.

Online access to the submitted PhD thesis□

Links to material published from the PhD□

Email: ____________________________