

<http://researchcommons.waikato.ac.nz/>

Research Commons at the University of Waikato

Copyright Statement:

The digital copy of this thesis is protected by the Copyright Act 1994 (New Zealand).

The thesis may be consulted by you, provided you comply with the provisions of the Act and the following conditions of use:

- Any use you make of these documents or images must be for research or private study purposes only, and you may not make them available to any other person.
- Authors control the copyright of their thesis. You will recognise the author's right to be identified as the author of the thesis, and due acknowledgement will be made to the author where appropriate.
- You will obtain the author's permission before publishing any material from the thesis.

What Makes Constitutions Legitimate?
A Legal Analysis of Constitutions and Legitimacy: the Example of
Fiji

A thesis

submitted in fulfilment

of the requirements for the degree

of

Doctor of Juridical Science in the Faculty of Law

at

The University of Waikato

by

SHAISTA SHAMEEM



THE UNIVERSITY OF
WAIKATO
Te Whare Wānanga o Waikato

2019

Table of Contents

Title	Page
Abstract	iv
Acknowledgements	v
 <i>I Introduction</i>	 1
A The Thesis Question.....	1
B The Literature on Justice and Law	4
 <i>II Chapter 1 Legal Methodology: Standpoint, Theories and Focus</i>	 9
A Methodological Standpoint	9
1 <i>The feminist methodology</i>	10
2 <i>Praxis and legal praxis</i>	11
3 <i>Law and justice in legal philosophy</i>	15
(a) Natural law and justice	15
(b) Positive law and justice	22
(c) Case law: Natural law v Positive law	25
4 <i>Systems theory</i>	30
5 <i>New perspectives: Legitimacy/legality in constitutionalism</i>	32
(a) Autopoiesis	34
(b) Autopoiesis and law	36
B Drafting a Fijian Constitution through Autopoiesis	44
 <i>III Chapter 2 The Concept of Justice</i>	 52
A Concepts of Justice from the Beginning of Organised Society to the 20th Century	59

1	<i>Sumer, Mesopotamia and India</i>	59
2	<i>Moses, Greeks and Romans</i>	63
3	<i>The notion of justice in post-Roman Britain</i>	72
4	<i>The concept of justice in Islam</i>	79
5	<i>The Normans, and justice in English law and society</i>	81
6	<i>Capitalism, enlightenment and justice: the social contract</i>	89
IV	<i>Chapter 3 Legitimacy of the Fijian Constitutional Framework</i>	99
A	Early Fijian (Pre-Colonial) Polity	99
B	Contact with Europeans.....	102
C	Establishing Constitutional Law in Fiji Pre-Cession	104
D	Cession	109
E	Indian Indenture	110
F	Independence and Constitutional Developments from 1970 to 1987.....	111
G	The Coup d' État of 1987 and Attempt at Forging a New Grundnorm in 1990.....	115
H	The 1997 Constitution: A Document of Consensus.....	119
I	The <i>Chandrika Prasad</i> Case and Restoring the 1997 Constitution.....	121
J	The 2006–2009 Constitutional Events	124
K	The 2013 Constitution.....	126
V	<i>Chapter 4 Drafting a Legitimate Fijian Constitution</i>	136
A	Drafting a Fijian Constitution through Autopoiesis.....	144
VI	<i>Conclusion</i>.....	152
VII	<i>Bibliography</i>	158

What Makes Constitutions Legitimate?

A Legal Analysis of Constitutions and Legitimacy: the Example of Fiji

Shaista Shameem

Abstract

The title of this thesis *What makes Constitutions Legitimate? A Legal Analysis of Constitutions and Legitimacy: the Example of Fiji* gives an indication of its subject matter and its significance to understanding the relationship between legitimacy and legality in constitutional theory. In light of early studies of constitutionalism and case law from the first constitutional case to the most recent in Fiji after a revolution or regime change has occurred the common understanding was that legitimacy and legality were two different theoretical concepts. Legality was obtained through effectiveness and success while legitimacy's attributes were justice and morality. It seemed that legality was more important than legitimacy in any declaration of a successful regime change.

However, recent scholarship suggests that a deficit in legitimacy is also necessarily a failure of legality. Without justice and morality there is no legality in any constitutional order and thus, following John Locke and specific constitutional provisions appearing in modern constitutions, the lack of legitimacy, precisely because it also indicates absence of legality, gives the citizenry the right to revolt. The question is whether there is a common understanding of the meaning of justice and morality. Morality now refers to rights represented by the Universal Declaration of Human Rights. Justice, on the other hand, is more complex- it incorporates a series of qualities which developed incrementally through the centuries of human progress. Each of these qualities is relevant for a particular time and socio-economic and political space. But, above all, the main quality of justice that seems to be consistent over time are the concepts of fair and independent delivery of law and free access to the mechanisms of justice.

The application of these concepts to the Fijian context reveals that in most Fijian constitutional instruments from 1865 to date both fair and independent delivery of justice and access to the mechanisms of justice were assured. The two exceptions were the *1990 Constitution* and the *2013 Constitution*. In both these documents fair and independent delivery of justice and access to the courts were limited by ouster clauses. In the case of the *2013 Constitution* the ouster provisions are so serious as to dislodge the fundamental grundnorm of Fiji established by the first Constitution of 1865, reinforced by the *1970 Constitution*, where people's rights were considered to be free and unfettered. The 21st century constitutional situation thus triggers the right to rebel should the citizens of Fiji feel so inclined. To fend off the risk of violence in the community in response to the unlawful and illegitimate *2013 Constitution* what is proposed in this thesis is a new Constitution, based on the last consensus based instruments, namely the *1997 Constitution* fortified by the 2008 *People's Charter*. The innovative methodology of autopoiesis is used to draft the framework and principles of a justice-defined Fijian Constitution for the future.

Acknowledgments

This work is dedicated to my family, friends and lecturers from my formative years to the present, especially my parents Abdul Azeez Shameem and Ayesha Shameem, and Peter Prasad, the Shameems, Shameem-Singhs and my extended family in Fiji and abroad.

In particular, I acknowledge with gratitude the assistance, support and patience of my Doctorate in Juridical Science Committee, Professor Grant Hammond, Professor Margaret Wilson, Ms Gay Morgan and Dr David Neilson of Waikato University.

I gratefully acknowledge Ms Evelyn Chuang, Academic Development Coordinator at the University of Fiji JDP School of Law, for checking and re-checking references, footnotes and Bibliography with impeccable attention to detail and for ensuring that the thesis was properly formatted. I thank Evelyn for the long hours she put into this work in the final stages and for patiently trying to understand and correctly reference some of the more obscure legal sources.

The students at the JDP School of Law provided immeasurable support to me and to them I am grateful for the welcome distractions provided during the last stages of thinking and writing. My colleagues at the School of Law were patient with my delayed responses to their requests and I am grateful to them for their good humour, as well as keen interest in the subject matter of the thesis.

This thesis is also dedicated to the memory of Professor Frederick Brookfield and, Anu Patel, both guerrilla lawyers par excellence.

I Introduction

A The Thesis Question

What makes Constitutions Legitimate? In light of the principles of legitimacy established by constitutional writers and international case law, is the 2013 Constitution of Fiji legitimate?

My formulation of the thesis question was inspired by Professor Frederick Brookfield's seminal constitutional text, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation*.¹ In it he made a distinction between legality and legitimacy in a legal order:²

I think one must accept that the test of success and effectiveness, necessarily a limited test, is generally sufficient for revolutionary legality. Success and effectiveness will, it is likely, also provide a minimal measure of legitimacy, in that some justice according to law will be done. But 'considerations of morality' and justice' may still deny full legitimacy to a regime that is judicially recognised as legal because it passes that limited but sufficient test.

Then it remains possible that, in some extreme circumstances in a particular legal order, considerations of morality and justice may provide a basis for legal challenge to the validity of particular laws of an oppressive regime, whether the regime is long established or is the creation of a more or less recent revolution that satisfies the test of success and effectiveness. But in relation to the status of a regime of the latter sort, and the order of which it is a part, the considerations of morality and justice generally go to its legitimacy rather than its legality.

I first read Brookfield's text in early 2000, at the time that the Fijian Parliament had been overrun by the George Speight group who were holding the Prime Minister Mahendra Chaudhry and his government hostage within the parliamentary precincts in Suva. Professor Brookfield's two paragraphs above influenced my ideas thereafter

¹ Frederick Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (2nd ed, Auckland University Press, Auckland, 2006).

² At 34.

and triggered the planning of the *Prasad v Republic of Fiji* case which restored the 1997 Fijian Constitution later in the same year.³

Initially appearing in the first edition of Professor Brookfield's book,⁴ the paragraphs also launched my 14 year enquiry into the subject of 'legitimacy' of a constitutional or legal order.

My investigation into the conditions of legitimacy of a legal order led me into the history of legal versus legitimate orders from ancient times to the contemporary Fijian constitutional framework. It ended with the query: is the 2013 Fijian Constitution legitimate in light of the principles developed on legitimacy?

The background of research and writing for the thesis arose out of my position in Fiji, initially as a student and, subsequently, a journalist, High School teacher, social activist, Sociology and Social Anthropology Lecturer, film maker, lawyer specialising in Human Rights law, United Nations Expert on Mercenaries and Private Military Companies and, from 2016, Professor and Dean of the University of Fiji School of Law. In my various activities from youth to later life, I was witness to, and sometimes active participant in, a number of political and constitutional events and crises that confronted Fiji. These events, which took place in 1987, 2000, 2006, and 2009, revealed Fiji to be constitutionally fragile notwithstanding its former position as a seemingly stable British colony from 1874–1970.

Like Brookfield I found that the difference between legality and legitimacy appeared to be the presence or absence of 'morality' and 'justice'. Morality and justice appear to be linked in the literature though 'morality' is troubling for those not inclined towards its religious connotations. More attractive is the connection between 'morality' and 'rights'. In "Moral Sentiment and the Politics of Human Rights", Sharon Krause says:⁵

Moral sentiment theory – the theory of judgment and deliberation found in a range of 18th-century thinkers but articulated most powerfully by David Hume – offers some valuable resources in this regard. It can be developed to suggest a non-foundationalist basis for international human rights today,

³ *Prasad v Republic of Fiji (No 5)* [2000] FJHC 273, [2000] 2 FLR 115; and upheld by the Court of Appeal in 2001 in *The Republic of Fiji v Prasad* [2001] FJCA 2.

⁴ Frederick Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999).

⁵ Sharon Krause "Moral Sentiment and the Politics of Human Rights" (October 2010) Jason Swadley (ed) *The Art of Theory: Conversations in Political Philosophy* <www.artoftheory.com> at 1.

one that justifies human rights with reference to the faculty of empathy and the fact of interdependence.

Similarly, Michael J. Perry says:⁶

Recall that as the concept *human right* is understood in the UDHR and in every international human rights treaty, a right is a *human right* if the rationale for establishing and protecting the right is, in part, that conduct that violates the right violates the “act towards all human beings in a spirit of brotherhood” imperative. Given that understanding of *human right* and assuming that the category *moral right* includes whatever else it includes, rights whose fundamental rationale is that conduct that violates the right violates the “act towards all human beings in a spirit of brotherhood” imperative or some equivalent norm, every human right is a moral right.

And further:⁷

For better or worse, the language of rights—especially the language of human rights—is now a common feature of moral discourse throughout the world and is likely to remain so. Indeed, the language of human rights has become the moral *lingua franca*.

Thus 'human rights' is grounded in morality and, in the past, was defined as the moral imperative. So Brookfield's point that legitimacy involves both morality and justice is clearly significant if legitimacy of a legal order takes into account 'rights'.

For those inclined towards 'legality' rather than 'legitimacy' of a legal order the term 'justice' appears equally problematic. In much constitutional case law 'justice' is mostly ignored. However, for many revolutionaries, particularly from the left, the word justice has been both a rallying cry for social transformation as well as a legal expression denoting something above and beyond ordinary codes, rules or laws.

Since the notion of 'justice' in the Fijian legal order, both past and present, is the core of the analysis on legitimacy in the thesis, it concentrates on this idea in some detail in Chapter 2, with a brief survey below for the purposes of this Introduction.

⁶ Michael Perry “The Morality of Human Rights” (2013) 50 San Diego L Rev 775 at 781 (footnote omitted) (original emphasis).

⁷ At 784.

B The Literature on Justice and Law

Justice as a legal term is usually linked to the theory of Natural Law. Represented first by the ancient Greek philosophers, Natural Law was adopted by a number of (European) Enlightenment Thinkers in the 15–17 centuries, for example, John Locke, who said:⁸

And thus the community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even of their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject ...

The Lockean perspective harked back to the origins of Natural Law theory where 'morality and justice' were established as the benchmarks of a legal system.

Brookfield had made his intriguingly brief comment in *Waitangi and Indigenous Rights* in reference to the *Mitchell v Director of Public Prosecutions* case that "[i]njustice in a legal order is necessarily a deficiency in legitimacy."⁹ In this case Haynes P had stated that in order to achieve legitimacy a revolutionary government must show (*inter alia*) that it was "not oppressive and undemocratic" and that it "must not impair the just rights of citizens under the Constitution".¹⁰

The *Mitchell* case, based on some significant principles of Natural Law, at the same time, referred to its nemesis, Positivist Law. This attempt to cover both theories possibly reflected the continuing influence of the Positivist legal theorist Hans Kelsen in constitutional cases. Kelsen had stated:¹¹

The validity of a legal norm cannot be questioned on the ground that its contents are incompatible with some moral or political value. A norm is a valid legal norm by virtue of the fact that it has been created according to a definite rule and by virtue thereof only.

⁸ John Locke *Two Treatises of Civil Government* (JM Dent and Sons Ltd, London, 1924) at 192.

⁹ Brookfield, above n 1, at 42; and *Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 35 (Grenada CA).

¹⁰ Mai Chen and Geoffrey Palmer *Public Law in New Zealand: Cases, Materials, Commentary and Questions* (Oxford University Press, Auckland, 1993) at 118.

¹¹ Hans Kelsen *General Theory of Law and State* (Harvard University Press, Cambridge, 1945) at 113 as cited in Miriam Theresa Rooney "Law Without Justice?—The Kelsen and Hall Theories Compared" (1948) 23 Notre Dame L Rev 140 at 148.

In contrast to *Mitchell*, the Kelsenian theory had been applied in two earlier Pakistani constitutional cases, those of *State v Dosso* and *Bhutto v Chief of Army Staff*.¹² In both cases the courts had decided that effectualness of the new [revolutionary regime] provides its own legality. In other words a valid legal order was one that was effective. There was no reason to consider 'justice' or 'morality' in questions of legality. The *Mitchell* and the *Dosso* cases therefore represented the two ends of the Natural Law/Positive Law (or legitimacy/legality) spectrum in constitutional law. These cases will be discussed again in Chapter 1.

In the New Zealand context, Brookfield had concluded, since his book was about the relevance of the Treaty of Waitangi to the New Zealand constitutional order, that the presence or absence of injustice would identify whether there was legitimacy in that order. This was only an observation in the first edition of his book but in an Epilogue in the second edition, in an allusion to his own assistance in the planning of the *Chandrika Prasad* case, Brookfield said: "I hold to [that] view, adding only that, of course democratic majoritarianism in Fiji, as in New Zealand and elsewhere, does not provide the sole criterion for legitimacy."¹³

However, neither Brookfield nor any of the cases referred to above went so far as to say whether an absence of legitimacy or 'justice' would inevitably render a particular regime unlawful or illegal, although this would be a natural conclusion.

In this regard, the obvious question with respect to Fiji is whether lack of 'legitimacy' in a legal order would also be considered as lack of 'legality'. In other words, if there was no legitimacy of a constitutional order, could people happily and safely (without any penalty) disobey the laws or the legal system. Neither the *Mitchell* case nor Brookfield himself had reached this conclusion. On the contrary it was assumed that legality of any new regime would depend on effectiveness which would indicate its 'success'. This showed the continuing influence of Hans Kelsen even as the theories and cases considered the important differences between the conditions of legality and legitimacy.

My view in this thesis, that an absence of 'justice' in the law meant there was no law, was influenced by Aristotle who had outlined both psychological and political

¹² *State v Dosso* [1958] PLD 533 (SC); and *Bhutto v Chief of Army Staff* [1977] PLD 657 (SC).

¹³ Brookfield, above n 1, at 187.

reasons for revolution; the main political one being discontent with those in power despite the legality of their authority.¹⁴

This was fortified by a modern article called "When to Overthrow your Government: The Right to Resist in the World's Constitutions" in which the authors survey the world's constitutions for the provisions on the right to rebellion.¹⁵ The preconditions of the right are stated as being the "trinity" of (i) Natural Law; (ii) Constitutional Defence and (iii) Self-defence.¹⁶ Thus the right to rebel is a legitimate constitutional power.

The first substantive chapter of the thesis explores the methodologies of the study, first in relation to the overarching feminist theory to which I am committed as it encourages diversity of viewpoints. Secondly, I use the 'right to resist' or 'Legal Praxis' methodology as it developed in relation to the legitimacy/legality or Natural Law/Positive Law conundrum. Thirdly, I explore Systems Theory which includes autopoiesis and, as an extension, the New Perspectives including that of drafting a constitution with a Natural Law identity. In this regard the drafting technique that is considered, against all others, is autopoiesis which is considered as a part of Systems Theory with an infusion of Legal Praxis. It is my contention that the concept of 'justice' can be autopoietically drafted into a constitution once a historically robust definition of justice has been identified.

What is 'justice'? Brookfield showed that the term is not synonymous with what we know as 'law'. If it was the same there would be no need for him and other constitutional theorists, or indeed judges, to explore the difference between 'legitimacy' and 'legality'.

From a purely layperson's perspective, 'justice' is an important concept which was as significant in ancient times, when written records were rarely kept, as it is today. It never lost its allure even when societies became more complex. Chapter 2 of the thesis considers 'justice' as a concept of law in history from earliest times until the 20th century. Since 'justice' has been used to identify the disjunction between legality and legitimacy of a social order, I find it critically important to see whether this

¹⁴ TA Sinclair (translator) Aristotle *The Politics* (Penguin Books, London, 1962) at Book V.

¹⁵ Tom Ginsburg, Daniel Lansberg-Rodriguez and Mila Versteeg "When to Overthrow your Government: The Right to Resist in the World's Constitutions" (2013) 60 UCLA L Rev 1184.

¹⁶ At 1221–1224.

concept retained the same meaning over the centuries of human political and social activity.

'Justice' and 'law' have been used synonymously in societies, sometimes innocently, at other times by design. Despots have often used the term 'justice' to explain and justify what is, in actual fact, the enactment of an oppressive law or the imposition of an absolutist or arbitrary regime.

At the same time, the existence of a democratic parliamentary structure does not necessarily illustrate evidence of 'justice' in a political order as Brookfield has said. Justice is a complex term for both revolutionaries and lawyers. This complexity is investigated in the next chapter for its relevance to constitutional theory and drafting. If one is to embed the notion of 'justice' in a constitution to ensure its legitimacy it is obvious that its meaning must be clear and unequivocal.

To be sure, the question of whether a regime is 'legitimate' has only arisen in the context of revolutionary change, that is, in its aftermath. The challenge in the thesis was to be able to recommend how a constitution, or legal order represented by a constitution, would be purposefully 'legitimate' rather than just 'legal'. The related question is whether it matters whether a constitution or legal order is legal or legitimate. Furthermore, at what point could a 'legitimate' constitution fall back into being just 'legal'?

The last question above has arisen recently in the context of the proposed amendment, passed by a parliamentary majority, to s 25 of the South African Constitution.¹⁷ The deprivation of property without compensation that the proposed amendment represents will breach all human rights laws, from the Magna Carta to the European Convention of Human Rights.¹⁸ It highlights Brookfield's notion that democratic majoritarianism is not the sole criterion of legitimacy. The proposed amendment may be legal because it had majority approval in parliament but would not be 'legitimate' if the Magna Carta and relevant European Court of Human Rights decisions¹⁹ are to be taken into account. The South African situation highlights the importance of seeing a Constitution within the legitimacy/legality framework. Could

¹⁷ Section 25 states that land can be expropriated with compensation. The proposed provision will allow expropriation without compensation. Constitution of the Republic of South Africa 1996, s 25.

¹⁸ See Jelena Ristik "Right to Property: From the Magna Carta to the European Convention on Human Rights" (2015) 11(1) SEEU Review Special Ed Magna Carta 800th 145.

¹⁹ *Sporrong and Lonnroth v Sweden* (7151/75 & 7152/75) ECHR 23 September 1982.

the absence of legitimacy as far as the new s 25 of the South African Constitution is concerned trigger a 'right to rebel' among those deprived of their property without compensation?

Chapter 3 of the thesis considers the Fijian political and constitutional framework from the legality/legitimacy divide. The question is whether the Fijian constitutions from the 1800s to the present promised justice or law. The answer to this question may well determine whether or not Fijians can expect their political crises, such as in 1987, 2000, 2006 and 2009, to abate with the enactment of the 2013 Constitution.

The final chapter considers the principles of a proposed new Constitution, Constitution 20XX, as one that embeds justice, at its core.

From beginning to end the thesis contemplates three essential philosophical questions: (i) whether an absence of legitimacy, and therefore, as I see it, an absence of legality, in a constitutional order gives citizens the right to rebel; (ii) whether, and to what extent, has the presence or absence of justice in the Fijian legal order served as a reason or justification for constitutional crises and transformation; and (iii) whether, and how, embedding justice as part of the basic structure of a (Fijian) constitution is likely to make a constitutional order more sustainable.

In terms of (ii) in the above paragraph it is important to make the point that the definition of what the concept of 'justice' may be is not easy. The next chapter comes to some definitions that have emerged time and again in history. But there is one condition that seems to be very important as a precursor to the definition, universally, and that is, access to the courts or to the mechanisms of justice. It will be shown in the final substantive chapter that the ouster clauses represented by s 174 of the 2013 Constitution of Fiji deny access to the courts in constitutional challenges. This then represents the unlawfulness of that Constitution if seen from the perspective of the essential and core value of legitimacy of a social order.

II Chapter 1

Legal Methodology: Standpoint, Theories and Focus

This chapter addresses the legal methodologies to be employed to provide answers to all the questions posed in the Introduction of the thesis and subsequent questions in the body of the thesis as they arise. It will be seen that application of a diverse range of methodologies is relevant to determine thoughtful responses to these questions.

A Methodological Standpoint

The thesis employs multiple methodologies for the purpose of arriving at answers, similar to Gestel, who said that legal theory or methodology should not be pursued as an end in itself:²⁰

... methodology should not be seen as something that is imposed upon legal scholars by others but as a voluntarily chosen *modus operandi* that can make one's research more challenging, more valid, and more credible.

Conventional studies of constitutions normally consider structure, function and, in the more advanced sense, the anatomy of a legal document that has higher value than ordinary law. Due to my subject matter and interdisciplinary perspective the analysis of constitutions that I offer may be more experimental in nature based on various philosophical ideas that pre-determine constitutional structure.

This approach finds particular resonance with a series of methodologies beginning with the feminist methodology and then moving onto Legal Praxis, Natural Law/Positivist Law theories, Systems Theory and New Perspectives.

Why is a multiplicity of methodologies necessary to find some answers to the thesis questions? It is necessary because constitutional theory is not just a meta-theory uniformly applicable in a range of different contexts and situations. In conventional analysis of constitutions, pure *structure* (the way provisions are developed and included) and *function* (the need for certain provisions, for example supremacy of the constitution or supremacy of parliament, and remedies for breach) are two elements that are required for understanding both the purpose and place of a particular

²⁰ Rob van Gestel, Hans-W Micklitz and Miguel Poiares Maduro *EUI Working Papers-Law 2012/13-Department of Law: Methodology in the New Legal World* (European University Institute, Florence, 2012) at 6.

constitution within a legal system. That would normally be sufficient. However, the Fijian context, in my view, demands a much more philosophical attitude towards formation of a constitution due to the struggles Fiji has had with constitutional government since 1863 and the methods by which the people and institutions of Fiji have tried to either maintain or dislodge stability in the constitutional landscape. Thus a straightforward mere description of constitutional structure, devices and content cannot properly answer the hard questions of constitutional meaning in Fiji. A broader sociological interpretation of constitutions would be more useful, hence a variety of methodologies is considered here, not only to find meaningful answers to the thesis questions but also to recommend the kind of amendments needed for any new constitution to have legitimate effect and thus less likely to be deposed. My survey of relevant methodologies below is not prioritised in any way. However it can be said that they range from the more general to the particular.

1 *The feminist methodology*

I begin with the Feminist Methodology and, specifically, the Feminist Legal Method expressed as "the manner in which feminist scholars attempt to answer the epistemological question 'how do we know what we know?'"²¹

Feminist Methodology is not merely woman-oriented in subject matter. It can be described better as a way of de-bunking traditional methodologies. In her *Feminist Legal Theory*, Weisberg says that feminist theory does not have a single methodology but has been characterised as being "eclectic, discouraging artificial separations of related ideas and promoting cross-disciplinary thinking that furthers its animating values".²² She says that feminist research has also been described as "contextual, inclusive, experiential, involved, socially relevant, multi-methodological, complete but not necessarily replicable, open to the environment and inclusive to emotions and events as experienced".²³

Feminist methodology, however, is usually considered to be relevant only to research that concerns women, for example equality and discrimination, patriarchy, domestic violence, and criminality towards or by women. The methodology is not normally employed by all legal theorists as a useful tool to research the mainstream legal

²¹ D Kelly Weisberg (ed) *Feminist Legal Theory: Foundations* (Temple University Press, Philadelphia, 1993) at 529.

²² At 529.

²³ At 530.

world. They seem to be accepted only as a feminist critique of mainstream (objectified) methodology but not as a general methodology that can be used by everyone, including male legal theorists, for their analyses. There is a paradigm deficit in the way in which both old and new legal theory and methodology sidestep the value of seeing the legal world in another, less exclusive, way.

In terms of Feminist Methodology the concept is used here as a framework of 'seeing differently' or, as I have often said when describing it, it is like 'putting on a pair of spectacles which makes one less short-sighted'. The thesis thus employs, as an underlying consciousness or sub-text, the eclectic, experiential, contextual, inclusive, involved, socially relevant, and multi-methodological knowledge (that define the feminist methodology) to validly investigate questions to which we, in Fiji, need good answers because, without them, we cannot look forward to a reasonably secure future. These answers do not have to be relevant to any other constitutional framework or schema apart from Fiji but they may be useful, in certain specific circumstances, to others.

The methodologies utilized to investigate the issues for answers to the question are multi-dimensional, multi-faceted and non-binary. All of them explore the nature of justice and the application of it to constitutional theory and drafting. Feminist Methodology was itself developed as an aspect of justice, as was Praxis and Legal Praxis which is discussed next.

2 *Praxis and legal praxis*

Due to my specific personal and professional experiences and qualifications, the thesis question is inevitably set against a specific type of legal practice which comes from my experience as a human rights lawyer in Fiji and internationally. My personal perspective is that '*the personal is political and the political, personal*'.²⁴ The '*personal is political*' catchphrase originated with the second wave of feminists who aimed to demolish the public/private dichotomy in relation to the status of women in

²⁴ As a Marxist-feminist theorist of colour I adopted the feminist standpoint of 'the personal is political' from the early feminist and student movements of the 1960s. My inclusion of 'the political' being also 'personal' comes from my own lived experiences as a justice and human rights advocate in my writing, teaching, practice of law and activism in Fiji where political decisions with profound personal effects due to our unique, less individualistic, experiences of rights violations, needed to be exposed. This expresses the experience/theoretical bond.

(mainly western) society.²⁵ As a Fijian (Indian) feminist of colour and in terms of my own legend, I also added the phrase '*the political is personal*' because I accepted the Marxian political theory of class struggle and the need for me personally to assist with the elimination of all forms of exploitation of labour power, including female labour power in the family. The agenda was to facilitate societal transformation for the better as a personal duty.

Karl Marx had said that the desired outcome of class struggle was fundamental transformation of all society. The concept of *praxis*²⁶ made the transformation possible. Marxists now commonly use *praxis* to describe the unique combination of theory and action required to move societies towards egalitarianism.

In her paper "What is Praxis? Discussed in relation to Hegel, Marx, Nietzsche and Sartre", Natalie Cowley states the definition of praxis as "the synthesis of theory and practice and the reciprocal relationship between them".²⁷

In "The Philosophy of Praxis" Peter Critchley says:²⁸

Praxis incorporates philosophy but, in closing the gap between human agency and the social world, develops it into an activist conception of knowledge. Praxis is the central category of the philosophy which is not merely an interpretation of the world, but is an integral part of its transformation.

This general perspective on 'praxis' is related to Karl Marx's comment that "*philosophers have only interpreted the world, in various ways; the point, however, is to change it.*"²⁹ The point is to ask why one would want to change the world. The

²⁵ The first wave of feminists, of the 19th and 20th century, were women who fought for a woman's right to vote and to work. The second wave of feminists, of the 1950s to 1970s referenced patriarchy, especially in the family and equal pay.

²⁶ From Karl Marx "Theses on Feuerbach" in Robert C Tucker (ed) *The Marx-Engels Reader* (2nd ed, WW Norton & Co Inc, New York, 1978) 143 at 145 where he stated, as a definition of the practical-critical perspective, later termed 'praxis': "*philosophers have only interpreted the world, in various ways; the point, however, is to change it*". (emphasis added).

²⁷ Natalie Cowley "What is Praxis? Discussed in relation to Hegel, Marx, Nietzsche and Sartre" (2008) 4 Te Kura Kete Aronui Graduate and Postgraduate E-Journal - Faculty of Arts and Social Sciences at 1.

²⁸ Peter Critchley "The Philosophy of Praxis-The Democratisation of Philosophy, Politics and Power" in *Beyond Modernity and Post-Modernity* (1997) <www.academia.edu> vol 2 at 2.

²⁹ Marx, above n 26, at 145 (emphasis added).

answer is that exploitation of one set of people by another, whether this is the ruling class, however defined, the coloniser or, indeed, men in patriarchy, needs to be eliminated.

The core value that is often expressed as a rallying cry against exploitation is 'justice'. While Marx analysed exploitation as a scientific term, this was used mainly to reference political transformation. Marx and Engels' text *On Colonialism* is where this notion is addressed directly to those of us who live in post-colonial contexts.³⁰

It is often overlooked that Karl Marx, whose ideas of praxis were influenced by Hegel, among others, had trained as a lawyer, though he preferred to study philosophy and literature.

In conceptualising "praxis",³¹ Marx considered the way in which law functions in society, not merely as part of the "superstructure"³² subject to the economic base, but in a more complex way since laws often transformed the economic base as did Lex Mercatoria in medieval times,³³ facilitating early capitalism.

Despite Marx himself seeing that law could not just be a slave to the property relations rhythm,³⁴ Marxists have rarely considered praxis from a legal viewpoint. A search of the available legal literature reveals very few articles from the Marxist viewpoint on conceptualising legal praxis as a valid methodology besides those that deal with specific topics, for example racial or gender discrimination in the American context.

The one exception to this is what is known colloquially as 'guerrilla lawyering' which is used synonymously and pertinently as 'social justice lawyering'. *Praxis* in legal practice is also known as 'rebellious' lawyering or 'lawyering for social justice and human dignity'. Guerrilla lawyering or lawyering for social justice³⁵ is useful in

³⁰ Karl Marx and Friedrich Engels *On Colonialism* (Progress Publishers, Moscow, 1959).

³¹ Karl Marx "The German Ideology: Part I" in Robert C Tucker (ed) *The Marx-Engels Reader* (2nd ed, WW Norton & Co Inc, New York, 1978) 146 at 187.

³² At 3–6. "Foundation" refers generally to the economic foundation of a society and "superstructure" to politics, law and arts normally influenced by the economic foundation though not automatically.

³³ See references to Lex Mercatoria, for example, Ralf Michaels "The True Lex Mercatoria: Law Beyond the State" (2007) 14 Ind J of Global Legal Stud 447.

³⁴ In "The German Ideology" Marx says: "The very first town which carried on an extensive maritime trade in the Middle Ages, Amalfi, also developed maritime law." Marx, above n 31, at 186–187.

³⁵ See generally SA de Smith "Constitutional Lawyers in Revolutionary Situations" (1968) 7 W Ontario L Rev 93; Ashly Hinmon "Achieving Justice through Rebellious Lawyering: Restructuring

contexts where a disjunction between law and justice is apparent. Its value in the world of 'real-politik', lies in the domain of expressing defiance.³⁶ Notwithstanding an unstable legal context, compromise of the judiciary,³⁷ or abrogation of conventional legal redress mechanisms,³⁸ many in the legal profession may practise guerrilla lawyering by providing legal redress 'in the public interest' to protect vulnerable members of society.

In cases where the executive or other (say military) removes a constitution, guerrilla lawyering has taken the form of a constitutional challenge.³⁹ It can also include publication of a strong or 'subversive' legal opinion articulating dissent and rebellion, somewhat reminiscent of the "pen is mightier than the sword" concept.⁴⁰ Much has also been said of the significance of armed struggle in the past, for example in Third World places such as Cuba and Algeria; this, though, is usually seen, even by those advocating this form of legal praxis, as a last resort. We cannot ignore the fact in relation to armed struggle that at least two of the most admired constitutions in the world, the American and French Constitutions, were birthed in violence as a reaction to perceived injustice.

Systems of Law and Power for Social Change" (2010) 6(1) *The Modern American* 15; Karen L Loewy "Lawyering for Social Change" (2000) 27 *Fordham Urb LJ* 1869; Faith Rivers James "Leadership and Social Justice Lawyering" (2012) 52 *Santa Clara L Rev* 971; and Martha Minow "Lawyering for Human Dignity" (2002) 11 *Am U J Gender Soc Pol'y & L* 143.

³⁶ Guerrilla lawyering in the legal literature is an expression of social justice, not social injustice. Thus the lawyers drafting the anti-Indian (Indo-Fijian) decrees after George Speight's takeover in Fiji in 2000 or drafting the 1990 Fijian Constitution cannot be considered as 'guerrilla lawyers' in the sense that SA de Smith or Martha Minow and others defined it. Similarly, the 2013 Constitution was drafted by government lawyers without proper and informed public consent and thus they also cannot be described as 'guerrilla lawyers'.

³⁷ Much as lawyers would like to think of all courts in all contexts as 'independent' of political or other influence, the *Re Pinochet* decision showed the apparent reality, even in the highest of courts in the British legal system, to be somewhat different. See *Re Pinochet* HL Oral Judgment 17 December 1998 <<https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm>>.

³⁸ For example when constitutions have purportedly been abrogated and constitutional officers removed.

³⁹ As in the *Prasad v Republic of Fiji* and *The Republic of Fiji v Prasad* cases in 2000 and 2001 in Fiji. *Prasad v Republic of Fiji*, above n 3; and *The Republic of Fiji v Prasad*, above n 3.

⁴⁰ The "pen is mightier than the sword" coined by Edward Bulwer-Lytton in 1839, in his historical play *Richelieu: Or the Conspiracy* (Harper, New York, 1839) at Act II Scene II.

Guerrilla lawyers often face threats, danger, imprisonment or worse and there is no recipe for success in this mode of operation.⁴¹ Nevertheless, guerrilla lawyering, for those who engage in it, exemplifies the social responsibility bestowed by the legal qualification on its professionals irrespective of the hazards. Legal Praxis also involves thinking and acting outside conventional ways. For example the Legal Praxis methodology may provide a better understanding of the constitutional issues facing citizens and may be used to formulate a background to why guerrilla lawyering may be needed.

However Legal Praxis, to be meaningful, requires a lawyer or jurist to place herself/himself in the philosophy of law spectrum. The jurisprudential question, 'What is law?' is the significant precursor to the type of legal praxis that may be contemplated by a constitutional lawyer.

The connection between this jurisprudential enquiry and legitimacy/legality of a legal order is an important one. The question is whether 'law' and 'justice' are the same thing. This will be considered in more depth in the next chapter as a historical survey but is articulated here in terms of jurisprudence only.

3 *Law and justice in legal philosophy*

(a) Natural law and justice

In their seminal text *Introduction to Jurisprudence*, Lord Lloyd of Hampstead and MD Freeman say that the origins of natural law theory lie in Greek thought.⁴² Ancient Greeks were much more concerned with exploring law's philosophical foundations than with technical development of the law. Thus Plato's *The Republic* was about a "philosopher-king who could attain 'absolute justice' by consulting the mystery locked in his own heart of divine wisdom which remained uncommunicable to lesser mortals".⁴³ Aristotle made only a "passing reference to the distinction between natural and conventional justice ... immediately qualifying this by pointing out that, among men, even natural justice is not necessarily changing".⁴⁴

⁴¹ In my experience there are far more failures because resources and legal weight are inevitably on the side of the state.

⁴² Lord Lloyd of Hampstead and MDA Freeman *Lloyd's Introduction to Jurisprudence* (5th ed, Stevens and Sons, London, 1985).

⁴³ At 107.

⁴⁴ At 107.

It is only with the rise of Alexander the Great and imperial Greece, that natural law as a "universal system" became known, for which the Stoic philosophers were responsible.⁴⁵ Until the Stoics "nature had meant the order of things" being "identified as reason", that is, when man lived according to "reason" he was living "naturally".⁴⁶ For the Stoics, however, precepts of reason had universal force.⁴⁷ They stressed the ideas of individual worth, moral duty and universal brotherhood, from their early reference to wise men alone to the later inclusiveness for all men.⁴⁸

It was in this form, say Lloyd and Freeman, that Stoicism passed over from Greek thought into Roman thought, particularly with Cicero whose definition of natural (true) law as "right reason in agreement with nature" was highly influential even in later centuries, particularly during the Enlightenment.⁴⁹ Cicero advocated the possibility of striking down positive or 'man-made' laws which contravened natural law. While Cicero lived before the Christian era (106-46 BCE) his influence was still in existence centuries later. For example, the opening sentence of Gaius' Institutes (c AD 160) reads:⁵⁰

That law which a people establishes for itself is peculiar to it, and is called *jus civile* (civil law) as being a special law of the *civitas* (state), while the law that natural reason establishes among all mankind is followed by all people alike, and is called *jus gentium* (law of nations or law of the world) as being the law observed by all mankind.

By the Middle Ages *jus gentium* had influenced the Catholic Church. But it was Aquinas (1224-74) in the 13th century who rejected the idea, current at the time, "that civil government was necessarily tainted with original sin". He argued "for the existence of a hierarchy of law derived ultimately from God in which human or positive law had a rightful though lowly place and was worthy for its own sake".⁵¹

During the periods of Renaissance, Reformation and Counter-reformation there emerged an emphasis on the individual, free will, human liberty and rejection of the

⁴⁵ At 107.

⁴⁶ At 108.

⁴⁷ At 108.

⁴⁸ At 108.

⁴⁹ At 108.

⁵⁰ As translated by De Zulueta, *The Institutes of Gaius*, pt 1. At 108.

⁵¹ At 109.

idea of a collective European society. This coincided with, and influenced, the emergence of nation states and even separate national churches.⁵²

By this time, Machiavelli's secular' formulations, including the "naked expediency" of human institutions, was beginning to eclipse natural law ideas.⁵³ However, Vitoria and Suarez (called Thomists and followers of Aquinas) countered Machiavellian influence with the idea that it was impossible, as Luther stated, for even a "just man to follow God".⁵⁴ It was not possible to neglect the law of nature since "all men from the beginning of creation have in fact been subject to it".⁵⁵

Subsequently, Aquinas' distinction between natural law (*jus gentium*) and positive law began to be rejected, with Suarez stating that *jus gentium* differed in an "absolute" sense from natural law and was, instead, "straightforwardly a case of human positive law".⁵⁶ Once it was accepted that *jus gentium* was an aspect of positive law it was also accepted that it could be formulated into a code of law to govern relationships between nations.⁵⁷ Suarez said that the idea of political authority could be brought into existence by a general act of consent performed by men in a state of nature.⁵⁸ He said that people were able to conceive of themselves as a *universitas* and so participate univocally in corporate legal acts.

Grotius moved the debate away from its link with religion to the idea that natural law would exist "even if God did not",⁵⁹ thus re-locating it towards the "natural reason of man".⁶⁰ Grotius saw government as resting on a social contract, with the people surrendering their freedom for security. Nevertheless, said Grotius, the 'sovereign' to which the people surrender cannot be repudiated no matter how unjust his laws may be. But he also stated, seemingly paradoxically, that sovereigns are bound by natural law. The link between natural law and social contract in Grotius is perhaps the most useful development for the purposes of ongoing debates on natural law and positive law.⁶¹

⁵² At 111.

⁵³ At 111.

⁵⁴ At 111.

⁵⁵ At 112 (citation omitted).

⁵⁶ At 112 (citation omitted). This means that the distinction was seen to be artificial or superficial.

⁵⁷ At 112.

⁵⁸ At 113.

⁵⁹ At 115.

⁶⁰ At 115.

⁶¹ At 112.

Following this development, however, social contract theorists such as Thomas Hobbes (1588-1679), John Locke (1632-1704) and Jean-Jacques Rousseau (1712-1778) introduced the concept of "consent" to show how it was possible for a free individual to become the subject of a state and by such consent grant that state legitimacy.⁶² For Hobbes "social contract" was to be used in defence of absolutism, for Locke it was to be used to support "limited constitutionalism", and in Rousseau it is a "mystical construct by which the individual merges into the community and becomes part of the general will".⁶³

It is only in the debates about social contract that the purported differences between natural law and positive law became more refined and therefore now becomes more useful for this thesis. For Hobbes natural law was not that significant; it only exhibited a man's (I assume he meant a 'person's') right to self-preservation rather than, as the earlier thinkers saw it, as a duty to conform conferred on 'mankind'. For Hobbes natural law explained that man could make certain legitimate demands on his fellow men.

Locke, on the other hand, described the state of nature that preceded the social contract as a golden age (unlike Hobbes who saw it as a state of brutality) except for the fact that property was insecure. Thus, said Locke, 'man' gave up part of his liberty in the golden age to a sovereign. It was the need for protection of social entitlements that allowed men to consider forming a government. And, if that government became unjust, Locke said it was the duty of those who had placed it there in the first place to rebel and resist.

Locke's promotion of rebellion as resistance to unjust rule can be linked to legal praxis discussed in the previous section of this chapter. In his *Two Treatises of Government* Locke said that "reason" separated man from beast and "reason" supplied answers where God's will is not clear.⁶⁴ Thus reason enabled man to grasp the content of the law of nature which is the right to hold men responsible for each other's breaches of the law and to punish them accordingly.⁶⁵

There were obvious weaknesses in Locke's ideas of how the social contract was historically devised and how each member of society would consent to give up their

⁶² At 116.

⁶³ At 116–122.

⁶⁴ At 117.

⁶⁵ At 117.

salient independent power (expressly or tacitly), which perhaps only constitutional theorists could answer much later. Nevertheless Locke's work is invaluable for its proclamation of a "right of revolution"⁶⁶ (only with just cause) and its central idea of "trust"⁶⁷ which could be defined as part of the social contract, pointing also to the fiduciary obligation of a government towards the people. Government of the people for the public good is Locke's central theme for the purposes of considering the role of a government. Locke's two elements of contract and trust conjoin the rulers and ruled in a dialectical relationship.⁶⁸

Furthermore, Locke saw the tyrants as the true rebels, not those who rebel against them. From this perspective, the definition of treason becomes an interesting legal concept (especially as observed in the Fijian context) as Locke defines tyrants as "noxious beasts" and declares the act of rebellion against them as an act of "restoration".⁶⁹

Locke's idea of property is also relevant to the focus in this thesis. Locke's influential idea is that it was God (not a sovereign) who had given men a title to the fruits of their labour. Locke thought that God himself had bestowed on mankind the obligation to protect rights. Thus rulers could not depose of their subjects' property for the public good without their consent (and with compensation for any deprivation, which later became a part of the human right to property).⁷⁰

The 'Social Contract' was taken in a somewhat different direction by Rousseau but he was closer to Locke than Hobbes in this respect. Rousseau believed that human beings should indeed govern themselves but since they could not practically spend all their time in public affairs, there needed to be an 'elective aristocracy' reflecting the 'general will'. He thought that the law was the register of the general will and that government would be tolerated as long as it accurately reflects the general will; those refusing to obey it will be "forced to be free".⁷¹

⁶⁶ At 119.

⁶⁷ At 119.

⁶⁸ Dialectical; from Dialectics which is a philosophical concept meaning the combination of thesis and antithesis which results in a synthesis. Hegel and Marx were best known for developing the concept, though its roots are in ancient Greek philosophy, for example, Socrates and Aristotle.

⁶⁹ At 120.

⁷⁰ At 120.

⁷¹ At 122.

However, Rousseau refused to draw a distinction between law and morality. He defined the general will as the "moral will"⁷² of each citizen. He also thought that elections indicated not freedom of the people but "slavery"⁷³ as soon as the members of parliament were elected. Instead, he said, direct citizen participation was a necessary condition for establishing the moral basis of obedience to law. In Rousseau the general will seems to replace the higher law standard of natural law. He appears to conflate the elements of natural law with positive law by not seeing any difference in them as long as the principles of general will as laid down were followed.⁷⁴

From the 18th to the 20th centuries natural law principles firstly came under attack⁷⁵ and then were restored from a different perspective. In the 18th century, the assault came from the 'age of reason' non social contractual thinkers such as Montesquieu (1689-1755) who saw the human being as merely the instrument of historical change,⁷⁶ and Hume (1711-1776) who said it was government that made promises possible.⁷⁷ Hume, however, is said to have developed a "modern theory of natural law" which empirically set out the fundamental principles of natural law as being those related to justice.⁷⁸ He called the rules of justice "natural laws" which were prior to government and positive law.⁷⁹ Yet, despite his adherence to natural law, Hume's work was later thought to be the basis upon which the eminent positivist Hans Kelsen derived his theory of law.⁸⁰ In the 19th century, came Hegel who, following Rousseau, saw the state as an end in itself and absolutely sovereign but not subject to any external laws of nature.⁸¹ Karl Marx (1818-1883) developed a concept of bourgeois justice as:⁸²

... a juridical notion that is dependent upon the mode of production, "the conceptions of right and justice which express this point of view are rationally comprehensible only when seen in their proper connection with

⁷² At 122.

⁷³ At 122.

⁷⁴ At 123.

⁷⁵ At 123.

⁷⁶ At 123.

⁷⁷ At 124–148.

⁷⁸ At 124 (citation omitted).

⁷⁹ At 125.

⁸⁰ Julie Maria Sievers "A Philosophical Reading of Legal Positivism" (PhD in Philosophy Thesis, Université Charles de Gaulle - Lille III, 2015) at 28.

⁸¹ Lloyd and Freeman, above n 42, at 123–125.

⁸² George Callan-Woywod and David A Duquette "Marx's Theory of Ethical Justice" (1979) 6 *Auslegung: A Journal of Philosophy* 75 at 81 (citation omitted).

other determinations of social life and grasped in terms of their role within the prevailing productive mode"

Thus, Marx linked it with the mode of production in which it was exercised.

The 20th century saw the development of the concept of a higher truth and justice (as opposed to laws that were man-made) that could not be suppressed. It was mainly because of the calamitous events of that century that the notion of natural law again received attention. These concepts were expressed by Finnis, who revived the Aquinas version of natural law and wrote not only of "natural law" but also of "natural rights".⁸³ Finnis started his proposition by stating that there were certain basic goods for human beings such as life, knowledge, play, aesthetic experience, sociability or friendship, practical reasonableness and religion. He said the reason these basic goods were 'good' was because they were self-evident. They could not be denied as otherwise those denying this idea would 'cut the ground from under their own feet'. He said that the common good required a legal system and, if a legal system worked against a common good, the stipulations it made lacked the authority they would otherwise have. In this sense unjust law would not be a law at all.⁸⁴

Lon Fuller (1902-1978) is famous for his Harvard Law Review debate on this issue with H.L.A. Hart (1907-1992). Fuller moved away from seeing natural law as tied to Christian doctrines and from the 17th and 18th century proponents of doctrinal natural law rationalists. This sets him apart from the rest of the thinkers surveyed here. As LLoyd and Freeman said "[t]o Fuller the most fundamental tenet of natural law is an affirmation of the role of reason in legal ordering."⁸⁵ Fuller described communication between men as the one indisputable principle of "substantive natural law".⁸⁶ Connection between law and morality was necessary and a legal system, whatever its other purposes, had an "internal morality"⁸⁷ of law which set up standards for evaluating official conduct. Fuller said that the legal system rested on a tacit reciprocity between lawgiver and subject with the subject being given fair opportunity. He called 'legitimacy' a moral value and the law giver who violates principles of legality forfeits some government legitimacy. Extensive violation would remove all legitimacy and moral basis of government.⁸⁸

⁸³ LLoyd and Freeman, above n 42, at 139.

⁸⁴ At 128.

⁸⁵ At 128.

⁸⁶ At 130.

⁸⁷ At 131.

⁸⁸ At 131.

Hart possibly represents the most significant attempt to bring together natural law and its opposite and will be considered more closely after the section on positive law below. Hart, mainly a positivist, did attempt to restate the position by acknowledging that human survival was a principal human goal.⁸⁹ He postulated a minimum content of natural law arising from the fact of the human condition such as human vulnerability, approximate equality, limited altruism, limited resources, and limited understanding and strength of will.⁹⁰ In light of these there is a need for some protection for persons, property and promises. But Hart does not make any effort to seek a higher law basis for the necessary protections.⁹¹

The end of the Second World War saw a higher principle than just 'effectiveness' in law which was established through the 1948 United Nations Declaration of Human Rights.⁹² The Nuremburg trials revealed that the positive laws of Germany which permitted genocide had to be held up against some higher law that emphasised morality and justice, as in natural law, against human constructed law.

However this historical reality and emphasis on natural law did not mean that the philosophy of positive law was abandoned. Positive law's practical attribute, that effectiveness was the measure of a success of a law, revealed the scientific or 'cartesian'⁹³ nature of lawmaking.

(b) Positive law and justice

Positive law did not receive specific attention until the emergence of what Lloyd and Freeman call the "modern doctrine of sovereignty" appearing from the end of the medieval period.⁹⁴ The doctrine was influenced by the rise of nation states, the advent of the industrial and scientific revolution and the gradual demise of the feudal mode of production as the main socio-economic and political system.

⁸⁹ At 134.

⁹⁰ At 134.

⁹¹ At 133–135.

⁹² Andrew Woodcock "Jacques Maritain: Natural Law and the Universal Declaration of Human Rights" (2006) 8 *Journal of the History of International Law* 245 at 248.

⁹³ Mind and matter dualism. From Rene Descartes who said that the mind was totally separate from the body thus there is now reference to Cartesian 'dualism'. It is the scientific approach to the human condition. See generally René Descartes *Discourse On Method* (Macmillan, New York, 1986).

⁹⁴ Lloyd and Freeman, above n 42, at 246.

This development did not, however, hark back to mere codification of customary law. On the contrary, positive law was seen as being the law of the state that was ascertainable and valid. It did not deny subjective considerations but was separate from morality. The main proponents of the doctrine were Bentham, Austin and, later, Kelsen who followed the Kantian model.⁹⁵

Bentham's utilitarian approach is seen as the 'newtonian' perspective of the legal world.⁹⁶ His approach relied on "standards based on human advantages, pleasures and satisfactions" and the "science of legislations".⁹⁷ But in this 'science' Bentham distinguished between private and public morals. He believed that no reform of the substantive law could be made without a reform of its form and structure. In his work the key concepts were sovereignty and command. Sovereignty could be divided and partial.

Bentham rejected any idea of 'natural' rights but he still included the values of equality, liberty and property into his analysis of the law because his focus was "the greatest happiness for the greatest number". This allowed him to advocate for a wall of protection within which individuals could do as they liked to maximise their happiness.⁹⁸

Following Bentham came Austin, also a lawyer, who sought to show what "law really is" as opposed to natural or moral notions of what it "ought to be."⁹⁹ The pertinent difference between Austin and Bentham was Austin's idea of the illimitable and indivisible nature of sovereignty. Austin saw legal rules as imperative statements. His ideas of sovereignty were somewhat rigid and closed, not taking into account realities such as federalism, entrenched clauses, revolutions and take-overs. In this sense his concept of habitual obedience to the command of a sovereign could not be sustained. Austin, recognising that law must be based "outside of the law", located it in "habitual obedience" of the mass of the population. He also rigidly separated law from morals. He noted that sanctions were a mark of law, indicating that he saw law

⁹⁵ Immanuel Kant has been described by Jeremy Waldron as a "normative positivist". Kant's idea is that everyone has a moral duty to obey the legislature and this duty is absolute. Jeremy Waldron "Kant's Legal Positivism" (1996) 109 Harv L Rev 1535 at 1541.

⁹⁶ Lloyd and Freeman, above n 42, at 248.

⁹⁷ At 249.

⁹⁸ At 248–250.

⁹⁹ At 255.

as some form of formal feature of legal systems which makes it different from other systems.¹⁰⁰

In the 20th century, the development of positive law took a more detailed and refined turn. Hart, already mentioned above, saw a legal system as a "system of social rules"¹⁰¹ an idea that is firmly located in the positivist school. Hart proposed the idea of two types of rules- primary and secondary. Primary rules were obligations and secondary rules specified the way in which primary rules could be ascertained, introduced and varied, and penalties imposed for violations of them.¹⁰² For Hart it was the combination of primary and secondary rules that constituted the heart of the legal system. But Hart did not discuss validity of any law except to say that it did not depend in any way on equity or inequity.¹⁰³

Nevertheless, due to his influence on the debates defining legality and legitimacy, Hart's work deserves more discussion. He described rules as being 'social' in that they regulated the conduct of members of society and were derived from human social practices. Hart said that a legal system can only exist if it is effectively in force, and the preconditions are that it represents (i) valid rules of behaviour and must be obeyed and (ii) its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.¹⁰⁴

Importantly, however, Hart thought natural law was relevant, though he did not believe that law was derived from morality because he saw no higher order from which law took its authority. He considered the reasons for people continuing to obey the law and the persistence of law. He saw legal limitations as legal disabilities and put forward the notion of the 'rule of recognition', defining it as the authoritative criteria for identifying valid law within a legal system and having it accepted by those who operate the system.

In this regard Hart stated:¹⁰⁵

¹⁰⁰ At 258–259.

¹⁰¹ At 403.

¹⁰² At 270.

¹⁰³ At 402–413.

¹⁰⁴ At 409.

¹⁰⁵ At 411.

So long as the laws which are valid by the system's tests of validity are obeyed by the bulk of the population this surely is all the evidence we need in order to establish that a given legal system exists.

There is no concept of 'justice' in this view. On the other hand, in this view, presumably a 'test of validity' could include elements of natural law.

Hans Kelsen is defined as the "positivist of positivists"¹⁰⁶ Natural Law, said Kelsen, is nothing but an illusion; it is an attempt to justify existing law and sanctify the property system that it enshrined. Instead, Kelsen proposed a "pure theory of law",¹⁰⁷ a concept of positive law which identifies a structure and physical forms, excluding all elements foreign to it such as justice or sociology.

Despite this, Kelsen does not abandon 'justice'. For him the concept of 'justice' is the collective happiness as regulated in a social order.¹⁰⁸ However, he says, the basic norm of the legal order as a whole must rest on efficacy, that is, on an assumption that in the main people by and large conform to that legal order. Kelsen did not think there was any value in considering 'the state' or 'rights' and 'duties' but said that every legal system rested on some kind of sanction as every norm, to be legal, must have a sanction.

While the other legal theories remained at the level of philosophy, Kelsen's edicts were used by judges considering revolutionary change. They were applied in a number of influential court decisions determining the parameters of legality of a constitutional order, thus pitting natural law and positive law against each other, as the legitimacy/legality divide, more than might have been intended by the legal theorists to which they referred.

(c) Case law: Natural law v Positive law

From the very first 20th century decision in *State v Dosso*,¹⁰⁹ to the most recent 21st century (Fijian) decision in *Prasad v Republic of Fiji/The Republic of Fiji v Prasad*,¹¹⁰ Kelsen's principles of efficacy, rather than any reference to justice or rights

¹⁰⁶ At 321.

¹⁰⁷ At 322.

¹⁰⁸ At 321. This is where Kant's influence is possibly ideally located. Hans Kelsen "Law, State and Justice in the Pure Theory of Law" (1948) 57 Yale LJ 377 at 381.

¹⁰⁹ *State v Dosso*, above n 12.

¹¹⁰ *Prasad v Republic of Fiji*, above n 3; and *The Republic of Fiji v Prasad*, above n 3.

and duties, have been used in judicial reasoning in constitutional petitions. Thus the positivism of Kelsen was not confined merely to academic legal theory but has been used practically by courts to declare revolutionary regimes as being either 'lawful or 'unlawful' (that is, declaring 'legality' or its opposite).

In opposition, those who support the 'natural law' perspective offer the notion of 'legitimacy' instead of legality as being the basis on which the success or otherwise of a new legal regime is to be established by the courts. In one specific constitutional case in Grenada, in *Mitchell* already mentioned in reference to Brookfield's text, the Court (Haynes P) surveyed the issue from the perspective of Kelsen's theory of legal validity. The significance of this case lay not in the decision itself but in the opportunity that Haynes P took to survey previous judicial decisions that set natural law against Kelsenian positive law.

In *Mitchell* Haynes P began his analysis with the Pakistani case of *State v Dosso* which was a challenge to the President of Pakistan's abrogation of the 1956 Constitution and declaration of martial law. The Pakistani court had to decide on the validity of a writ of *habeas corpus* to establish whether the appellant Dosso would be released due to the violation of his rights pursuant to the 1956 Constitution. The Chief Justice of Pakistan considered whether the abrogation of the Constitution was lawful. Applying Kelsen's principles he declared that the 'revolution' by the President was valid because it was effective. The fundamental rights in the abrogated Constitution, on which the applicant was relying for his writ, were no longer the law since the Constitution itself had been abrogated.¹¹¹

In his analysis Haynes P also considered what is known in short form as the *Matovu* case. Another *habeas corpus* application, the case of *Uganda v Commissioner of Prisons ex parte Matovu* arose as a consequence of the abrogation of the 1961 Ugandan Constitution by the Prime Minister, Milton Obote.¹¹² Referring to the "positivist school of jurisprudence represented by the famous Professor Kelsen",¹¹³ the Chief Justice of Uganda said the abrogation of the Constitution was effective and therefore lawful; thus the application could not rely on the rights contained in it.

¹¹¹ Overruled 13 years later in *Jilani v The Government of Punjab* [1972] PLD 139 (SC).

¹¹² *Uganda v Commissioner of Prisons ex parte Matovu* [1966] EA 514.

¹¹³ At 514, 535.

The next Kelsenian case surveyed by Haynes P was the Rhodesian *Madzimbamuto v Lardner Burke*.¹¹⁴ This case was a challenge to the legality of the post-unilateral declaration of independence in Rhodesia and the 1965 Constitution passed simultaneously. Stella Madzimbamuto challenged her husband's detention under the new emergency regulations as being unlawful. The court (Goldin J) also accepted the Kelsenian doctrine by stating that what is "destroyed no longer exists".¹¹⁵ Stella Madzimbamuto's husband was not released. On appeal Beadle CJ, quoting from *Dosso* and *Matovu*, said that Kelsen had stated that "success alone was the determining factor" and that the new government was so firmly established as to have become a 'de jure' government; thus its laws were binding.¹¹⁶ This decision was appealed to the Privy Council where Mrs Madzimbamuto's application was successful by a majority decision of the court. Lord Reid, speaking for the majority, decided on the side of "rigid constitutionalism" stating that the sovereign power was still trying to re-establish its control in Rhodesia despite the usurpers appearing to be effective. He said that since there could not be two governments co-existing de jure, the appeal would be allowed.¹¹⁷ In another case soon after, *Ndholovu v the Queen*, the Rhodesian court rejected the Privy Council's decision in *Madzimbamuto*, ostensibly because the Privy Council, despite allowing Stella Madzimbamuto's appeal, had also agreed with the *Dosso* and *Matovu* rule regarding effectiveness of a new regime.¹¹⁸

But, as Haynes P's analysis showed, the tide against Kelsen turned in another military coup case, *Sallah v The Attorney General of Ghana*.¹¹⁹ In *Sallah* the Court of Appeal overruled Kelsen's principle as being 'irrelevant' on the grounds that the court had difficulty in locating any new basic norm after the coup. The court pointedly remarked that foreign jurists did not have a role to play in court decisions which considered matters on the ground. *Sallah* was followed by another Pakistani case, that of *Jilani v The Government of Punjab*.¹²⁰ In it the court determined that *Dosso* had been wrongly decided and that Kelsen's doctrine should not be accepted by the courts as a rule or principle of law; it was a legal theory and "a controverted one at that".¹²¹ *Jilani* decided that it was the courts that had to determine legitimacy and no one else.

¹¹⁴ *Madzimbamuto v Lardner Burke* [1968] 3 All ER 561; and *Madzimbamuto v Lardner Burke* [1969] 1 AC 645 (PC).

¹¹⁵ Chen and Palmer, above n 10, at 103.

¹¹⁶ At 104.

¹¹⁷ At 104–105.

¹¹⁸ *Ndholovu v The Queen* [1968] 4 SALR 515.

¹¹⁹ *Sallah v The Attorney General of Ghana* [1970] Constitutional Supreme Court 8.

¹²⁰ *Jilani v The Government of Punjab*, above n 111.

¹²¹ Chen and Palmer, above n 10, at 106.

Haynes P then considered, with approval, another Pakistani case, that of *Bhutto v The Chief of Army Staff*,¹²² also regarding a military takeover. In his decision, the Chief Justice had referred to Kelsen's proposition that the "effectualness of the regime determines its own legality".¹²³ However the Chief Justice said it was not just effectiveness that determined legality but questions of 'justice and morality' which contribute to the effectiveness of the new legal order. Thus he linked Kelsenian positivist effectiveness with 'justice and morality'. In this way the *Bhutto* case not only introduced the natural law concept of justice but also added another dimension of 'necessity'. The imposition of martial law was a necessary transitional measure to restore, peace, order and good government. Thus Bhutto's petition was dismissed.

After surveying all these cases in his *Mitchell* ruling, Haynes P said there were two main conditions for a regime to be seen as successful and effective by the courts: (i) necessity in the interest of peace and order (and the usurper must not be responsible for creating that necessity); and (ii) it must not impair the just rights of citizens under the Constitution. Thus the case of *Mitchell* by (ii) above consolidated the element of natural law ('just rights') introduced in *Jilani* and *Bhutto* and dismissed claims to pure efficacy for lawfulness (or legality) of a regime or legal order as decided in *Dosso, Madzimbamuto, Ndholovu* and *Matovu*.¹²⁴

The most recent case, that of the Fijian *Prasad v Republic of Fiji* and *The Republic of Fiji v Prasad*,¹²⁵ was once again decided on Kelsenian principles of 'efficacy' (against the usurper). Despite *Mitchell* and submissions made by counsel for the applicant Prasad, no references were made by the High Court or the Court of Appeal to rights and justice that Prasad expected as a citizen from the Constitution. Instead, Kelsen's strict positivist principles were used to remove the Fijian usurper since the court said that the new regime had not proved that it was necessary to remove the Fijian Constitution permanently. Nor had its rule been effective as the people had said by way of affidavits that they did not agree with the removal of the 1997 Constitution of Fiji.

In the constitutional cases surveyed by Haynes P, it becomes obvious that the positivist concept of 'legality' was mitigated by some courts' tentative reference to

¹²² *Bhutto v Chief of Army Staff*, above n 12.

¹²³ Chen and Palmer, above n 10, at 106.

¹²⁴ At 118.

¹²⁵ *Prasad v Republic of Fiji*, above n 3; *The Republic of Fiji v Prasad*, above n 3.

'justice and morality', not just as an issue of 'legitimacy' but also as a condition of 'legality'. Brookfield has also highlighted this interesting connection. In his text he had said that 'legitimacy' and 'legality' had been used inter-changeably in relation to regime change but they were not the same thing:¹²⁶

Success and effectiveness is necessarily sufficient for legality and will provide a limited measure of legitimacy in that some justice according to law will be done. But considerations of morality and justice may still deny full legitimacy to a regime that is judicially recognised as legal because it passes that limited but sufficient test.

And, as earlier said, that "the considerations of morality and justice generally go to its legitimacy rather than its legality".¹²⁷

It appears to be the case from the above survey of the theories and case law that 'legality' of a constitutional order exists in the realm of positivist effectiveness while 'legitimacy' rests on the principles of natural law though, as Brookfield says, legality does contain within it aspects of legitimacy.

My contention is, instead, to draw in the Lockean idea and state that, if there is no justice in a constitutional order, that order is not only illegitimate, it is also unlawful. It is this situation that allows praxis to become relevant. As Locke stated, lack of the existence of 'legitimacy' would permit the citizens of a state to consider rebellion and resistance against tyrants as 'noxious beasts' and that act of rebellion against the tyrants would then be seen as an act of 'restoration'. It is in this realisation that the importance of legal praxis as a device to restore legality in a social system is revealed.

To consider the significance of Legal Praxis in restoring legality one needs to refer to another proposition, Systems Theory. We need to consider how law (and the legal 'system') actually functions in society and how it is constructed and de-constructed, not merely as a social entity but also as a communication device. Such an enquiry is helpful because, through it, we will be able to see how the notion of 'justice' can be embedded in the very structure of a law, for example a Constitution and thus the legal system, to form its identity within which legal praxis as a device, allowing the right to rebel, can function as a remedy in the event of attempts to either breach the constitution or to dislodge it by any means.

¹²⁶ Brookfield, above n 1, at 34.

¹²⁷ At 34.

Systems Theory is not specifically a legal conjecture; it is more broadly a theory of society. While eminent Sociologist Talcott Parsons initiated the discussion on a different way of analysing society (that social systems are related either to the internal environment of other social systems or to external non-social environments - psychic, biological, cultural environments), it is Niklas Luhmann who is regarded as the father of Systems Theory.¹²⁸ The subject matter of the theory is social evolution and social differentiation, as well as the concept of 'autopoiesis'. The last concept, autopoiesis, became a central aspect of Luhmann's theory of law and was later developed in greater detail by legal theorist Gunther Teubner. Its practical relevance to the thesis questions will be considered in more detail below.

An article by Aldo Mascareno titled "Ethics of contingency beyond the praxis of reflexive law"¹²⁹ provides a critique of Niklas Luhmann's Systems Theory as applied to law by Teubner and others.¹³⁰

The obvious problem that is raised by a first reading of Mascareno's article, noted above, is that Systems Theory and Legal Praxis Theory appear to be poles apart. Luhmann's Systems Theory is a theory of stability. It shows how societal 'perturbations' or disruptions within a 'closed system' (for example law) are repaired by 'communication with other closed systems' to minimise these disruptions in order to maintain stability. Legal Praxis, in contrast, intends to create transformations of existing systems for radical change. Thus these two ideas do not seem to have anything in common as systems will work to preserve themselves and legal praxis will work to transform them. They seem to always be on different methodological planets.

However, Mascareno attempts to bring the two together by calling the process of conjoining the two apparent opposites, "an ethic of contingency", that is, a "systemic praxis which regulates the consequences of the operative closure by reinforcing the

¹²⁸ Luhmann was Talcott Parson's student but broke away from him. Luhmann was trained as a lawyer.

¹²⁹ Aldo Mascareno "Ethics of contingency beyond the praxis of reflexive law" (2006) 12 *Soziale Systeme* 274.

¹³⁰ John Bednarz Jr (translator) with Dirk Baecker, Niklas Luhmann *Social Systems* (Stanford University Press, Stanford, 1995); and Gunther Teubner *Law as an Autopoietic System* (Blackwell, Oxford, 1993).

commitment of the participants with that closure",¹³¹ quoting Helmut Wilke's strategy of an "invitation to self-regulation".¹³²

Moreover, referring to Teubner's idea of "reflexive law"¹³³ Mascareno says that "reflexive law" "must take into account the function of the involved systems, its procedural rules and the normative expectations of the participants" and (thus) "the affected units (alter and ego) are able to accept an external guidance and are cognitively open to change the setting of goals without abandoning their normative expectations".¹³⁴ Mascareno explains Teubner's idea of reflexivity simply as: "the legal framework [which] becomes binding for the participants if the participants decide to bind themselves to law".¹³⁵ An example of how this may work for a Constitution is if it states in its preamble that 'the people give' (themselves) 'their Constitution'.¹³⁶

Thomas Blanke is cited by Mascareno for providing a clearer definition:¹³⁷

Find a form of law which leaves the autonomy of social discourses undisturbed but which simultaneously encourages them reciprocally to take heed of the basic assumptions upon which each is based.

To explain this further, Blanke says, ideas of the "good", "conceptions of justice" or even "utopian thoughts"¹³⁸ can be considered along with "expertise, knowledge, efficiency [and] viability" required, and "pragmatic advantages can motivate [participants] to get into negotiations with each other" on all these matters.¹³⁹ This

¹³¹ Mascareno, above n 129, at 275.

¹³² At 277.

¹³³ Coined by Teubner in 1983 to characterise the 20th century evolution of law from formal, to substantive to reflexive. Reflexive law refers to "'procedures of internal discourse' within social subsystems and to their 'methods of coordination with other social systems'" using the mechanism of the "internal reflexion of social identity". Sanford E Gaines "Reflexive Law as a Legal Paradigm for Sustainable Development" (2002–2003) 10 Buff Envtl LJ 1 at 5 (footnotes omitted).

¹³⁴ Mascareno, above n 129, at 277 (citation omitted).

¹³⁵ At 279.

¹³⁶ For example, the 1997 Constitution of Fiji stated in its Preamble: "WE, THE PEOPLE OF THE FIJI ISLANDS ... WITH GOD AS OUR WITNESS, GIVE OURSELVES THIS CONSTITUTION". Constitution Amendment Act 1997 (Fiji), Preamble.

¹³⁷ Mascareno, above n 129, at 284–285. Blanke is cited at page 285 from Teubner, above n 130, at 97.

¹³⁸ The concept of "Utopian thoughts" is relevant when I later consider the value of Martin Loughlin's "The Constitutional Imagination". Martin Loughlin "The Constitutional Imagination" (2015) 78 MLR 1.

¹³⁹ Mascareno, above n 129, at 281.

approach clearly presents an active method involving participants' input and, therefore, has the potential to bridge the obvious intellectual and practical gap between the systems approach in law and legal praxis. It is akin to establishing the third dimension in legal work, beyond formalism/substantive and reflexive methodologies towards the conceptualisation of justice as being applicable for both legal praxis and the structure of systems.

In an interview in December 2010 when journalist Mauro Zamboni asked Gunther Teubner what he was most proud of as a scholar, Teubner replied with another question:¹⁴⁰

Which was my most painful piece of work? If I consider which piece made me suffer most from self-doubts, these were the articles I wrote on justice ... because it opens a space for the non-rational in law, which is anathema to self-confident legal scholarship. ... Rejecting Habermas and Rawls in their optimistic rationalism we need to [think] of justice as the contingency formula of law.

Teubner's article, "Self-subversive Justice: Contingency or Transcendence Formula of Law" makes the point more clearly.¹⁴¹ He says there is "no socio-legal theory of justice" and that "legal sociology has no idea of justice".¹⁴² He asks: "is justice itself, the most profound expectation that people have of the law, the blind spot in the distinction between law and society"?¹⁴³

New perspectives in legal theory which have a bearing on constitutional theorising and drafting have developed the notion of 'justice' in law more broadly.

5 *New perspectives: Legitimacy/legality in constitutionalism*

Recent work in political theory and theoretical sociology consolidate the links between legality/legitimacy and constitutional law. Two examples of the new perspectives are represented by Chris Thornhill and Samantha Ashenden's

¹⁴⁰ Mauro Zamboni "Interview with Gunther Teubner: Frankfurt (Germany), December 2010" (2012) 35(4) *Retfærd* 3 at 20.

¹⁴¹ Gunther Teubner "Self-subversive Justice: Contingency or Transcendence Formula of Law" (2009) 72 *MLR* 1.

¹⁴² At 2 (footnote omitted).

¹⁴³ At 2.

"Introduction: Legality and Legitimacy- between political theory and theoretical sociology" and Martin Loughlin's "The Constitutional Imagination".¹⁴⁴

Thornhill and Ashenden make the point that the relation between legality and legitimacy is, to quote Niklas Luhmann, both the "basic question" of modern legal and political philosophy and one of the most "deeply constitutive conceptual problems in the history of sociological theory".¹⁴⁵ They reinforce the idea of the significance of legitimacy by stating that "purely" coercive laws are unlikely to be perceived as "legitimate".¹⁴⁶ They add that it is the common position that "legitimate power is tied to the common recognition and enablement of social freedoms".¹⁴⁷

Loughlin takes these ideas further and into the practical realm of constitution-making by re-engaging Locke through Thomas Paine.¹⁴⁸ He says that "a constitutional mode of thinking found its legitimacy on some notion of consent".¹⁴⁹ He also states:¹⁵⁰

The question now to be asked is whether, in making the transition to modernity, we have been able to jettison such tropes [as a ruler's will or a community's identity] and commit ourselves to Paine's conviction that constitutional government, established through the drafting of a constitutional text, now rests its authority purely on the power of reason.

This question, says Loughlin, can be simplified by first focusing on the relationship between thought and text. The two concepts he uses to make this possible are "ideology" and "utopia" in order to fashion what he calls the "constitutional imagination".¹⁵¹ He draws the distinction between drafting a constitution that bolsters either authoritarian or bourgeois interests (negative constitutionalism) and one that is 'aspirational' or 'utopian' in perspective (positive constitutionalism). He says that modern government now derives its rights not from a theory of sovereignty but from an idea of public service.¹⁵²

¹⁴⁴ Chris Thornhill and Samantha Ashenden (eds) *Legality and Legitimacy: Normative and Sociological Approaches* (Nomos Publishers, Baden Baden, 2010); and Loughlin, above n 138.

¹⁴⁵ Thornhill and Ashenden (eds), above n 144, at 7.

¹⁴⁶ At 8.

¹⁴⁷ At 8.

¹⁴⁸ Thomas Paine's pamphlet the "Common Sense" (14 February 1776) was one of the drivers of the American Independence Revolution. Loughlin, above n 138, at 1.

¹⁴⁹ At 3.

¹⁵⁰ At 5.

¹⁵¹ At 11–12.

¹⁵² At 21.

However, Loughlin says, even this positive transition does not grasp the essence of utopianism of the "general will" (the ideal expression of equal liberty).¹⁵³ In his "juridical revolution"¹⁵⁴ he displaced even the separation of powers doctrine, replacing it with a pervasive commitment by all government agencies to engage in a form of deliberation and dialogue for public service. This type of positive constitutionalism's objective is not emancipation but integration. He says it shows the operation of the dialectic of ideology and utopia which avoids the "governmentalisation of the state".¹⁵⁵

In their new 21st century perspective Thornhill and Ashenden thus offer the notion of social freedoms as being indispensable to legitimacy without which there is no legality. These are offered in answer to the same ancient questions that the Greeks explored, the Romans avoided and the Enlightenment thinkers uneasily grappled with against the background of monotheistic religion, industrialisation, scientific and 'new world' discoveries and the emergence of a parliament against the monarchy. They are also offered against 20th century legal theorists' ideas, for example those of Kelsen, which the courts then attempted to apply 'on the ground'.

The new perspective is consolidated and advanced in a more practical way by Loughlin who says that (social) integration and not authoritarianism can be drafted into a constitution to express a new way of seeing a government and its people as being in a relationship of continuing deliberation and dialogue. He proposes the methodology of 'constitutional imagination' to make this possible.

In the next and final methodological section I discuss how the concept of 'autopoiesis' as a drafting tool can assist to take the new perspectives even further forward to draft a 'justice-defined' constitution.

(a) Autopoiesis

Luhmann, as has already been discussed above:¹⁵⁶

¹⁵³ At 21.

¹⁵⁴ At 22.

¹⁵⁵ At 24.

¹⁵⁶ Michael King "The 'Truth' About Autopoiesis" (1993) 20 JL & Soc 218 at 219 (original emphasis) (endnote omitted).

... distinguished social autopoiesis from its biological origins by identifying *communication* as the basic element of social systems and by defining social systems, not as groups of people, ... but as systems of meaning.

Michael King refers to social systems in this framework:¹⁵⁷

... as networks of communication [which] produce their own meaning. In Luhmann's version of the theory they do not, as many other theorists have proposed, perform operations of interpretation and selectivity upon 'facts' gleaned from the social environment. Rather, they construct that environment and perform their operations upon the environment that they themselves have constructed. A defining criterion of an autopoietic social system is that it should contain and constitutes 'a representation of society within society'. Different social systems are distinguished from one another by the meaning each gives to relationships and events in the social world.

Luhmann's application of autopoiesis to the social sciences has been criticized as a "construction of a 'super-theory'".¹⁵⁸ But King also says:¹⁵⁹

Luhmann's intentions were far more ambitious. They were to provide a total theory in the European tradition of grand theories, which extended to the whole of society and to all social systems.

Legal theorists employing autopoiesis in their analysis of legal systems do not seem to have attracted as much opprobrium as Luhmann, possibly because they have been less meta-theoretical in their approach. Furthermore, those who applied autopoiesis to the legal domain improved on Luhmann's conceptualization by moving away from its foundation in Parsonian Systems Theory towards the direction of Weber and Habermas.¹⁶⁰ This is apparent in Gunther Teubner's work on autopoiesis and the law.¹⁶¹

¹⁵⁷ At 220 (endnote omitted).

¹⁵⁸ Danilo Zolo "The Epistemological Status of the Theory of Autopoiesis and its Application to the Social Sciences" in Alberto Febbrajo and Gunther Teubner (eds) *European Lawbook in the Sociology of Law: State, Law, Economy as Autopoietic Systems: Regulation and Autonomy in a New Perspective* (Giuffrè, Milan, 1992) at 67–124 as cited in King, above n 156, at 221. I will not go any deeper into criticisms of Luhmann's version of autopoiesis in this thesis.

¹⁵⁹ King, above n 156, at 222–223.

¹⁶⁰ In particular Luhmann's functionalism which in law would be regarded as legal positivism.

¹⁶¹ King, above n 156, at 221.

(b) Autopoiesis and law

King says that the "hypercycle of circularity" which identifies the legal autopoietic system asks the question: "How do we know that the law's decision is lawful or unlawful?" He says the answer must be "because the law says so",¹⁶² confirming the self-referential nature of the law.

However, clearly, a legal system includes not just law in the strict sense of a code or legal text, but also its development or location in a social domain. In his "Law as an Autopoietic System",¹⁶³ Gunther Teubner has said that " ... the nature of modern society is determined by the highly intensive and explosive mixture of law, politics, economics and other social domains".¹⁶⁴ He said the value of autopoiesis to legal theory lies in what it says about the conditions, mechanisms and consequences of mutual interference between law and (these) other domains.

Teubner's adaption of autopoiesis builds on two main concepts of the relationship or 'communication' between the legal system and the social domain. He says:¹⁶⁵

1. The law is defined as an autonomous system whose legal operations form a closed network. ... but law is not more or less dependent on society ... the main question is to determine empirically the precise balance between internal and external causation,

and

2. Heteronomy is treated as 'structural coupling'. This view ... involves the multiple membership of legal communications in other autonomous domains.

Furthermore:¹⁶⁶

Autopoietic operational closure creates a "meaning world" of its own that does not exclude outside influences. It recognizes the steady stream of

¹⁶² At 225.

¹⁶³ Malcolm Peltu (ed) Gunther Teubner "Law as an Autopoietic System" (reports on presentations at LSE Complexity Study Group Meeting No 3 "Can Social Systems be Viewed as Autopoietic", London, 18 June 1997).

¹⁶⁴ At 1.

¹⁶⁵ At 2.

¹⁶⁶ At 6.

external influences on the communication systems and world views of lawyers, which are so important in the creation of a legal system. However the really important factor in this autopoietic process is 'reconstruction'. Reconstruction translates and re-signifies social meaning in the legal world. ... Each autopoietic system could be seen as a unique ongoing dynamic that cannot be controlled from elsewhere. Such systems cannot participate directly in each other's worlds, yet an ongoing process of structural coupling between worlds creates zones of contact between them.

It appears that 'communication' is key even in the legal dynamic- not a linear communication, but one that is, as Teubner says:¹⁶⁷

... a very artificial type of communication [that] specializes itself and begins to operate recursively on different types of its own kind, thereby beginning the development of a chain of distinctions that propels itself into the future. The dynamic game consists of recursively linked moves in a web of expectations, moves and rules.

He further states:¹⁶⁸

A legal system is constituted whenever legal acts emerge as a set of operations that go back recursively to earlier acts of its own kind, in order to produce new legal acts of the same kind.

Teubner says that:¹⁶⁹

Legal acts driving the dynamics of this network include the making of a judgment in a court, the passing of a law by parliament or the concluding of a contract agreement by the parties to it. These are defining 'magic moments' when validity is conferred to a new norm or rule.

Teubner also considers the 'validity' of law autopoietically constructed. He says:¹⁷⁰

... there is a special class of communications which carry authority in making a statement about the validity of certain legal rules. This would include a pronouncement on the law by a legal authority, for example the

¹⁶⁷ At 4. Teubner uses the analogy of a chess game where the "move", as a communication, has integrity in its own right.

¹⁶⁸ At 4.

¹⁶⁹ At 4.

¹⁷⁰ At 4.

judge, the legislator or the law professor, but not other general comments by that professor or other observers, such as journalists.

In his "Autopoiesis in Law and Society: A Rejoinder to Blankenburg" Teubner confirms that he adopted autopoiesis as a "heuristic device" in an "experimental manner" for legal study even though it was originally "formulated by biologists".¹⁷¹ He says:¹⁷²

If the legal system is organized autopoietically ... it does not directly regulate social behavior. Rather, it formulates rules and decisions with reference to an internal legal representation of social reality. It is for this reason that legal models of the social world are crucial. ... the quality of the legalization process may change if the legal system becomes aware of the autopoietic character of its surrounding social systems and adapts its normative structures to it.

It is clear that the relationship between a legal code and a legal system or a legal system and the social environment is not a linear one, but is based on what Teubner, as referred to earlier, called "structural coupling" which "involves the multiple membership of legal communications in other autonomous domains".¹⁷³ This is well understood as part of the social reality of the legal subject matter.

Nevertheless, in reference to the questions asked in this thesis it is clear that Luhmann and Teubner's descriptions needed deeper exploration. They had shown how communications occurred within the legal system in relation to its social domain but had not, however, considered whether transformations, either to legal system or legal context, may be desirable at all times, especially if they are 'perturbations'. And, the related question that, rather than just observing them, could legal theorists intervene, that is, does legal praxis have a role to play?

Physicist Hugo Urrestarazu, in relation to "the conditions of emergence of long-lasting self-organised dynamic systems", makes the point that one of the threats to the persistence of a stabilized configuration of relations resulting in reducing a system's

¹⁷¹ Gunther Teubner "Autopoiesis in Law and Society: A Rejoinder to Blankenburg" (1984) 18 Law & Soc'y Rev 291 at 292 (citations omitted).

¹⁷² At 297, 300.

¹⁷³ Peltu (ed), above n 163, at 5–6.

lifespan was "unpredictable disrupting effects produced by environmental encounters".¹⁷⁴ In order to mitigate this threat he said:¹⁷⁵

... homeostatic dynamic structures [are those] in which some self-sustained structure determined mechanisms are always available to compensate for disruptive external interactions. ... We need to search for a describable feature of the dynamic system that remains invariant throughout all the history of state transitions affecting its components.

Apart from constructing robust "boundaries", the technique of "self-healing"¹⁷⁶ can be used also as a more accurate expression of the way in which any autopoietic system is able to mitigate (or compensate for) any external threat caused by environmental encounters.¹⁷⁷

In his critique of Luhmann, Matej Makarovič asks whether modern society can be defined, as Luhmann does, "on the basis of ... *functional* differentiation".¹⁷⁸ He sees Luhmann's view as being quite different from the hierarchical theorists like Marx and the feminists who consider society as class-based or gender-based emanating from the role divisions in society. The weakness in Luhmann's theory is that he does not differentiate between stratificational differentiation and social inequality, says Makarovič.¹⁷⁹

Andreas Fischer-Lescano takes the criticism of Luhmann a step further by referring to Critical Systems Theory.¹⁸⁰ He says that Critical Systems Theory does combine other developments which bring Luhmann's perspective "right-side up".¹⁸¹ Using the Frankfurt School as his basis for the analysis, Fischer Lescano says that the proponents of this School attempt a detailed analysis of society as a system and look

¹⁷⁴ Hugo Urrestarazu "Autopoietic Systems: A Generalised Explanatory Approach – Part 2" (2011) 7 Constructivist Foundations 48 <www.univie.ac.at/constructivism/journal> at 48. Urrestarazu was a teacher-researcher in nuclear and solid state physics at the Universidad de Chile and was a student of Maturana's and colleague and friend of Varela in the 1970s.

¹⁷⁵ At 52.

¹⁷⁶ Term used by physicist Noel Livick in exchange of communication, Livick/Shameem, February 2015.

¹⁷⁷ To stop the organism from disintegrating out of existence.

¹⁷⁸ Matej Makarovič "Some Problems in Luhmann's Social Systems Theory: Differentiation, Integration and Planning" (2001) 17(37–38) *Družboslovne razprave* 59 at 60 (original emphasis).

¹⁷⁹ At 60.

¹⁸⁰ Andreas Fischer-Lescano "Critical Systems Theory" (2012) 38 PSC 3.

¹⁸¹ At 4.

for strategies for de-reification, its common starting point being social differentiation. He points out that Luhmann, in his "introduction of the concept of self-reference, avows to preserve the Marxian notion of society as 'self-abstracting categorizing, thematizing social systems'".¹⁸² Quoting Marx he says that "[n]ot only is the individual the 'ensemble of ... social relations'" but "society is also the ensemble of societal subsystems", and that "[u]ltimately, this makes it impossible to understand society by merely focusing on the individual".¹⁸³

He refers to Teubner as stating:¹⁸⁴

With polycontexturality understood as the emergence of highly fragmented intermediary social structures based on binary distinctions, society can no longer be thought of as directly resulting from individual interactions, and justice can no longer be plausibly based on universalizing the principle of reciprocity between individuals.

Fischer-Lescano adds that "'[c]apitalism' then does not delineate a scheme of determination in the interplay between base and superstructure, but a specific form of system arrangement in a differentiated world society."¹⁸⁵ In reference to legal systems, he says that critical systems theory pleads "against an administrative science of justice".¹⁸⁶ In order to make "societal struggles in law" recognizable it has to establish "the preconditions for the mutual safeguarding of spaces of autonomy and by way of an experimental 'conditional freedom' which enables societal self-regulation".¹⁸⁷

In reference to the significance of this point for 'constitutionalization', Fischer-Lescano says:¹⁸⁸

By generalizing and respecifying the function of constitution as an evolutionary achievement, societal processes of constitutionalization are meant to be supported, stabilized and made permanent. Their core concern is to keep societal institutions socially responsive ... be it through the

¹⁸² At 6.

¹⁸³ At 7 (citation omitted).

¹⁸⁴ At 7 (citation omitted).

¹⁸⁵ At 7.

¹⁸⁶ At 11.

¹⁸⁷ At 13 (citations omitted).

¹⁸⁸ At 14 (citations omitted).

immediate commitment of private actors to human and fundamental rights
... , through the commitment to environmental rights

What this means is that one must be involved in the "opening-up of societal structural decisions about the democratic process through the development of world societal constitutional rights, which set free the potential of global civil society to safeguard autonomy".¹⁸⁹

However, how is all this to be achieved in reality and in the practical sphere of constitutionalism? In a relevant paper, Zvonimir Lauc,¹⁹⁰ in relation to the Republic of Croatia, said that in terms of utilization of a theoretical basis for drafting a constitution, reference had to be made to (among others) the "modern theory of autopoiesis".¹⁹¹ He states:¹⁹²

The true local and regional self-government in the autopoietic concept has the crucial place and role on this path. Furthermore, we proceed from the hypothesis that the alopoeitic institutions have dominated in the past development, and that there was neither conception nor place for the autopoietic institutions. In other words, *in today's information society, which is horizontally netted, the autopoietic system should be dominant, where one starts from the self-organization, the conception (the system theory) of which is holistic and which is based on a cause-teleological interpretation.* In such an atmosphere there is a higher chance for the constitutional engineering, when we can choose the best (the theory of choice), with an adequate evaluation of the components and the whole.

It is obvious that, in any context, the existence of a constitution indicates the existence of a 'legal system'. That in itself draws a legal researcher into the realm of a particular perspective in order to explain how a legal system may need a constitutional document to solidify or manage relationships within that system.

However, recent scholarship shows that the traditional formats of constitutions which normatively establish separation of powers and a hierarchical structure of duties and obligations, even within a 'rights framework', may no longer be satisfactory for a situation where the nation state idea is not only threatened from within but also from

¹⁸⁹ At 14 (citation omitted).

¹⁹⁰ Professor of Constitutional Law at the Josip Juraj Strossmayer University Faculty of Law Osijek.

¹⁹¹ Zvonimir Lauc "The Vertical Separation of Powers" (paper presented at the World Congress of the IACL, Oslo, June 2014) at 18.

¹⁹² At 18–19 (original emphasis).

the effects of globalisation which include development of transnational laws, such as commercial law or human rights law.

In new work on constitution making in societies which did not have a formal constitution previously, this deficiency in philosophical foundations is evident.

In her "Written Constitutions: Principles and Problems" Dawn Oliver, in reference to a proposed United Kingdom written Constitution, and taking several options into account,¹⁹³ states that it should contain the following:

(i) assuring the legitimacy of constitutions; (ii) extent of justiciability of constitutions; (iii) extent of detail provided in constitutions; (iv) the extent of entrenchment and hierarchy of laws; and (v) extent of political neutrality desirable in constitutions.

Stating that the constitutions should assure 'legitimacy' it is clear that what Oliver means by this is the 'will of the people'. However Brookfield has shown that democratic majoritarianism is not automatically evidence of legitimacy. In Oliver's work there is no mention of 'justice' as a core feature of a proposed UK Constitution. Robert Blackburn, also in relation to a UK Constitution, expresses more of a principle-based approach. In "Enacting a Written Constitution for the United Kingdom" he says the Magna Carta has imported the principles of "rule of law", "fundamental rights of the people" and "government by agreement and consent".¹⁹⁴

A written Constitution would first identify the boundaries of what is considered to be 'constitutional' in scope and thus would include the core principles and values underlying the UK's political and legal culture in the Preamble or component parts for example, the method of protecting civil liberties and human rights in the UK.

In our region of the world the norm has moved towards a more conventionally structured and hierarchical constitution. In *A Constitution for Aotearoa, New Zealand*, Geoffrey Palmer and Andrew Butler deal exclusively with constructing a

¹⁹³ The three proposals were (i) The Macdonald Constitution (1990); (ii) Tony Benn's Constitution (1991); and (iii) the IPPR Constitution. Dawn Oliver "Written Constitutions: Principles and Problems" (1992) 45 Parliamentary Affairs 135 at 136.

¹⁹⁴ Robert Blackburn "Enacting a Written Constitution for the United Kingdom" (2015) 36 Stat LR 1 at 1.

written constitution for New Zealand without extrapolating general principles.¹⁹⁵ While it would reference the "sound elements of our past",¹⁹⁶ they say, it would also anchor structure and function to place New Zealand on a firmer constitutional foundation. However the draft constitution that the authors offer places the Bill of Rights (a Natural Law phenomenon) at the end of the document with Parliament having a final say. Thus Palmer and Butler's constitution would be placed on the list of positivist constitutions.

In countries which already have written constitutions judges have taken the opportunity (sometimes in a crisis) to interpret certain provisions and even to decide whether to strike down purportedly inconsistent legislation in cases before them. One such case is the 675 page decision of the Indian Supreme Court in *Bharati v State of Kerala* delivered on 24 April 1973.¹⁹⁷

By a narrow majority (7-6) the Court established what is called the *Basic Structure Doctrine of the (Indian) Constitution*. The court said that while parliament could abridge and amend the Constitution of India it could not do so outside the broad contours and structure of the Preamble and, while Parliament had broad powers, it did not have the power to emasculate or destroy the fundamental features or basic structure of the Constitution which it listed as including fundamental rights and freedoms, separation of powers and judicial review of amendments to the Constitution or any law that would have that effect. Parliament had unfettered rights but could only limit fundamental rights in the public interest.

In reaching this conclusion with the slight majority of others on the bench, Chief Justice Sikri surveyed the work of philosophical theorists such as Bentham and Austin, other eminent jurists, and decisions from the courts of the United States, Australia and Canada.

The relevance of this decision is perhaps only for countries, like Fiji, which have experienced a long, somewhat turbulent, history of written constitutions. The centrality of rights has been a matter of much discussion. Sir Robin Cooke (as he was then) of New Zealand expressed it in these terms in *Taylor v New Zealand Poultry Board*: "Some common law rights presumably lie so deep that even Parliament could

¹⁹⁵ Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa, New Zealand* (Victoria University Press, Wellington, 2016).

¹⁹⁶ At 7.

¹⁹⁷ *Bharati v State of Kerala* [1973] 4 SCC 225.

not override them.”¹⁹⁸ In an important speech, titled “Fundamentals: A Constitutional Conversation”, the Chief Justice of New Zealand, Dame Sian Elias, also made similar comments about the relationship between the judiciary and parliament in the matter of fundamental rights.¹⁹⁹

The philosophical question of 'legitimacy/legality of a Constitution' does not rest merely on 'consultation' and the "will of the people"²⁰⁰ but also on "framework",²⁰¹ as Oliver states in her article reviewed above. However, the question of 'legitimacy/legality' can also be considered from different perspectives depending on whether one is embarked on writing a brand new Constitution where none existed before, or whether one has to consider how amendments to a Constitution, which has already been through the process of public consultation previously, should be treated, as the Indian Supreme Court did.

Hence, in drafting a new Constitution, what is required is Loughlin's "Constitutional Imagination" to centre the notion of integration and public service into a constitutional document. The framework of a constitution would then base itself on the assumption of 'legitimacy', the core value of which arose in the natural law principles of 'justice' (and morality)²⁰² as well as legal praxis.

B Drafting a Fijian Constitution through Autopoiesis

Autopoiesis is the strategy of showing how a system survives. Despite changes or 'perturbations' if a system's identity survives it will also survive. The Indian Supreme Court had identified, through its development of the Basic Structure Doctrine, how the courts would ensure that the Indian Constitution would survive amendments by Parliament which normally had unfettered power over legislation.

¹⁹⁸ *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398.

¹⁹⁹ Sian Elias, Chief Justice of New Zealand “Fundamentals: A Constitutional Conversation” (Harkness Henry Lecture, University of Waikato, Hamilton) was published in the Waikato Law Review. Sian Elias “Fundamentals: A Constitutional Conversation” (2011) 19(1) Waikato L Rev 1.

²⁰⁰ Oliver, above n 193, at 139.

²⁰¹ At 151.

²⁰² 'Morality' is often confused with religious morality, hence the lack of attention to this concept in recent scholarship. However, we have seen that in recent scholarship 'morality' is defined as 'rights'.

In an article entitled “Physical Basis for the Emergence of Autopoiesis, Cognition and Knowledge”²⁰³ William Hall says that “autopoiesis increases the fitness of the environment to support (itself)”.²⁰⁴ Hall explains this unique phenomenon in more detail:²⁰⁵

Stabilised autopoietic systems are those complex entities whose tentative solutions embodied in self-regulatory feedback enable them to persist indefinitely in the face of at least some system disturbances, thereby establishing lineages through historic time. At this stage survival knowledge is embodied in the fitness of the component subsystems and their networking to participate in self-regulation and self-production of processes within the entity. Those entities that fail to solve new problems dis-integrate and lose the historical successes of their embodied solutions. Successfully stabilized autopoietic systems may grow to the point where physical perturbations such as turbulent sheering cause fragmentation. If the network of processes producing autopoiesis is distributed, fragments may retain enough components of the necessary processes to continue autopoiesis – thus multiplying the number of entities sharing “inherited” knowledge that survives fragmentation.

Hall goes on to describe dispositional autopoiesis as that which carries survival components in its structure:²⁰⁶

[This] refers to the state where autopoiesis lineages perpetuate historically successful solutions for survival into their self-produced processes and material structure as tested compositional inheritance (i.e. structural or dispositional knowledge ...). Where self reproduction becomes common, competition is inevitable for limiting environmental resources of exergy and material components required for self-production, growth and replication such that lineages begin to be starved for energy and resources and disintegrate.

²⁰³ William P Hall “Kororoit Institute Working Paper No 2: Physical Basis for the Emergence of Autopoiesis, Cognition and Knowledge” (24 November 2011) Kororoit Institute Proponents and Supporters Assoc Inc <<http://kororoit.org>>. Hall is an Evolutionary Biologist and Organizational Theorist at the Melbourne School of Engineering. His article is quite detailed on the different formulations of autopoietic content, mainly in science; however, I have used only those aspects of his work which would assist in identifying the elements of an autopoietic constitution.

²⁰⁴ At 23. This is clearly to avoid disintegration.

²⁰⁵ At 24.

²⁰⁶ At 24. The term “exergy” refers to usable energy.

He says:²⁰⁷

It follows that coalescent entities with favourable structures will ‘live’ for increasingly long stretches of time, until lineages are formed that do not readily dis-integrate. These surviving lineages establish continuous historical heritages. Survival knowledge continues to accumulate in an organized state with an unbroken history (i.e. heritage).

Hall says this is linked to reproduction of the structure and components of the organism beyond fragmentation:²⁰⁸

... with historical continuity, re-production begins to play a role. In its simplest form (i.e. requiring the least knowledge beyond the state of flux close to equilibrium), reproduction would probably involve nothing more than incorporating additional components in favourable ratios and structural locations to grow larger until the assemblage becomes physically unstable and fragments into pieces. If at least some of the fragments retained enough of the favourable structural organization to maintain an autopoietic existence, those histories would be preserved and added to. Even this nearly chaotic form of replication would serve to multiply the history of solutions that worked.

And:²⁰⁹

... as long as some lineages survive, those that do survive will continue to accumulate more and more survival knowledge Also, in the early days of this process when autopoietic systems do not survive for long, disintegrating systems will return their once functional components to the medium, thus maintaining or even improving favourable conditions for them.

Physicist Hugo Urrestarazu goes deeper into the survival techniques of autopoietic lineages by stating that at the heart of the theory of autopoiesis is “organizational variance” which is “a general dynamic ... following a path of structural changes and, at the same time, manifesting conservative properties” to survive.²¹⁰

²⁰⁷ At 26.

²⁰⁸ At 26.

²⁰⁹ At 26.

²¹⁰ Urrestarazu, above n 174, at 50.

He says:²¹¹

The particular way in which self-organisation manifests itself is structure determined. ... [i]n the most general case, any component of the system could interact with dynamic objects existing in the environment, provided that they reach states compatible with the occurrence of such interactions (which depend on the nature of the underlying interaction mechanisms). These interactions may either lead the composite unity to disintegrate or to evolve into new steady state configurations.

Urrestarazu says that one of the threats to the persistence of a stabilized configuration of relations, resulting in reducing a system's lifespan is the "unpredictable disrupting effects produced by environmental encounters".²¹² In order to mitigate this threat he says:²¹³

The first approach is to think about homeostatic dynamic structures in which some self-sustained structure determined mechanisms are always available to compensate for disruptive external interactions. ... We need to search for a describable feature of the dynamic system that remains invariant throughout all the history of state transitions affecting its components.

He says that organisational variance could be limited by creating a "boundary".²¹⁴

We can imagine some possible ways by which a system may achieve long-lasting stability. One way could be, for example, to limit the impact of external interactions by reducing somehow the scope of the propagation of triggered transitions within the interaction network so that their causal effects produce only minor perturbations to the dynamic structure. A minor perturbation is an interaction that modifies the topology of the network of relations only locally, leaving the rest of the structure unchanged. This consideration has led many authors to focus on the role that a protecting "boundary" could play in limiting the effects of external potentially disruptive interactions with the environment.

Urrestarazu says the boundary would be like a 'frontier' which can prevent

²¹¹ At 51 (original emphasis).

²¹² At 52.

²¹³ At 52.

²¹⁴ At 52.

perturbations from destroying the organisms by reacting to them in specific ways.²¹⁵

A dynamic system can achieve a global state in which some of the components reach states in which they do not interact with environmental dynamic objects and some of the components reach states in which they interact with environmental dynamic objects only through “local” neighbourhood causation ...

And:²¹⁶

Thus, we can say that this “specialized” substructure constitutes an instantaneous “frontier” between the system and the environment. Furthermore, if these “local frontier” interactions do not induce disruptive causation propagation within the whole dynamic structure, we can say that the “frontier” components act as a shield for the whole causation network with respect to cause-effect couplings originated by triggering transitions undergone by “external” dynamic objects.

Thus, he says, the ‘boundaries’ are also invoked as a ‘mediating structure’ for the interaction of the system with its environment. Simply put, a boundary can do three things- (i) it can interact with one core component either directly or indirectly via another boundary component; (ii) it can absorb an external interaction if, after the occurrence of the interaction it reaches a state in which it interacts only locally with neighbour core components but may induce the propagation of chained interactions in the boundary so that the propagation does not reach core components; and (iii) it can transmit an external interaction if, after the occurrence of the interaction, it reaches a state in which it provokes the propagation of internal chained interactions to the core of the dynamic structure.

What is apparent from Urrestarazu’s physical science-based analysis is that one could devise a series of protections that maximize the opportunity of survival and reproduction rather than fragmentation (without (re)production in the fragmented components) or disintegration.

²¹⁵ At 52. The term “local” means “direct cause-effect coupling between dynamic objects, not necessarily to spatial vicinity”. He says “the components that constitute the boundaries of the unity constitute these boundaries through preferential neighborhood relations and interactions between themselves ... if this is not the case, ... the observer is determining its boundaries, not the unity itself”.

²¹⁶ At 53.

He also says that:²¹⁷

The capability of a system to compensate for disruptions provoked by successive external interactions by maintaining an interrupted succession of steady states is a conservative property of the system. ... it [only] means that the flow of interactions continuously produces new topological arrangements of the network of relations in such a way that all global states reached are steady states, whatever the configuration may be at a given time.

When a composite unity shows this kind of behaviour and is also capable of producing a structure determined compensating mechanism that is repeatedly available after each graph rearrangement then we can say that the composite unity conserves a particular kind of configuration of relations, namely its organization (for a specific type of interaction with the medium).

The maintenance of the configuration of relations that define the system as pertaining to a specific class of systems means conservation of its organization. Here, the class of system being considered is composed of all those systems that, due to their internal dynamics, evolve, moment by moment, by reaching successive global steady states, and are provided with compensating mechanisms repeatedly available after each graph rearrangement provoked by external perturbations. This is the invariant feature that we were searching for. The system behaves as an autonomous homeostatic “device”, where the “self-controlled” variable is its own organization. Everything can change: structure, component membership, medium objects; but the organization is preserved as long as a compensating mechanism is available after each encounter with the medium.

Clearly, given the technical description above, one can see why the natural sciences' conceptualisation of autopoiesis has not always been appreciated by social scientists. Michael King says:²¹⁸

The origins of autopoiesis within the biological sciences has, not surprisingly, given rise to much critical comment. For some social scientists any theory which draws upon biological models smacks of *social Darwinism*, and for that reason alone must be suspect. Such sweeping

²¹⁷ At 56.

²¹⁸ King, above n 156, at 221 (original emphasis).

criticisms tend to be made by people who have decided to dismiss the theory out-of-hand.

However, obviously, if social scientists had moved beyond considering autopoiesis for interpreting only the external relationship or communication between different (autonomous) systems,²¹⁹ they might not have dismissed it as merely a socio-biological theory. The significance and relevance of the biological and physical sciences analysis of autopoiesis to the internal dynamics of a socio/legal construct such as a constitution, has not, so far, been comprehensively considered by social science theorists.

Thus for drafting a Fijian Constitution the strategy of using autopoiesis as a drafting methodology is useful. Autopoiesis does not abandon structure or organisation of a constitution (or legal system). It identifies, however, a core identity that employs survival techniques to withstand perturbations that may come to destroy the constitutional organism.

My contention is that 'justice' forms the identity of a legitimate constitution.

In this chapter I make the point that only a variety of methodologies, in combination, can fruitfully be employed to answer the thesis questions of whether there could be a single idea that can be identified as being the best principle on which a constitution can sustainably rest or depend and through which it can survive despite interferences or 'perturbations'. This would grant that constitution legitimacy which, in fact, would fulfil the requirements of legality also. In the minds of those of us who have had to face and resist constant political upheavals due to constitutional crises there can be no disjunction between natural law and positive law, between legitimacy and legality, between theory and praxis and between constitutional structure/function and content. Constitutional formation is not just a theoretical perspective. It also arises out of lived experience of injustice and a decided social and legal movement towards realising justice, the core concept of which, though understood in a personal sense, is not appreciated as one that drives history towards its logical destination, namely legitimacy of a legal order, as the next chapter on the 'concept' of justice will show.

While these methodologies have been considered here in discrete sections due to the autonomous legal philosophies they bring to bear on the thesis question, it is clear that there are fewer substantive boundaries or demarcations between them than were

²¹⁹ For example, between the economic or political system and the mode of production.

originally thought. The internal contradiction between Legal Praxis and Systems Theory can be resolved through the legal contingency perspective and the distinction between Natural Law and Positive Law can be narrowed through use of certain drafting techniques in law making and decisions of the judges in constitutional cases for example in *Mitchell*. While legality and legitimacy in the literature and case law appear to be quite separate, in fact it is obvious that courts have also determined that Kelsenian positivist effectiveness (defining legality) was affected by questions of 'justice and morality' which normally define 'legitimacy'.

Finally, the 'constitutional imagination' required to draft a different type of constitution with justice as its core, that is, one that is not hierarchical or vertical, but still structured, would include applying the technique of autopoiesis, originating in the science of organisms where closed and open systems are in a constant inter-play for the purposes of survival and by identifying a core invariant element or *identity* that the system constantly moves to protect against disintegration.

It will be obvious by now that all the writers and thinkers surveyed in this chapter have used the word 'justice' without any real explanation or detail of what this word might mean. From a subjective point of view, 'justice' means different things to different people. This difference is particularly stark in law and legal systems where the concept is riddled with political influences and is used loosely or carelessly to mean 'the rule of law' or where despots use the idea of justice to enact oppressive law.

The centrality of the notion of justice in the methodological spheres explored in this chapter shows that one can now consider whether there is a definition of 'justice' that is consistent throughout time, space and ethnic or cultural variations. If such a core principle of justice is identified common to all humankind, it may pave the way to considering how it may be autopoietically structured into a legal framework and be maintained by consent as the 'invariant feature' in any constitution, in this case the Fijian Constitution.

The meaning of 'Justice' over time and space is discussed in the next chapter.

III Chapter 2 The Concept of Justice

Legal sociology needs to develop a concept of justice which is specific to the law, that is, juridical justice. This does not mean, of course, that law monopolizes justice. Rather, that in contemporary society, different concepts of justice co-exist in different contexts, with no meta-principle that could give them unity.²²⁰

While, at a glance, Gunther Teubner's words may illustrate that the concept of justice is culturally specific, in fact the proposition that he puts forward is a little more complex. He sees justice as law's contingent side, that is, that law needs justice to improve itself. This perspective requires more discussion, alongside another view, though linked, expressed by Surendra Bhandari, that justice is law.

(i) Justice and law

Gunther Teubner's reference to 'juridical justice' above takes as its starting point Niklas Luhmann's sociological concept of justice as "law's contingency formula".²²¹ Teubner says that:

Justice as contingency formula is not justice immanent to the law but a justice that transcends the law. Internal consistency plus responsiveness to ecological demands- that is the double requirement of juridical justice.

In his "Alienating Justice: On the Social Surplus Value of the Twelfth Camel" Teubner says that constitutional rights protect social differentiation from destroying itself and societies:²²²

In long lasting political fights, constitutional rights emerge as social counter-institutions protecting social differentiation against its inherent self-destructive tendencies. Individual conflicts between private citizens

²²⁰ Teubner, above n 141, at 6.

²²¹ Niklas Luhmann *Law as a Social System* (Oxford University Press, Oxford, 2004) at 211 as cited in Teubner, above n 141, at 8.

²²² Gunther Teubner "Alienating Justice: On the Social Surplus Value of the Twelfth Camel" in David Nelken and Jirí Pribán (eds) *Consequences of Legal Autopoiesis* (Dartmouth, Aldershot, 2001) at 9.

and administrative bureaucracies are transformed in legal institutional support of political self restraint.

Debates about the quality and conditions of justice have been influencing social theories for some time. In “The Ancient and Modern Thinking about Justice: An Appraisal of the Positive Paradigm and the Influence of International Law” Surendra Bhandari begins with Gautama Buddha's idea that law is the law of justice.²²³ It means "fair reward' and proper punishment". It also includes defying the law if the law is “evil”.²²⁴ According to Bhandari, Confucius, on the other hand, saw justice in the form of a justified duty that would lead to the welfare of both individual and the state. It was the standard of governance for Confucius but in all other respects his idea was similar to that of Buddha. Bhandari says that Confucius also "connected the idea of justice with reason".²²⁵

For Plato, says Bhandari, a constitution could be a source of justice or injustice. If laws legitimize unjust, discriminatory, or exploitative provisions, they may serve injustice. Referring to Aristotle, Bhandari says that he had powerfully argued that all lawful and fair acts are just and all unlawful and unjust acts are unfair. The problem is, as Bhandari states: “In this sense, the idea that law in itself is justice has been ignored under the Aristotelian framework of justice.”²²⁶

Jeremy Bentham and John Stuart Mill, says Bhandari, show that justice is meant to obey law and if the law is bad, there should be an endeavour for the alteration of the offending law so that human relationships are conducted purely on the basis of law and rights. Unlike Bentham, says Bhandari, Kant, for whom morality is what the positive law dictates, instead offers the idea of the supremacy of moral laws (laws of reason) over positive laws.

Bhandari then goes on to analyse John Rawls' Theory of Justice. He says that Rawls departs from the Kantian conception of justice by claiming that justice as fairness is not a metaphysical conception (a categorical imperative) but a political conception of

²²³ Surendra Bhandari “The Ancient and Modern Thinking about Justice: An Appraisal of the Positive Paradigm and the Influence of International Law” (2014) 13 *Ritsumeikan Annual Review of International Studies* 1.

²²⁴ At 6.

²²⁵ At 7. Bhandari says that the notion of "reason" is "complex" and cites the book, Michael Oakeshott *Rationalism in Politics and Other Essays* (Basic Books Pub Co, New York, 1962), in which he says Oakeshott "has brilliantly explored the complexities of reason". Bhandari, above n 223, at 7, n 12.

²²⁶ Bhandari, above n 223, at 13.

a liberal democracy. As a metaphysical concept the idea of justice always placed priority on the laws of reason (moral laws) over the positive laws. At the end, says Bhandari, Rawls argued that in debating justice and rights, we should set aside our personal, moral and religious convictions and argue from the standpoint of a political conception of the person, independent of any particular loyalties, attachments, or conception of the good life. The demand that we separate our identity as citizens from our moral and religious convictions means that when engaging in public discourse about justice and rights, we must abide by the limits of liberal public reason.

Bhandari says that, unlike Rawls, Michael Sandel considers justice as relative to social good and not independent of it.²²⁷ He asks: “Why should we not base the principles of justice that govern the basic structure of society on our best understanding of the highest human ends?”²²⁸

Bhandari then considers the work of Indian economist Amartya Sen whose book *The Idea of Justice* was considered to be the best theory since that of John Rawls.²²⁹ Sen considers reasoning as a central instrument to understanding justice. This is particularly important, he says, in a world of unreason. Sen says that with reason, justice can be promoted and injustice contained.

Having surveyed the main propositions of justice in the literature of the philosophers and theorists, Bhandari then goes on to propose that law is justice or that what is meant by justice is law. This proposition broadly identifies justice as the facts and processes of the creation, protection, promotion, and enforcement of rights, duties, and institutional responsibilities. Accordingly, he says, the idea of justice cannot be conceived beyond the positive domain of law. But, he also asks, what about justice if the law itself is undemocratic, oppressive, treacherous, and unjust? In other words, should laws be good to ensure justice?

Bhandari uses the example of the case of *Brown v Board of Education* in the United States prior to which racial discrimination in schools was both ethical and legal.²³⁰ He asks, “[h]ow would the justice theories that [he] has canvassed address the issue of good law, especially when the law itself is contested?”²³¹ For Buddha this required a

²²⁷ At 28.

²²⁸ At 28, n 93.

²²⁹ Amartya Sen *The Idea of Justice* (Harvard University Press, Cambridge, 2009).

²³⁰ *Brown v Board of Education* 347 US 483 (1954) as cited in Bhandari, above n 223, at 36–37.

²³¹ Bhandari, above n 223, at 37.

transformation of the individual, in Confucius a good ruler, in Socrates it was considered a virtue to obey a law unto death, and in Aristotle it was reason.

To consolidate the ideas of justice so that the law itself consolidates it, Bhandari offers the following:²³²

The dynamics of justice thus need to be examined in encompassing three important processes for good laws: demands, arrangements, and realization. ... demands imply creation or recognition of rights, duties, and institutional responsibilities ... [a]rrangements are those institutional aspects that take responsibilities in realizing or enforcing the demands, [and] [r]ealization is an end, i.e., symbolically the supply side that fulfills all necessary conditions for the full enjoyment of rights, duties, and institutional responsibilities.

He says that this process (above) “thoughtfully demands a critical role for legitimacy, validity, and enforceability in ensuring good laws”.²³³

However, Teubner's “Self-subversive Justice” takes the notion of legality and justice a little further than Bhandari which is descriptive and serves as something of a critique, as well as being prescriptive. Teubner says that the:²³⁴

... ecological orientation of the law in the broadest sense is probably the most important aspect that systems theory, with its insistence on the system/environment distinction, adds to the debate on justice. Justice redirects law's attention to the problematic question of its adequacy to the outside world.

He says that justice is confronted with the primary closure of law as identified by recursive chains of court judgments, legislative and contractual acts. Such operative closure of law has become in itself a major source of injustice. But, as Teubner says, the discourse of justice has the capacity of transcending the boundaries of law through 're-entry' of the extra-legal into the legal.²³⁵

Whenever the distinction between legal and non-legal (in the sense of extra-legal, not of illegal!) re-enters the sequence of legal operations, legal

²³² At 38.

²³³ At 38.

²³⁴ Teubner, above n 141, at 10.

²³⁵ At 11.

argumentation gains the capacity to create an 'enacted' environment, by distinguishing between norms and facts, between internal legal acts and external social acts, between legal concepts and social interests, between internal reality constructs of the legal process and those of social processes.

Teubner says:²³⁶

That is the moment in which the discourse on justice confers judgement on these distinctions and raises the question of whether legal decisions are doing justice to their 'enacted' ecologies.

Then Teubner says:²³⁷

At this point, a theory of justice is directly subsidised by social theory. ... While the *justitia mediatrix* of the middle ages mediated in a vertical-hierarchical mode between divine, natural and human law, the justice of modernity mediates in a horizontal-heterarchical mode between the proper normativity of the law and the proper normativity of its social, human and natural ecologies.

Teubner then asks whether this is a new natural law which replaces god, nature and reason by differentiation of principles of society, a sociological concept of natural law. He says that:²³⁸

... this concept of justice undercuts the distinction between positivism and natural law and declares them both right and wrong. It shares with natural law the impulse that justice searches for an extra-legal orientation, but with positivism it has in common that the search for justice can only be done by the law itself, not by external authorities whether god, nature or natural reason. Justice turns against natural law when it refutes the idea that outside authorities will furnish substantive criteria of justice. But it turns also against positivism insofar as justice is not something that can be produced by a legal decision.

He says that, "[i]nstead, justice is sabotaging legal decisions. ... Justice works as a subversive force with which the law protests against itself. ...

²³⁶ At 11.

²³⁷ At 12.

²³⁸ At 12–13.

Subversive justice stirs up the law”.²³⁹ As he says at the end, “[i]t is law itself that puts the law on trial.”²⁴⁰

But, Teubner says:²⁴¹

Law's search for justice cannot externalise its criteria, cannot put its hope in either democracy or morality, not to speak of rational choice, but is thrown back onto itself. By enacting its ecologies, law alone bears responsibility for its criteria of justice.

Referring to Derrida's work on “transcendence” of the knowledge world into spheres beyond their boundaries, Teubner says that “[j]ustice begins where law ends.”²⁴² Furthermore, he says, “[i]n short, justice would be a process of transformation of law possible only by going through the real experience of injustice.”²⁴³

Teubner then goes on to say that: “In aspiring to justice, law does not have at its disposal much power or influence. It has comparatively impoverished operations and structures – legal acts and legal rules.”²⁴⁴ But the constraints that justice places on the law places the law “under enormous pressure to innovate” says Teubner.²⁴⁵ That means chances of improvement.

Yet, at the same time, “[g]eneral and generous principles can be inverted in their application. Every generous thought is threatened by its own Stalinism.”²⁴⁶ He dismisses the “human rights ideology as the ideal of a just society, calling it “justicialization” as an attempt to bring the whole of society to justice with juridical instruments- representing the “imperialism of juridical justice”.²⁴⁷

Clearly, Bhandari and Teubner look at justice differently. Bhandari says that there is a certain quality to the definition of justice that is universal- with legitimacy (democratic process), validity and enforceability as the ultimate criteria of justice. Teubner, on the other hand, says that the idea that there is universal justice is a fallacy

²³⁹ At 13.

²⁴⁰ At 16.

²⁴¹ At 17.

²⁴² At 18–19.

²⁴³ At 20.

²⁴⁴ At 20.

²⁴⁵ At 21.

²⁴⁶ At 21.

²⁴⁷ At 21.

for the simple reason that aspiring to a universal idea of justice can create the conditions for injustice. Instead, Teubner says it is important to distinguish between higher and lower degrees of juridical justice.²⁴⁸ But at another level, I believe it is not only that. It is important to have an idea of a goal of justice because, from a legal praxis sense, that becomes a rallying cry across the board (say against exploitation). However, it is also important to realise that this so-called common idea can cause problems if, for example, democracy which everyone thinks is that criteria, does not provide justice but delivers injustice as in Hitler's regime and in South Africa recently.

This leads to another reported divide- that of legality/legitimacy. The question is whether legitimacy and legality are in fact the same thing if one is to consider the ideas of both Bhandari and Teubner on justice? I think it is important not to lose sight of two aspects in any analysis of law and justice: (i) that rules, processes and enforceability of the rules are indispensable because society needs to function in an orderly way with consistency, clarity and certainty in the application of law; and (ii) despite the orderliness of the structures and processes of the law, law is not automatically the delivery of justice.

The fact that law and justice do not necessarily coincide was starkly shown in Nazi Germany during the height of Hitler's absolute power. The Nazi laws of Nuremberg were racist laws properly passed. Hitler was properly appointed Chancellor. Though Hitler came second in the elections the Nazi Party had gained the majority of seats in the Reichstag by 1933. Nevertheless, Nazi law de-naturalising Jewish nationals was discussed in *Oppenheimer v Cattermole*, where the House of Lords (Lord Chelsea) said, "a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all", though Oppenheimer had to pay the tax claimed on his pension by the tax department.²⁴⁹ That statement shows a time when law and justice were considered to be, by the House of Lords, inseparable.

It seems, if one sees Teubner's perspective as being useful to expressing the relationship between law and justice, the concept of justice will keep the closed nature of law sufficiently open in the public interest, or perhaps as a demand from the body politic, to balance law's excesses.

²⁴⁸ At 22.

²⁴⁹ *Oppenheimer v Cattermole* [1976] AC 249 (HL) at 278.

Given the survey above on the relationship between law and justice and the obvious disjunction and conjunction between them, this chapter considers this (vexed) relationship in history. It must be acknowledged that discussions of justice cannot be confined merely to western contexts. Thus, an important question is whether the term 'justice' is culturally specific or whether it may be a universal presumptive value of humanity despite its contingent positioning. The survey will highlight whether there is such a definition that would satisfy even Teubner's notion of a subversive justice which reveals the internal paradox in law.

For the sake of convenience the survey of the notion of justice provided in this chapter is chronologically presented. However, the account is based on the themes expanded by Bhandari and Teubner- that society needs to function according to some orderly legal process (Bhandari) but that the law itself searches for justice which is the re-entry of the extra-legal into the legal (Teubner).

Thus, from ancient to modern times, while strict application of law in societies was necessary and inevitable, at the same time there were periods when justice could be regarded as 'law's contingent formula'. Justice then changed the law. The question is whether the definition of justice itself developed in an incremental manner so that constitutional writers such as Loughlin can now refer to an "aspirational" constitution with a particular definition of justice forming its identity.²⁵⁰

For all that Bhandari, Teubner and other writers wrote about the impact of justice as a construct of law or as contingent to it, no one has said what its definition might be in both time and space, including cultural space. This needs to be traced from its earliest reference.

A Concepts of Justice from the Beginning of Organised Society to the 20th Century

1 Sumer, Mesopotamia and India

The very first law that is in evidence, the *Code of Urakagina of Lagash* (Sumer 2050 BCE) emphasised one main quality of social organisation and legal relationships, *the amagi* or *amargi* - liberty.²⁵¹ This was expressed against the background of

²⁵⁰ Loughlin, above n 138, at 1.

²⁵¹ Benjamin Foster "Social Reform in Mesopotamia" in K Irani and Morris Silver (eds) *Social Justice in the Ancient World* (Greenwood Press, Westport, 1995) 165 at 169. BCE is Before the Common Era.

corruption exhibited by 'unjust priest judges' who conspired to deprive the people of their personal property. Urakagina himself claimed his authority to rule from a covenant with the god Ningirso justifying his authority to write a Code for application to everyone in his society.

The next law in evidence, the *Code of Lipit-Ishtar of Isin* (1868-1857 BCE),²⁵² is the first law ever to use the word 'justice' and does so in reference to the King Lipit-Ishtar. The Code establishes the duty of the King (the wise shepherd) to establish "justice in the land", to "banish complaints", to "turn back enmity and rebellion by force of arms", to "bring well-being to Sumerians and Akkadians ... in accordance with the word of Enlil" and:²⁵³

to procure freedom of the sons and daughters of Nippur, the sons and daughters of Ur, the sons and daughters of Isin, the sons and daughters of Sumer and Akkad upon whom slavery had been imposed.

A century later the *Code of Hammurabi of Babylonia* (1772 BCE), which could be identified as the earliest constitution, expresses itself as the "laws of justice which Hammurabi, the wise king, established".²⁵⁴ In it Hammurabi refers to himself as the "salvation-bearing shepherd" who "let the oppressed, who has a case at law, come and stand before this my image as king of righteousness".²⁵⁵ There are other useful clauses in the Code, for example 'presumption of innocence' but, simultaneously, the Code establishes the death penalty for transgressions, sophisticated rules for slave ownership and rules of marriage, succession and inheritance, indicating that private property in both women and slaves was well established by this time.

In 1600 BCE the Hittite Laws introduced a broader group than just a king alone for the dispensation of judgment,²⁵⁶ namely a Council of Elders. These were appointed to

²⁵² Francis R Steele *The Code of Lipit-Ishtar* (The University Museum - University of Pennsylvania, Philadelphia) at 4–8. This museum monograph was "reprinted from" the *American Journal of Archaeology* (July–September 1948).

²⁵³ Jeffrey H Tigay *The Evolution of the Gilgamesh Epic* (University of Pennsylvania Press, Philadelphia, 1982) at 13.

²⁵⁴ LW King (translator) "The Code of Hammurabi" The Avalon Project - Yale Law School Lillian Goldman Law Library <<http://avalon.law.yale.edu/ancient/hamframe.asp>>.

²⁵⁵ King (translator), above n 254.

²⁵⁶ Including the Code of the Nesilim 1650–1500 BCE. Paul Halsall (ed) "The Code of the Nesilim, c. 1650-1500 BCE" (August 1998) Fordham University Internet Ancient History Sourcebook <<https://sourcebooks.fordham.edu/>>.

assist the king and were a compilation of customary practice and established cooperation rather than strict hierarchy, extending the idea of a group of people acting in concert with the king. The Sun God was the supreme god of “justice” in the Hittite world.²⁵⁷

Ancient Egyptian law was similarly complex in its reference to justice. In “The Representation of Justice in Ancient Egypt” JG Manning says that prejudice more than anything else ensured western disdain for Egyptian ideas of law and justice.²⁵⁸ But, he says, the principles of justice in Egyptian law served as the link between Egyptians and others, for example Mesopotamians and Sumerians, and were expressed as follows: “the right to be heard, the dramatic public setting of trials, the need for narration and storytelling at trials, the swearing of oaths in giving testimony, [and] the weighing of ‘evidence’ against truth on scales”.²⁵⁹

The Indus Valley Civilisation, represented next due to the fact that ideas of equality seem to have entered the justice schema at this time and its survival into modern India's legal system, had a 300 year technological advantage over Mesopotamia but appeared to have flourished parallel to it. Again there is evidence in the pottery art and sculptures of collective responsibility as well as a more equal position for women. This civilisation was assaulted, most likely by the Aryan invasion (from about 1500 BCE) from steppes of the north, and considered to have been destroyed but remnants of the religion appear as early forms of Hinduism. The Aryans brought with them a completely different (hierarchical) social structure which would have clashed with the Indus Valley people.²⁶⁰ Between 1500–500 BCE the Aryans with their Vedic culture began to expand all over India and further east. They were a warlike people and their war rituals and manoeuvres are known from their scriptures and accounts such as the Mahabharata.²⁶¹

The early Vedic period in India saw the development of the socio-legal concept of 'rita' which expressed the ideas of 'law', 'commandment', 'sacrifice', 'order', 'truth',

²⁵⁷ Trevor Bryce *Life and Society in the Hittite World* (Oxford University Press, Oxford, 2002) at 141.

²⁵⁸ JG Manning “The Representation of Justice in Ancient Egypt” (2012) 24 *Yale JL & Human* 111 at 112.

²⁵⁹ At 113.

²⁶⁰ George Dunbar *History of India From Earliest Times to the Present Day* (Nicholson and Watson Ltd, London, 1943) vol 1 at chs 1–3.

²⁶¹ See generally Ernest Mackay *The Indus Civilization* (Lovat Dickson & Thompson Ltd, London, 1935). No evidence of any structures of supremacy within the excavated villages and ‘forts’ has been found so far.

'regularity' and 'sovereignty'.²⁶² This was an imposition of a hierarchical social structure justified by religion. Both gods and humans were subject to 'rita' which included 'cosmic retribution'. 'Rita' was the principle and 'dharma' was its governance. In Vedic terms there was no reference to 'justice', 'liberty', 'freedom' or any such concept understood by the early Sumerian and Mesopotamian Codes or hinted at by the Indus symbolism. Linked to 'dharma' was the concept of 'agreement' derived from village custom and royal edicts. In this situation the ultimate decision maker and judge was the King (usually a warrior king) who was assisted by his assemblies of Sabha, Samiti, Vidhata and Gana which exercised deliberative, military and religious functions on his behalf.²⁶³

The violence and imperialist tendencies of the early Vedics were mediated by the onset of the Mauryan Empire (322-185 BCE) and especially by the reign of King Ashoka (269-232 BCE) who gave up violent warfare after a particularly bloody battle with the Kalingas in 262 BCE. Though retaining a link between the divine and the monarchy Ashoka formulated a set of secular edicts in stone which gave responsibility to the king to protect his people and do justice on the basis of 'dharma'. His edicts also established what he called 'right behaviour', 'benevolence', 'kindness to prisoners' and 'respect for animal life', thus connecting these principles with those that had appeared during the earlier civilisations. His Law of Piety prescribed righteousness across the board, between people themselves as well as between the king and the people. In this way, what was later seen in John Locke also, there was a 'duty of care' that was promised by the king to his people as well as by the people to each other.²⁶⁴

The somewhat egalitarian sentiment that marked Ashoka's reign disappeared at his death and the disintegration of his empire. In the vacuum created by its demise and the principles upon which it had been based, the power of the priests flourished again. Thus emerged strict hierarchies known as 'caste' which were encapsulated by the Code of Manu and the return to the Vedas as the source of all knowledge. The Code specifies the king as a judge who occupies the throne of justice. It regulates the King's behaviour as well as establishing penalties for criminal offences such as theft, inter-

²⁶² John Keay *A History of India* (Harper Collins Publishers, New Delhi, 2007) at 6, 21–22.

²⁶³ Manoj Kumar Sinha "Hinduism and international humanitarian law" (2005) 87 *International Review of the Red Cross* 285 at 289.

²⁶⁴ Kunwar Deo Prasad *Taxation in Ancient India From the Earliest Times up to the Guptas* (Mittal Publications, Delhi, 1987) at 3.

caste sexual relations, adultery and the specified work of commoners and servants.²⁶⁵ The Code of Manu was, eventually, two thousand years later, trumped by the Indian Constitution of 1949, coming into force on 26 January 1950.

It will be seen, therefore, that these early laws or codes emphasised the concept of justice but only in relation to the context in which they appeared. Liberty, freedom, benevolence and right behaviour were the definitions of justice emerging from the earliest times. Justice was not law as such but a method of delivering law or adjudicating it. In this way one can find resonance with Teubner's idea of justice as being contingent to law. What is obvious is that, as human society becomes more complex and larger, the relationship between law and its delivery or practice becomes more convoluted and problematic. The epitome of such complexity is revealed mostly in the Indian social structure in ancient times. It is the one society whose ancient customs and laws are still in existence today and thus provides us with an opportunity to understand, to some extent, legal relations in other contemporaneous societies such as Sumer, Indus and Mesopotamia that have now disappeared.

2 *Moses, Greeks and Romans*

In Mosaic law the principles of justice expressed in the early societies mentioned above seem to have merged completely not just with law, but with law as command. Mosaic Law came in reaction to the extreme and unwieldy polytheism of the Hittites. By referencing the 'one God' and monotheism Mosaic Law laid emphasis on the divine origin of the commands. It established the requirement to obey divine authority expressed through a prophet, namely Moses. The difference between Mosaic commands and a 'strong government' and the previous concepts of law and justice may have been due to the different modes of production evident in these societies.²⁶⁶ The Sumerians were commercialised traders whereas the Hebrews, at this stage, were desert wanderers trying to find a home. It may be that the Sumerians and Mesopotamians relied on different deities for different kinds of protection whereas the Hebrews, being pastoral and agricultural as well as travellers, were more dependent on authoritarian leadership which required a single deity for their well-

²⁶⁵ Wendy Doniger with Brian K Smith (translator) *The Laws of Manu* (Penguin Books, New Delhi, 1991) at 152–153. The Code of Manu was condemned publicly by the drafter of the 1949 Indian Constitution, the dalit (lower caste) lawyer Dr BR Ambedkar, who drafted protections and liberties into the Constitution for all people, not just for the upper castes. See Manusmriti Dahan Din "Why did Dr Babasaheb Ambedkar publicly burn the Manu Smriti on Dec. 25, 1927?" (24 December 2017) Sabrang <<https://sabrangindia.in>>.

²⁶⁶ Compare with Eshnunna 1930BC and Lipit-Ishtar 1875BC.

being. Mosaic Law, later emerging as the 'Judeo-Christian' tradition, remained an important source of law for Europe and the colonies.²⁶⁷

It was only with the Greeks that the relationship between law and justice becomes cause for extended discussion and deliberation which then influenced Europe much later in the second millennium CE (Common Era) during the age of Enlightenment. The Greeks found a difference between what Greek philosophers deemed 'natural' law and what they identified as 'positive' law.

Sir Henry Maine says that the earliest reference to the Greek God Zeus, was as a “judge” and not a “lawmaker”.²⁶⁸ He derives this definition from the Homeric words 'Themis' (gods dispensing judicial awards to kings) and 'Themistis' (term for the awards themselves). The Greeks linked laws with statehood and so the idea of the state was indispensable from the idea of justice which was identified as law. The Greeks investigated the difference between the two, mostly from the 8th century BCE. This is reflected in the reaction of Socrates to his death sentence which was to choose to die rather than escape which he could easily have done with the help of his philosopher friends. The first Greek laws were those of Draco which could only be enforced by a court and not kings.²⁶⁹ Early Greek law did not have a concept of 'king' dispensing laws or justice. Solon, who came after Draco, made Draco's laws less harsh. Afterwards, Cleisthenes re-organised the entire social and legal system so that, instead of tribes, the 'boule' or council became, as fusion, the supreme administrative and deliberative body of Athens. The 'Areopagus' was retained even under Cleisthenes' reform as advisors though it lost its power in 412 BCE except for presiding over murder trials.

Separate from Athens, Crete had its own law called the Gortyn Code. The Cretian Code is mentioned here because it consolidated rights of slaves and women, the right to property as well as establishing laws for adultery, rape, marriage, divorce rights, and inheritance indicating increasing complexity of social life. The Code also established social classes in Greek society, for example slaves, serfs, foreigner and free. Aristotle's account of the Greek laws of the past shows that the early legal system (between 800-400 BCE) was developing certain principles above ordinary laws, though not distinct from them.

²⁶⁷ Daniel J Elazar “Deuteronomy as Israel’s Ancient Constitution: Some Preliminary Reflections” Jerusalem Center for Public Affairs <<http://jcpa.org/>>.

²⁶⁸ Henry Maine *Ancient Law* (JM Dent & Sons Ltd, London, 1917) at 3.

²⁶⁹ Frederic G Kenyon (translator) Aristotle *The Athenian Constitution* (eBook ed, Project Gutenberg, 2008) at pt 3. This was written in 350BCE.

The three Greek philosophers commonly known for the exploration between law and justice are Socrates, Plato and Aristotle. Together they founded the idea that 'reasoned discourse' rather than religion or other non-rational or belief-based explanations provided answers to societal questions and maintained order. Socrates explored the difference between “good” and “evil” and is reported by Plato to have thought that "moral goodness as the one thing that matters".²⁷⁰ Moral goodness was knowledge. In Plato this goodness was linked with governance- identifying this connection for the philosopher-king.²⁷¹

In Plato the Socratic goodness is linked to 'the just state' and 'integrity of the social order'. Plato defines a just state as one where each citizen should 'perform the task for which he is best fitted with an eye to the welfare of the whole- and evil creeps in when any part of the state serves its own interest at the cost of the others. He included women in his schema:²⁷²

Women must be fully fledged citizens, possessing the same rights and duties as men; all doors must be open to them, and their position in the social order be determined solely by fitness; for a state in which women were outsiders would be a state divided against itself.

He thought that a state that did not measure up to an ideal state was not a state.

In his *The Laws*, through its dialogic methodology, Plato plans a new city to be built along certain constitutional foundations. This was normal at the time as Plato himself had been asked to help construct a new constitution for Megalopolis, as well as sending his students to a number of other Greek states to assist them to do the same. Using the fictive state of 'Magnesia' Plato thus established the principle of 'complete goodness' as the highest type of legal/state personality possible. He said the true function of law was to direct rather than punish. In his Book III of *The Laws* he introduces the need for a balance of the constitution where power is not concentrated in a single person or single body of men, as well as a balance between personal rule (monarchy) and popular control (democracy). Taylor says: “In view of the

²⁷⁰ Charles M Bakewell (ed) *Plato The Republic* (Charles Scribner's Sons, New York, 1956) at 8. See generally Hugh Tredennick (translator) *Plato The Last Days of Socrates* (Guild Publishing, London, 1992); and Desmond Lee (translator) *Plato The Republic* (2nd ed, Penguin Books, London, 1974).

²⁷¹ Bakewell (ed), above n 270, at 253.

²⁷² Bakewell (ed), above n 270, at xxxix.

prominence given to this thesis in Laws III it is not too much to call Plato the author of the doctrine of constitutionalism."²⁷³

The basis of Plato's constitutionalism is "godliness" that is, a supreme and "complete goodness" resting on knowledge gained through education."²⁷⁴

Plato's student Aristotle embarked on a constitutional survey which described an ideal society through empirical observations and practical concerns. His question was "what is the best form of constitutions"?²⁷⁵ In answer to this question Aristotle first considered the 'state' to be the 'supreme form of human association' thus locating western law in the concept of the 'state' rather than tribal or other bodies. He believed that "man is a political zoon", an animal that 'naturally lives in a state, polis. It was an "all-providing natural entity and not an artificial or conventional creation".²⁷⁶

However, because Aristotle regarded human society as being naturally hierarchical, he thought 'justice' was an arrangement of the political association, adding somewhat disconcertingly that the description of what is "just" comes from a "sense of justice": "The virtue of justice is the feature of a state; for justice is the arrangement of the political association, and a sense of justice decides what is just."²⁷⁷

It appears that what Aristotle means by "justice" is 'law' as the distinction between the two is blurred. More helpful is his answer to his main question: 'Who rules whom and with what justification?' While outlining the faults in the 'idealist' constitutions of Plato and the instability (due to lack of funds) in the Lacedaemonian Constitution, and the 'aristocratic bias' in that of the Cretans, he approved of the idea of 'consent' exhibited in the latter constitution. He made the important point, of significance to modern constitutions, that constitutions remain stable if people in a state all 'desire' to keep the constitution. In the Carthaginian Constitution he recognised the concept of contentedness in response to a proper arrangement of the constitutional system and plurality of constitutional offices. In Book III Aristotle sees a constitution as an "organising those living in a state".²⁷⁸ He goes further to say that "unjust and false

²⁷³ AE Taylor (translator) Plato *The Laws* (JM Dent & Sons, London, 1960) at xviii.

²⁷⁴ At xxi, xxiii.

²⁷⁵ Trevor J Saunders (reviser) TA Sinclair (translator) Aristotle *The Politics* (Revised ed, Penguin Books, London, 1981) at 16.

²⁷⁶ Bakewell (ed), above n 270, at xxvi.

²⁷⁷ Saunders (reviser), above n 275, at 61. Aristotle distinguishes between "justice" and "sense of justice" which can be described in his works as "virtue".

²⁷⁸ Sinclair (translator), above n 14, at 102.

mean the same thing”, but “when persons exercise their office unjustly, we continue to say they rule, though unjustly”.²⁷⁹ With Plato Aristotle agreed that:²⁸⁰

... those constitutions which aim at the common good are right, as being in accord with absolute justice; while those that aim only at the good of the rulers are wrong.

He names three "right" constitutions as being based on "kingship, aristocracy and polity" and the three "deviated constitutions" as being based on "tyranny, oligarchy and democracy". In relation to "democracy" he said it came from "power of the people" (demos) that is, rule by a particular class, the numerous poor, in their own interests and not in the common interest, thus democracy was "deviated".²⁸¹

Aristotle also saw justice as being embedded in the "right constitutions"²⁸² as laws framed in accordance with one of the right types of constitutions will "inevitably be just, but if according to one of the deviations, unjust".²⁸³ He also said that:²⁸⁴

... in the state, the good aimed at is justice and that means for the benefit of the whole community ... whereas without free population and wealth there cannot be a state at all, without justice and virtue it cannot be managed well.

For him constitutional theory was a 'convening' and not 'ruling' element.

In his Book VI Aristotle links democracy with “liberty”: “A basic principle of the democratic constitution is liberty.”²⁸⁵ Moreover, his concepts of justice, equality and freedom were linked with law. He also connected “virtue” with “prosperity”, stating:²⁸⁶

... let this be our fundamental basis: the life which is best for men, both separately as individuals, and in the mass, as states, is the life which has

²⁷⁹ At 172.

²⁸⁰ At 189.

²⁸¹ Saunders (reviser), above n 275, at 189.

²⁸² At 189.

²⁸³ At 189–190.

²⁸⁴ At 189–190.

²⁸⁵ At 362. “Liberty” is defined by Aristotle in two ways: (i) “... one which all democrats make a definitive principle of their democracy” and (ii) “to live as you like”.

²⁸⁶ At 389.

virtue sufficiently supported by material resources to facilitate participation in the actions that virtue calls for.

Greek thought on justice as being the foundation of an ideal state which would then formulate laws in light of it had far reaching effects, not only on the Roman laws that emerged as Greek civilisation began to fade, but also on all western legal systems that came afterwards. The ideas of justice as being served well in the "right constitutions" the notion of "consent", the idea of sovereignty being a "convening" and not "ruling" constitutional principle,²⁸⁷ and actions that are valid only in the public interest (which Aristotle said democracy did not allow) were part of the developing justice jurisprudence of the times.²⁸⁸ These are principles that even modern constitutional theorists would claim as being relevant and pertinent in the 21st century.

The development of the Romans' idea of justice and law inevitably benefited from Rome's proximity to Greece. But the Roman Empire which spread to almost the whole of Europe including Britain, and also Egypt, developed a concept of law that had very little to do with justice in the way the Mesopotamians and others, as well as Greeks, defined it. The Romans' concept of justice was regimented law that subsumed ideas of justice within it. It was not until the Emperor Justinian I commanded his *Corpus Civilis*, a compilation of the *Pandects*, the *Codex Justinian* and *Novellae Constitutions* that considerations of justice separate from law were articulated.

Sir Henry Maine said that, initially, Roman Law transformed customary law into codes, called the *Twelve Tables*.²⁸⁹ The compilation of the codes emerged as a consequence of a class war between the ancient aristocracy (the patricians) and the plebians (commoners). Buckland says that the Twelve Tables represented mainly Latin custom with infusion of Greek law, transforming the original customary law (*ius*) into written law (*lex*).²⁹⁰ The difference between these two terms, *ius* and *lex*, is quite crucial, though not very clear in the literature. The plainest definition of *ius* is not just customary law but principle of law (on a higher plane), and the definition of *lex* appears to be law that is of particular purpose, for example a marriage law. Thus *lex* is positive law, written down by a higher authority. *Ius*, on the other hand, though also 'law', that is, a 'rule of conduct', is nevertheless derived from the rights that every Roman had by virtue of being a citizen. In more common parlance *ius* is defined as

²⁸⁷ At 429–430.

²⁸⁸ At 207, 209.

²⁸⁹ Maine, above n 268, at 9.

²⁹⁰ William W Buckland *A Manual of Roman Private Law* (2nd ed, Cambridge University Press, London, 1939) at 16.

'justice' because it was also used in relation to the appeal of the Romans to their courts.

The Twelve Tables, therefore, were more in the nature of codified law as written down, though the application of the law was inevitably achieved against the framework of *ius*. This explains the content of the Tables as expressing the range of laws from access to courts to marriage laws, to crimes and penalties, ownership and possession and so on. In his analysis of the Twelve Tables, Polybius, a Greek expatriate in Rome, said they were like the Constitution of Sparta which ensured that every Spartan was also a soldier and thus emphasised the command nature of government.

Throughout the centuries the *Twelve Tables* remained constant in substance; any amendments were mainly reformist in nature. To assist with interpretation a specialised legal group, the jurists, was formed to formulate legal opinions on the law and, over time, these opinions also became law. The continuing influence of *ius*, however, was seen in the writings of eminent Roman lawyer Cicero who identified the basis of 'true law' as being 'divine' in nature with 'man' being the highest of all divine creations. He said the primary purpose of law was to promote the interactions of man and to protect the institutions he had created. The preservation of the 'order of man' was the single most important reason for law but Cicero borrowed from Aristotle and Plato by focussing on the essentially social nature of man to determine the content of the law. It is Cicero's work that had far reaching effects on the European Enlightenment, as well as on the development of the Latin language for the purposes of practising law.²⁹¹

The expansion of the Roman Empire under Octavius (later Augustus) transported Roman Laws into other countries, most importantly Britain. Throughout this period the character of the Roman *Tables* retained its persistence even after the millennium ended. This is even after Gaius' *Institutes* was published in 161 CE, initially as an interpretive tool but becoming a law in its own right. However there was one important difference between the *Twelve Tables* and the *Institutes* and that is that, unlike the *Twelve Tables*, Gaius' work harked back to the Greek Stoic's expression of a higher law against which positive law had to be measured with the one important difference being that Gaius did not believe that a conflict with natural law should cancel positive law. Thus, in Gaius's *Institutes* a conflict with justice would not

²⁹¹ Woodcock, above n 92, at 249.

render the positive law in question invalid.²⁹² The four books of Gaius were (i) Book I Concerning Civil and Natural Law (the *ius* of persons); (ii) Book II the *Ius* of Things; (iii) Book III The Estate of Persons (specifically mentioned in relation to the Twelve Tables); and (iv) Book IV Concerning Actions (real and personal).

In his first book Gaius states:²⁹³

The Civil Law of the Roman people consists of statutes, plebiscites, Decrees of the Senate, Constitutions of the Emperors, the Edicts of those who have the right to promulgate them, and the opinions of the jurists.

At the start of the First Millennium, Rome's power was clearly waning and the Romans were in retreat in Europe, including Britain, by 300 CE. At the same time a new religion, Christianity, began its influence over the Roman Empire. The Edict of Milan legalized Christianity in 313, and it later became the state religion in 380.

The most significant, though belated, change to Roman law came half way through the first millennium CE in the form of the aforementioned Byzantium Justinian *Corpus*. Spanning some 50 volumes the *Corpus* represented the codification of all Roman laws, including those of the Jurists, and was promulgated in 529 CE.²⁹⁴ The Roman Empire had been divided into two, east and west, between about 200-300 CE; the Roman west had collapsed due to a number of different reasons that were economic, political, religious and military but the east continued to flourish, influenced as it was by Greek culture and Christianity. During the reign of Justinian I (527-565 CE) the eastern empire reached its zenith by colonising the Mediterranean coast, Italy, North Africa and even Rome itself. Ultimately the power of the Byzantium Empire did not fade until the 15th century. It was during Justinian's time that the *Corpus* was promulgated with a different perspective from the *Twelve Tables* or the *Institutes*. The *Corpus* moved Roman law towards considerations of justice separate from law.

²⁹² TG Leesen *Gaius Meets Cicero: Law and Rhetoric in the School Controversies* (Brill, Leiden, 2009) at 6.

²⁹³ Samuel P Scott (translator) (ed) "The Institutes of Gaius - The Four Commentaries of Gaius on the Institutes of the Civil Law - First Commentary" in *The Civil Law* (The Central Trust Co, Cincinnati, 1932) Constitution Society <www.constitution.org/sps/sps.htm> vol 1 at s I(2).

²⁹⁴ Ronald Syme *The Roman Revolution* (Clarendon Press, Oxford, 1939) at ch 1.

Book I of the *Corpus* is headed “Concerning Justice and Law”. The very first speech that Justinian gave to the Senate on its importance indicates his different attitude towards law:²⁹⁵

We have determined, with the help of God, now to make a present, for the common good, of what appeared to many past emperors to require improvement, but which none of them, in the meantime, ventured to put into effect, and to make lawsuits less prolix by abbreviating the many constitutions, contained in the three Codes, the Gregorian, the Hermogenian, and the Theodosian, as well as those which, after these Codes, were issued by Theodosius of blessed memory and other emperors after him, as well as those issued by Our Clemency, and by compiling, under our auspicious name, one Code, collecting in it the constitutions of the three aforesaid Codes, as well as the new constitutions subsequently issued.

A second edition of the Justinian *Corpus*, called the *Novellae* was published in 534 CE. The Preamble in Volume II of the *The Civil Law* stated:²⁹⁶

It is expedient that the Imperial Majesty not only be distinguished by arms, but also be protected by laws, so that government may be justly administered in time of both war and peace, and the Roman Sovereign not only may emerge victorious from battle with the enemy, but also by legitimate measures may defeat the evil designs of wicked men and appear as strict in the administration of justice as triumphant over conquered foes. ... Therefore, after the completion of the fifty books of the Digest or the Pandects, in which all the ancient law has been collected ... [w]e have ordered these Institutes to be divided into the following four books, that they may constitute the first elements of the entire science of jurisprudence.

One of the principles referred to in the speech is stated in the first book *Concerning Justice and Law*: “Justice is the constant and perpetual desire to give to each one that to which he is entitled.”²⁹⁷

²⁹⁵ Fred Blume (translator) “Concerning the Composition of a New Code” in Timothy Kearley (ed) *Annotated Justinian Code* (2nd ed) University of Wyoming College of Law George William Hopper Law Library <www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2/> Book I at 1.

²⁹⁶ Scott (translator) (ed), above n 293, vol 2 at Preamble.

²⁹⁷ At 5.

He then goes on to describe this further: “Jurisprudence is the knowledge of matters divine and human, and the comprehension of what is just and what is unjust.”²⁹⁸

The Preamble of the Digest or *Pandects* in Book 1 Title 1 states:²⁹⁹

Those who apply themselves to the study of law should know, in the first place, from whence the science is derived. The law obtains its name from justice; for ... law is the art of knowing what is good and just.

The Justinian *Corpus* influenced Europe and other countries during the Middle Ages and the Enlightenment and continues to have far reaching effects on lawyers and law students to this day.

3 *The notion of justice in post-Roman Britain*

The retreat of the Western Roman Empire from Britain from about 200 CE opened a vacuum for a unique British formulation of law and justice. While influenced a great deal by the Roman *Twelve Tables* during the height of empire in Britain, the ancient Britons had their own versions of justice and law which, in most cases, had been driven underground during Roman colonisation.³⁰⁰ The law that was delivered in ancient Britain was that of the Druids. Both the Greek geographer Pytheas in 330 BCE and Julius Caesar in his *Caesar de Bello Gallico* in 58-59 BCE described ancient Briton law as being delivered by the Druids who were like a form of 'priest-judge'.³⁰¹ The Druids possessed both criminal and civil jurisdiction and decided all controversies among states and private persons.

A recent reference from the Courts Service of Ireland provides more detail of the concept of ancient Druid (Brehon) law.³⁰²

In many respects Brehon law was quite progressive. It recognised divorce and equal rights between the genders and also showed concern for the environment. In criminal law, offences and penalties were defined in great

²⁹⁸ At 5.

²⁹⁹ At 209.

³⁰⁰ David Hume *The History of England from the Invasion of Julius Caesar to The Revolution in 1688* (Liberty Fund, Indianapolis, 1983) vol 1 at ch 2.

³⁰¹ William A McDevitte and William S Bohn (translators) Julius Caesar *The Gallic Wars* (Red and Black Publishers, St Petersburg (Florida), 1869) Book 6 at chs 13–14.

³⁰² “Brehon Law” The Courts Service of Ireland <www.courts.ie>.

detail. Restitution rather than punishment was prescribed for wrongdoing. Cases of homicide or bodily injury were punishable by means of the eric fine, the exact amount determined by a scale. Capital punishment was not among the range of penalties available to the Brehons. The absence of either a court system or a police force suggests that people had strong respect for the law.

Despite the less regimented practice of Brehon law and some rights that may have been restored to Britons after the retreat of the Romans, the Anglo-Saxons who came hard on Roman heels became a dominant presence in the legal system until the Norman conquest five centuries later.

In *The History of England*, David Hume says the Anglo Saxon tribes were less inclined to be authoritarian, despite the savagery of their invasions, than the Romans.³⁰³ Nevertheless the Anglo Saxons had a motley of laws, either generic from the ancient Britons or remnants of Roman law in all social relations and institutions still in existence. Constantine withdrew the whole Roman army in 409 CE, leaving the Britons to themselves at the same time that Anglo Saxons were invading Britain in regular forays from the continent.

Rome itself was sacked by the Visigoths in 479 CE so its ability to defend any of its territories, especially a troublesome one like Britain which never really accepted colonisation, was negligible. The Anglo Saxons' rule was established promptly as the Romans had retreated rather rapidly, abandoning their towns, cities and country villas. The Anglo Saxons took advantage of the religious vacuum to restore paganism to Britain which held sway for about 200 years before Pope Gregory I sent out missionaries, having some success over time, especially in King Ethelbert's court.

Meanwhile, the laws of Britain became subsumed by Anglo Saxon laws which were codified from the 6th century by Anglo Saxon kings. Originally simply kept, by 890 CE the legal history of Anglo Saxon Britain was finally compiled during the rule of King Alfred of Wessex and called the *Anglo-Saxon Chronicles*. These laws, in fact, harked as far back as 64 BCE, that is, prior to the Roman invasion, but were mostly confined to the genealogy of Alfred and included the laws made by his predecessors from about the 6th century CE. The *Chronicles* formed three separate categories: (i) laws and collections of laws promulgated by public authority; (ii) statements of custom and (iii) private compilations of legal rules and enactments. The first category

³⁰³ Hume, above n 300, vol 1 at ch 2.

contained the power, interests and privileges of the kings as Anglo Saxon Britain was based on an inherited monarchy. The Visigoth Codes, linked with Canon Law of the Catholic Church, became influential and, importantly, the coronation oath of the Visigoth kings included an undertaking to protect the interests of their subjects. The Codes start with a statement of principle, “[t]he maker of laws should not practise disputation, but should administer justice”.³⁰⁴

A survey of the laws of the Anglo Saxon/Britons from 560-946 CE shows a significant shift in reasoning about justice as opposed to law. The kings during this span of centuries were King Athelbert of Kent (560-616), King Hlothhaere and Eadric (673-686), King Wihtraed (690-725), King Alfred (871-901), King Edward the Elder (901-924) who shared power with Guthrum and Edward the Elder (laws of 906), King Athelstan (924-939) and King Edmund 1 (939-946). There is no reference to justice in King Athelbert's laws which are mainly (set in the Roman method of statutory sections) about distribution of property among the church officials and the fines imposed and compensation to be given for transgressions of the law. The laws of Hlothhaere and Eadric follow the same pattern. However, the laws of King Wihtraed (late 5th-early 6th centuries) show a discernible shift towards a different kind of document. The principles were phrased around a new collective entity called "a deliberative convention of the great men" which included the king and the bishop of Rochester as well as the people and they all appear to have agreed that "[l]et the word of a bishop and of the king be, without an oath, incontrovertible".³⁰⁵

The Preamble of King Alfred's Laws just a century later brought into force Mosaic law as the source of all law thus combining religion with ruling power:³⁰⁶

The Lord spoke these words to Moses, and thus said: “I am the Lord your God. I led you out of the land of the Egyptians, and of their bondage.”

The last single Anglo Saxon Code of the First Millennium, that of King Edward the Elder, was added to the *Chronicles* after King Alfred's reign and appears to be an attempt to combine Christian sentiments with developing law without losing sight of the command prerogative of the monarchs linked with the Church:³⁰⁷

³⁰⁴ Samuel P Scott (translator) (ed) *The Visigothic Code* (Boston Book Co, Boston, 1910) The Library of Iberian Resources Online <<http://libro.uca.edu/vcode/visigoths.htm>> at Book I, Title I, Law II.

³⁰⁵ Paul Halsall (ed) "The Anglo-Saxon Dooms, 560-975" (June 1998) Fordham University Internet Medieval Sourcebook <<https://sourcebooks.fordham.edu>>.

³⁰⁶ Halsall (ed), above n 305.

³⁰⁷ Halsall (ed), above n 305.

King Edward commands all the reeves: that you judge such just dooms as you know to be most righteous, and as in the doom-book stands. Fear not on any account to pronounce folkright; and that every suit have a term when it shall be brought forward, that you then may pronounce.

In 871 CE Alfred and his brother Athelred defeated the Danes at the Battle of Ashdown in Berkshire. Alfred and Guthrum of the Danes entered a peace treaty in 884. Since many Danes had settled in Britain by now it was necessary to formulate joint legal principles; the Treaty culminated in a combined law to reflect autonomy in the areas the Danes claimed.³⁰⁸ The Laws provide a Preamble and Law 1, with an avowed Christian, and indeed monotheistic, foundation indicating that polytheism post-Roman exit was on the wane.³⁰⁹

This is the first which they ordained: that they would love one God and zealously renounce every kind of heathendom ... 1. And this is then the first which they ordained: that the 'church-grith' within the walls, and the king's 'hand-grith', stand equally inviolate.

Following swiftly from this development introducing monotheism as part of the origin of laws and their foundation were the Laws of King Athelstan (924-939) which consolidated the relationship between the king and the church by seeking tithes to render to God on pain of sin. Adding: “I will not that you unjustly anywhere acquire aught for me; but I will grant to you your own justly, on this condition, that you yield to me mine”.³¹⁰

The Laws of King Edmund 1 (939-946 CE) were in the same vein except that the King “assembled a great synod at London” consolidating the relationship between the church and the monarchy.³¹¹

Bede's *Ecclesiastical History of the English People*, written in Latin in 731 discusses the institution of the “Witenagemot” a political entity formed before the 7th century CE and which lasted well into the 11th century.³¹² It was an assembly of the ruling

³⁰⁸ Dane law survived as part of the Laws of Henry 1 written in about 1115.

³⁰⁹ *Ancient Laws and Institutes of England* (The Commissioner on the Public Records of the Kingdom, 1840) at 167.

³¹⁰ Halsall (ed), above n 305.

³¹¹ Halsall (ed), above n 305.

³¹² See generally AM Sellar (translator) *Bede's Ecclesiastical History of England* (George Bell and Sons, London, 1907) The Project Gutenberg <www.gutenberg.org>.

class whose primary function was to advise the king, including to witness charters and grants of land, taxation, jurisprudence and internal and external security, and was composed of the most important ecclesiastical and secular aristocracy in England.

Hume's account of the courts of law in existence at the time provides an insight into the constitutional position of the king and the Witenagemot:³¹³

But though the general strain of the Anglo-Saxon government seems to have become aristocratical, there were still considerable remnants of the ancient democracy, which were not indeed sufficient to protect the lowest of the people, without the patronage of some great lord, but might give security and even some degree of dignity, to the gentry or inferior nobility. The administration of justice, in particular, by the courts of the Decennary, the Hundred and the County, was well calculated to defend general liberty, and to restrain the power of the nobles.

JH Baker says, in relation to the simple nature of the early institutions:³¹⁴

Nevertheless, despite all this legislative activity, England was still governed rather by custom than by universal legal principles ... [t]he principal reason for the absence of common law at this stage was the absence of any judicial machinery to require or produce it.

Thus, due to the polyglot of competing forces between remnants of Roman law, Anglo Saxon Law, Danish Law and Mosaic law and just prior to the Norman invasion of 1066, in all probability, Britain was somewhat vulnerable to yet another occupation by foreigners.

In all this First Millennium legal development the concept of justice was referred to in many of the codes, but its meaning, though unclear and unevenly developed, was being incrementally constructed, brick by brick. Remnants of the early pre-Judaic and Christian ideas of justice kept re-surfacing despite positive laws expressed in, for example, the Mosaic Ten Commandments or the Twelve Tables or the Anglo Saxon Codes post Roman exit from Britain. The real transformation came from Justinian's *Corpus Juris Civilis* when, in 500 CE, it became clear that a new era in the

³¹³ Hume, above n 300, at ch 2, 789.

³¹⁴ JH Baker *An Introduction to English Legal History* (2nd ed, Butterworths, London, 1979) at 3–4.

philosophy behind, and method of delivering, law to the people was dawning.³¹⁵ The conversion of Emperor Constantine in 312 CE seems to have been a turning point, though he used Christianity more as an ideological tool to hold together the crumbling Roman empire. The Germanic kings who took over the western Roman Empire by 508 CE had also made Christianity their own religion and used the bishops as a conduit between the king and people, thus making them very powerful as well as highly political. By the time Charlemagne was crowned Emperor of the Franks by Pope Leo III in CE 800 Christianity was being spread through military conquests and secular law was replaced by religious law.³¹⁶

In terms of the connection between the new religion Christianity and ideas of justice, Jan Dengerink says that for Christians justice is expressed from within the concept of a divine or created order.³¹⁷ But the State is far from being external to this idea; it is considered as part of the created order despite its possible manifestation, at times, as tyrannical or oppressive. Dengerink says that Augustine saw:³¹⁸

Natural justice ... as a copy of the eternal idea of justice in the human soul, as "a disposition of the soul, respecting the general welfare, to render to each his due according to his station."

Within this, justice is seen as:³¹⁹

... the all-embracing term to designate the totality of virtues or moral perfection. Whoever gives to each his due (to God what is due him; to one's neighbour what is due him) fulfills the sum of moral obligations. In a narrower sense, justice is a particular duty besides those of wisdom, moderation, and courage. Justice is then the virtue that renders to each his due in a strict sense, i.e., what is rightly his. Taken in this sense, justice never refers to the act itself, but to others.

³¹⁵ Samuel P Scott (translator) (ed) *The Civil Law* (The Central Trust Co, Cincinnati, 1932) Constitution Society <www.constitution.org/sps/sps.htm>.

³¹⁶ Harold J Berman "The Influence of Christianity upon the Development of Law" (1959) 12 Okla L Rev 86 at 91–92.

³¹⁷ Robert D Knudsen and Ali M Knudsen (translators) Jan Dengerink *The Idea of Justice in Christian Perspective* (Wedge Publishing Foundation, Toronto, 1978) at 25–29. This was originally published in (1976) 39 WTJ 1.

³¹⁸ At 34.

³¹⁹ At 39.

The “basic ethical principle” of justice is “[d]o good and avoid evil”.³²⁰ He adds that in this development positive law is derived from natural law: “That is, every actual provision of the law that is in conflict with natural law is not binding.”³²¹

In his “The Influence of Christianity upon the Development of Law” Harold J Berman says: “The moral law is ... a preparation for Christianity”.³²² On the question of whether one should obey an immoral law, Berman says there is a duty not to do so due to Christianity's own origins as a religion that expressed itself against previous law: “Christian worship was itself illegal under Roman law in the first centuries. The Christian doctrine of civil disobedience is thus an ingrained part of Christian history.”³²³

Furthermore, he says:³²⁴

The Christian emperors of Byzantium considered it their Christian responsibility to reform the laws, as they put it, "in the direction of humanity"—to eliminate iniquity, to protect the poor and oppressed, to infuse justice with mercy.

However this was a Byzantine perspective. In contrast, says Berman, jurists western Rome in the same era just wrote down tribal laws and customary laws; their legal reforms were merely in family and slave laws and the rights of the clergy.

Berman says the influence of natural law from the ideas of Aristotle, Justinian, Augustine and Church Councils in the early centuries of Christianity cannot be denied.³²⁵

We cannot reject, however, the contribution which natural-law theory made to Christian life at a critical stage in its development. We are heirs to that theory; without it we might still be living under barbarian law.

As Christianity, with its own ideas of justice, was developing in the early centuries of the First Millennium, there arose in the Middle East, another monotheistic religion,

³²⁰ At 40.

³²¹ At 41.

³²² Berman, above n 316, at 87.

³²³ At 91.

³²⁴ At 91 (footnote omitted).

³²⁵ At 94.

namely Islam, which produced its own concept of justice and law. The links between the two religions were obvious but for most of their co-existence they have been at war with each other.

4 *The concept of justice in Islam*

Later known as the Prophet Muhammad, the Arabian tribal leader Muhammad first received his politico/religious revelations in 610 CE. In 622 Muhammad was requested by warring Jewish and polytheistic communities in Medina, Arabia, to arbitrate and settle their differences. He drafted the Constitution of Medina which established an alliance or confederation among the eight Medinan tribes and Muslim emigrants from Mecca who had followed him.³²⁶ The Constitution of Medina contains 63 articles and should be read in concert with Muhammad's farewell sermon before he died in 632. The Constitution was written mainly as a contract or treaty which set out principles of governance for the warring tribes and his Muslim followers. The first articles are therefore specific to the problem at hand, expressed in the form of a 'pact'. It is only in Article 50 that the philosophy underpinning the Constitution becomes clear:³²⁷

Equal right of life and protection shall be granted to everyone who has
been given constitutional shelter

A person given constitutional shelter shall be granted an equal right of life
protection as long as he commits no harm and does not act treacherously.

In his Final Sermon, Muhammad asks his followers to “regard the life and property of every Muslim as a sacred trust”, and says:³²⁸

All mankind is from Adam and Eve, an Arab has no superiority over a non-Arab nor a non-Arab has any superiority over an Arab; also a white has no superiority over black nor a black has any superiority over white except by piety and good action.

³²⁶ Omid Safi *A Biography: Memories of Muhammad – Why the Prophet Matters* (HarperCollins, New York, 2010) at 18–29.

³²⁷ Muhammad Tahir-ul-Qadri *The Constitution of Medina [63 Constitutional Articles]* (eBook ed, Minhaj-ul-Quran Publications, 2012) <www.minhajpublications.com> at art 50.

³²⁸ “The Last Sermon of Prophet Muhammad” (1990) Islamic Civilization <www.cyberistan.org/islamic/sermon.html>.

The Quran itself did not set out any legal codes and thus Sharia Law developed in response to this vacuum. It was drafted only after Muhammad's death by the caliphs who ruled Arabia in light of his teachings. The first caliphs began to conquer lands outside Arabia, for example present day Iraq, Syria, Palestine, Persia and Egypt. The Ummayyad Dynasty caliphs took control in 661 CE and expanded Islam into India, Northwest Africa and Spain. Sharia Law was developed more comprehensively from 750 ACE when the Abbasid Dynasty began.³²⁹ This dynasty favoured more authoritarian rule and perhaps this development can be seen to parallel the development of Christianity in its own militaristic phrase at the time. The absolutist tendency in Islam took hold over the next 500 years.

In *The Concept of Justice in Islam*, Sir Muhammad Zafrullah Khan says that Islam makes no distinction between a secular and religious state.³³⁰ The administration of justice is at the core of the legal mechanisms: “The dignity of the judicial office has always been fully safeguarded in Islam. Complete independence of the judiciary was established at the very beginning.”³³¹

Thus, unlike Christian law developing contemporaneously in Europe at the time, Islamic law introduced two new elements into the legal system- the concept of an independent judiciary and the right to equivalence, if not direct or exact equality. The idea of justice was framed in terms of these two concepts.

Islam would not have been an important subject for a discussion of justice in this thesis had it not been for the clash between two main ideologies for territory that the Crusades represented. The Crusades coincided with the most important legal change in Britain since the Roman invasion- the Norman Conquest. David Hume describes the conquest in graphic terms as England's inability to resist the Duke of Normandy's invasion mainly because of its vulnerability due to the invasions of the past and the relentless onslaught by the Danes. He said that the English soon succumbed to William and offered him the throne.

³²⁹ Ismail I Nawwab, Paul F Hoye and Peter C Speers (eds) “Islam and Islamic History and The Middle East” (21 May 2017) IslamiCity <www.islamicity.org>.

³³⁰ Muhammad Zafrullah Khan *The Concept of Justice in Islam* (Bait-ul-Zafar, Hollis) <<https://www.alislam.org/library/books/The-Concept-of-Justice-in-Islam.pdf>> at 3. This summarized “an address delivered by Sir Muhammad Zafrullah Khan, Judge of the International Court of Justice, to the Seminar on Islamic Studies at the Institute of Islamic Studies McGill University, Montreal, Canada, on November 4, 1954”. At 1.

³³¹ At 7.

William's rule facilitated a major transformation of both the political and legal system in England. First of all he took advantage of the ancient system of taxation, the danegeld, based on the value of landholdings, and which could be collected at any time, especially in crisis. Hume says that William also implemented a different perspective on justice:³³²

He introduced into England that strict execution of justice, for which his administration had been much celebrated in Normandy ... He confirmed the liberties and immunities of London and the other cities of England ...

But he was, at the same time, says Hume, firmly protective of his own position as “conqueror”:³³³

... the king took care to place all real power in the hands of his Normans, and still to keep possession of the sword, to which, he was sensible, he had owed his advancement to sovereign authority. He disarmed the city of London and other places, which appeared most warlike and populous; and building citadels in that capital, as well as in Winchester, Hereford and the cities best situated for commanding the kingdom, he quartered Norman soldiers in all of them, and left no where any power able to resist or oppose him.

Hume also describes the adoption, through legal means, of feudal laws and,³³⁴ it can be said, that a feudal mode of production, which was already in existence in a nascent form previously began to emerge strongly in Britain.³³⁵ William introduced feudal laws, divided all the lands into baronies which, in turn, shared them out to knights or vassals, thus creating a new pyramid-type social structure with layers of duties and obligations. Most, if not all, of the baronies were Norman.

William also minted coins as a royal prerogative and adopted the English kings' practice of issuing writs to their officials. He authorised the Domesday Survey, mainly for taxation, to identify landholdings of the previous owners as well as the

³³² Hume, above n 300, vol 1 at ch 4.

³³³ At ch 4.

³³⁴ At ch 4.

³³⁵ Prior to this feudal relations of production rather than a feudal mode were in existence in Britain which remained mainly tribal in the First Millennium. A mode implies institutional transformation as well as transformation in the class structure.

new tenants-in-chief. Large areas of land for royal hunting were also set aside. Land was now held and re-distributed according to a new system. Within this system taxation did not just represent revenue for the crown's usual expenditure, it was also the source of funding for the Crusades to which the Normans were utterly devoted as a rite of passage for young men in the cause of Christianity against the new imperialist religion, Islam.

In this situation justice was converted into law yet again. Attempts were made to pay heed to some of the laws of the Anglo Saxons kings represented by the *Chronicles*. Sir Frederick Pollock and Frederic Maitland in *The History of English Law before the time of Edward I* said the law of Normandy was uncertain before the invasion, unlike those of England.³³⁶ But what was certain was that the ducal lord was also a judge:³³⁷

In good times, however, the duke's justice was powerful throughout his duchy. It is as supreme judge hearing and deciding the causes of all his subjects, the guardian of the weak against the mighty, the stern punisher of all violence, that his courtly chroniclers love to paint him, and we may doubt whether in his own country the Conqueror had ever admitted that feudal arrangements made by his men could set limits to his jurisdiction.

But there was no record of any kind of Norman jurisprudence, say Pollock and Maitland: "The Normans then had no written law to bring with them to England, and we may safely acquit them of much that could be called jurisprudence."³³⁸

There was one Lanfranc, a lawyer, who had opened a school in Normandy and was remembered as one of the discoverers of Roman law. As Pollock and Maitland point out:³³⁹

The Norman Conquest takes place just at a moment when in the general history of law in Europe new forces are coming into play. Roman law is being studied, for men are mastering the Institutes at Pavia and will soon be expounding the Digest at Bologna; Canon law is being evolved, and both claim a cosmopolitan dominion.

³³⁶ Frederick Pollock and Frederic William Maitland *The History of English Law before the Time of Edward I* (2nd ed, Cambridge University Press, Cambridge, 1898) vol 1 at 64.

³³⁷ At 73.

³³⁸ At 77.

³³⁹ At 78.

The language of the law remained English for some time after the conquest but in the midst of the struggle between English and French in the form of the law, came Latin. Latin was common ground for both the English and French literati. Yet King William found legal English still useful:³⁴⁰

... the two languages which William used for his laws, his charters and his writs were Latin and English. Again, there were good reasons why the technical terms of the old English law should be preserved if the king could preserve them.

It was not until 1731 that English fully replaced Latin as the language of law. But during the Norman period in England, say Pollock and Maitland, there were few statutes enacted:³⁴¹

During the whole Norman period there was little legislation. We have spoken of the Conqueror's laws. It seems probable that Rufus set the example of granting charters of liberties to the people at large.

Pollock and Maitland show that the jurisprudence that developed after conquest was one based on expedience rather than principle:³⁴²

The jurisprudence of his court, if we may use so grand a phrase, was of necessity a flexible, occasional jurisprudence, dealing with an unprecedented state of affairs, meeting new facts by new expedients, wavering as wavered the balance of power between him and his barons, capable of receiving impressions from without, influenced by the growth of canon law, influenced perhaps by Lombard learning, modern in the midst of antique surroundings.

Much of the slow development of new law or one that defined justice as anything other than law during this period was possibly due to the constant absence of the kings, from William to those who succeeded him. The Crusades loomed large as in 1095, just 29 years after the conquest, the Byzantine Emperor Alexius Comnenus asked Pope Urban II for help in reconquering territories in Asia Minor that he had lost to the Turks. The Pope sent out a call to Christians all over Europe to help restore the holy sites in and near Jerusalem, phrasing it as 'the infidels' attack on the holy

³⁴⁰ At 82.

³⁴¹ At 95.

³⁴² At 108.

Roman Empire'. Between 60-100,000 people responded to the call, surprising even the Pope himself.³⁴³ Between 1098 and 1320 a number of wars between the Christians and Muslims took place under the name 'crusades' and during this period, when kings and nobles of England were usually gone for years at a time, no jurisprudence seems to have developed in England to make a distinction between law and justice. In the war economy which prevailed at the time, law, particularly black letter law or command type laws, rather than justice, would make more practical sense to governance.

Despite the lack of any significant new law being developed clearly old English law still held fascination for the Normans. In 1118 the *Leges Henrici Primi*, written by an unknown author at court, was published. However it did not contain any new definition of justice but merely set out, in a disorganised form, the laws that appeared to the author to have existed in England before the conquest. More significant is the work of Sir Ranulf de Glanvill titled *The Treatise on the Laws and Customs of the Kingdom of England* which was written to help Henry II (1154-1189 CE) resolve his legal dilemmas.³⁴⁴ The Treatise was based on Justinian's *Institutes* with modifications. The Preface attempts to set forth a principle of royal governance, not just for war but for peace:³⁴⁵

The Regal Power should not merely be decorated with Arms to restrain Rebels and Nations making head against it and its realm, but ought likewise to be adorned with Laws for the peaceful governing of its Subjects and its People. With such felicity may our Most Illustrious King conduct himself, in periods both of Peace and of War, by the force of his right hand, crushing the insolence of the violent and intractable and, with the sceptre of Equity, moderating his Justice towards the humble and obedient, that as he may be always victorious in subduing his Enemies, so may he on all occasions show himself impartially just in the government of his Subjects.

CP Sherman says that Glanvill's *Treatise* defined the previous customs of England, and identified the law as being derived ultimately from the king's authority.³⁴⁶ It was by this method that common law and its institutions emerged in 12th century

³⁴³ See generally John Gillingham (translator) Hans E Mayer *The Crusades* (Oxford University Press, Oxford, 1972) at ch 1.

³⁴⁴ GDG Hall (translator) (ed) *The Treatise on the Laws and Customs of the Kingdom of England* (Oxford University Press, Oxford, 2002) at xix, n 1.

³⁴⁵ John Beames *A Translation of Glanville* (John Byrne & Co, Washington DC, 1900) at Preface.

³⁴⁶ Charles P Sherman "The Romanization of English Law" (1914) 23 Yale LJ 318 at 326.

England.³⁴⁷ Under Henry II a central royal court called 'The Bench' began to sit regularly at Westminster.³⁴⁸ Other judges went on circuit but they had the same status as those at Westminster. In these developments dispensing law meant dispensing justice.

Feudalism involved a new type of class relations and its effect on the law and vice versa cannot be disputed. Its most obvious impact was on the type of relationship demanded by people, initially only the Norman barons, from the king. This was, at first, strongly expressed in the rebellion leading up to the drafting of the *Magna Carta*. The *Carta* was the most significant politico/legal agreement in the history of the English legal system in the Second Millennium and formed the basis of rights claims much later in the 1628 Petition of Right and the 1689 Bill of Rights. It also formed the foundation of the American Revolution and the Constitution in 1791. Its impact is felt to this day.

The Magna Carta of 1215 was a grant which represented an undertaking by King John of England to his barons. It signified the resolution of a two century struggle between Norman kings and their barons. As Pollock and Maitland describe it:³⁴⁹

Hardly have Normans and Englishmen been brought into contact, before Norman barons rebel against their Norman lord, and the divergence between the interests of the king and the interests of the nobles becomes as potent a cause of legal phenomena as any old English or old Frankish traditions can be.

The Carta's genesis lay in an earlier document called the *Charter of Liberties* which was a proclamation by Henry I in 1100 and was a pacifying instrument for the barons on the part of Henry to ameliorate the abuses of his late brother William II and to garner support for his claim to the throne against his older brother Robert.³⁵⁰ The *Charter of Liberties* was itself based on an earlier charter issued by William II in 1093, in the same century after the Norman invasion, indicating that the relationship between the former dukes of Normandy, now kings of England, was fraught with difficulty from the beginning. But Henry's Charter was important as it represented for

³⁴⁷ At 322.

³⁴⁸ Baker, above n 314, at 17.

³⁴⁹ Pollock and Maitland, above n 336, at 80.

³⁵⁰ "Charter of Liberties of King Henry I: AD 1100" (1999) The Center for Constitutional Studies, National Humanities Institute <www.nhinet.org/ccs/docs.htm>; and other charters 1100–1297 AD. The Center for Constitutional Studies, National Humanities Institute <www.nhinet.org/ccs/docs.htm>.

the first time a monarch's willingness to be bound to the laws. One of the interesting aspects of the Henry *Charter* was its reference to and approval of the law of King Edward, the last Anglo Saxon king. The *Charter of Liberties* was the first document to set out three new principles: (i) an agreement between the monarch and barons who ruled the ordinary people thus locking them into the relationship; (ii) 'justice' expressed as elimination of "bad customs by which the kingdom of England was unjustly oppressed";³⁵¹ and (iii) restoration of some Anglo Saxon political institutions and laws in amalgamation with Norman amendments.³⁵²

The *Charter of Liberties* did not last long as Henry I ignored it. Since it did not contain any enforcement provisions it had very little effect and he extended his powers well beyond those he had promised. After Stephen of Blois seized the throne in 1135 he issued his own Charter in 1136 based on the one Henry had signed in 1100. One of the clauses stated that "I promise that I shall keep the peace and do justice in all things, and maintain them as far as I am able."³⁵³ In this sense, justice was emphasised as an element of the law.

However the Magna Carta was much more vigorously fought over by the barons. By this time John had inherited the throne and, like some of his predecessors, was not popular with the barons for implementing taxation and other forms of raising cash for himself.³⁵⁴ From about 1209 until 1215 King John was pursued relentlessly by the barons. He attempted to maintain his power by making an agreement with the church to surrender sovereignty and then receiving it back in a kind of vassal relationship for an annual cash sum but this subterfuge did not deceive the barons.³⁵⁵

Subsequently, the barons renounced their feudal ties to him and appointed an 'army of God' against him in an attempted coup. It was inevitable that John would try to make peace just to keep his own position as monarch secure. At Runnymede near Windsor Castle King John began to negotiate peace with Archbishop Langton as mediator. Clause 40 of the Carta states: "To no one will we sell, to no one will we refuse or

³⁵¹ "Charter of Liberties of King Henry I: AD 1100", above n 350, at cl 1. (AD is 'CE' in the thesis)

³⁵² See Janelle Greenberg *The Radical Face of the Ancient Constitution: St Edward's 'Laws' in Early Modern Political Thought* (Cambridge University Press, Cambridge, 2006) for the development of the charters in association with modern constitutionalism.

³⁵³ David Crowther "The Charter of Liberties of Stephen" The History of England <<https://thehistoryofengland.co.uk>>.

³⁵⁴ Greenberg, above n 352, at 16.

³⁵⁵ Ralph V Turner *King John: England's Evil King?* (The History Press, The Mill Brimscombe Port Stroud, 2009) at 190.

delay, right or justice."³⁵⁶ The Charter ensured the freedom of the church (clause 1), and that "men in our kingdom shall have and keep all these previously determined liberties, rights and concessions, well and in peace, freely and quietly, in their fullness and integrity" (clause 63).³⁵⁷ It also states:³⁵⁸

An oath has been sworn, on the one hand by us and on the other by the barons, that all the aforesaid provisions shall be observed in good faith and without evil intent.

The language of the Carta reveals the movement away from the command structure of governance to that of mutual obligation. It shows the beginnings of 'rights talk' without taking away from it the agreement foundation of the document. However, even this Carta was on shaky ground, leading to the First Barons War which was eventually won by John. Over the next few years until the end of that century there were four or five more charters issued; all amendments of the 1215 Magna Carta. These amendments reflected not only the never-ending struggles between the monarch and the aristocrats but also the need for the Carta to reflect a rapidly changing society marked by mercantilism, the influence of the church, entrenchment of feudalism, the slow but steady progress in technology and diminishing populations due to the black death.

As time went on the Normans, now firmly entrenched as the new English, moved towards consolidating their constitutional position. For example, in 1258 the *Provisions of Oxford*, which many regard as the first English Constitution notwithstanding the *Magna Carta*, were forced upon the King by his barons and, a year later, the *Provisions of Westminster* were designed to consolidate *Oxford*.³⁵⁹ The significance of the *Provisions* was that they formed the first parameters of a parliament. While King Edward later annulled the clauses in the *Provisions* that limited his own powers, they were later confirmed in the *Statute of Marlborough* in 1267 and were still in existence until recently.

The first parliament of Edward I met in 1275. Its purpose was to raise taxes to help pay for Edward's Crusade from 1268-74 but also to issue the discriminatory *Statute of*

³⁵⁶ Xavier Hildegard (translator) "The Magna Carta of England, 1215" (2001) Magna Carta Plus <www.magnacartaplus.org> at cl 40.

³⁵⁷ At cls 1, 63.

³⁵⁸ Hildegard (translator), above n 356.

³⁵⁹ "Provisions of Oxford (1258) and Westminster (1259)" England calling <<https://englandcalling.wordpress.com>>.

the Jewry which allowed Edward to extort money from Jewish people. Thus the first English parliament had an unjust purpose if modern standards of injustice are to be applied. From this point on the King issued the writs for summoning parliament as a prerogative of the Crown. Associated with the new parliament were institutions such as the *curia regis* (similar to the Anglo Saxon witenamagot) which was composed of tenants-in-chief of the king, the senior officers of the court, as well as the bishops whose areas included the king's lands. It exercised all functions-legislative, judicial and diplomatic. Also what became the future Privy Council was the *Concilium Ordinarium* and this was formed alongside smaller councils selected from parliament itself.³⁶⁰

By 1275 the *Statute of Westminster* had been passed codifying all laws, many from the *Magna Carta*. The struggle between the king and the aristocrats was expressed in emergence of institutions such as parliament which provided space for what might be called 'agreed mutual obligations'. Command had given way to 'consent'. Justice became a rallying cry for the transformation of one to the other. The peasant revolt of 1381 marked the violent end of serfdom when even the Archbishop of Canterbury was not spared in the assault against the legal system as every lawyer in London came under attack. In particular, the legislators who had enacted the *Statute of the Labourers* were singled-out since this was considered an unjust law.

There is no doubt that the *Magna Carta* initially represented a kingly grant of privileges. However, over the following four centuries, the word 'rights' as an element of justice was fashioned out of the foundations of the Carta. The *Petition of Right* in 1628 and the *Bill of Rights* of 1689 represented this shift. Significantly, the advent of a new mode of production, emerging from the remnants of the old feudal mode, cannot be under-emphasised in the transformation of 'privileges' to 'rights'. Capitalism was the new mode, initially triggered by mercantile and banking activity during the Crusades, fortified by the technological revolutions in agriculture, for example, the plough and the mill, the movement of people from country to towns in search of waged work, the scientific advancements represented by steam power, and by the voyages to the far corners of the earth which instigated international trade and accumulated riches for Europe plundered from Asia, South America and Africa. It was inevitable that the ferociousness with which the new mode took hold would have

³⁶⁰ George B Adams *The Origin of the English Constitution* (Beard Books, Washington DC, 2002) at 142.

the effect of sweeping aside all vestiges of the previous feudal mode except where this could serve the advancement of capitalism, for example slavery.

6 *Capitalism, enlightenment and justice: the social contract*

The advent of capitalism undoubtedly had its effects on law and the conceptualisation of justice. This initially had its impetus in the move to the idea of contract as a new social relationship not present in the relationship of status indicated in feudalism.³⁶¹ While contracts had existed in human society since ancient times (in the form of early handshakes, promises and undertakings for as diverse social relations as marriage, trade and exchange, international treaties and pacts), as a legal term it had never been unified as a single concept as it always took the form of the mode of production in which it functioned.

Roman contract was called *nexum* which indicated a 'bond' or 'chain'. *Nexum* later became associated with 'obligation' so a contract was a pact plus an obligation. Obligation signified rights as well as duties- for example the right to have a debt paid and the duty of paying it. The first contracts did not have the element of consideration.³⁶² During feudal times contracts became somewhat more sophisticated due to merchant activity. An example of this was *Lex Mercatoria*, a law of merchants that both reflected the onset of early mercantilism as well as influenced it. Other feudal contracts were for labour services among peasants and serfs and, as landholdings took on a more capitalist form from around the 12th century, the idea of contract moved from protecting and facilitating feudal relations towards agreements based on explicit and free consent.

The relationship between contract and constitutional development has been explored by Paul Vinogradoff:³⁶³

... even a villein received his yard-land or ox-gang from the steward of a lord after swearing an oath of fealty and in the form of an "admittance" by the staff, of which a record was kept in the rolls of a manorial court: hence the copyhold tenure of English law. ... This view was readily extended from the notion of a breach of agreement between the lord and his tenants to a conception of infringement of laws in general. In this way the feudal

³⁶¹ Maine, above n 268, at 196.

³⁶² See generally Alan Watson "The Evolution of Law: The Roman System of Contracts" (1984) 2 *Law & Hist Rev* 1.

³⁶³ Paul Vinogradoff "Feudalism" in *Cambridge Medieval History* (1924) vol 3, 458.

view could be made a starting-point for the development of a constitutional doctrine. We may notice this in the case of Bracton.

By the 15th century, the notion of 'freedom to contract' or 'freedom to enter into legal relations' was replacing 'obligations' exemplified in feudalism. The choice and free will aspect of the capitalist contract was absent in the feudal contract. Nevertheless feudal aspects of legal relations of the previous millennia were not totally abandoned in this transformation. The concept of 'justice' as an obligation of the monarch towards his or her subjects became 'justice' as part of the negotiated and agreed social relationship, identified as a 'social contract' between the two. It introduced the concept of 'equality' not present in the previous modes.

Also in the new legal arrangements were the concepts of 'liberty' of the subject which had been a feature of the *Magna Carta*, founded on the *Charter of Liberties*. The transformation in social relations in the 13th century inevitably made an impact on the absolutist tendencies of the monarchy in England. Justice may have been defined narrowly as 'law' but what the people were seeking was justice in the delivery of law. No longer were they satisfied with a king or his judges dispensing law and pretending that it was also justice. There was a discernible shift in the people's minds and claims from law to justice differently defined. The traditional calls for justice, though loosely defined in various protests and peasant revolts, were nevertheless articulated as the obverse of law.

The combination of active mercantilism, opening up of the new worlds, the onset of African slavery, transformation of technology, amendments to the *Magna Carta*, the emergence of parliament alongside the authority of the monarch, the remnants of the crusades in religion and the rapid wealth accumulation by the churches, as well as the changing social structures, eventually resulted in what is termed 'the Enlightenment'.

The Enlightenment was in reality about the emergence of Europe from the Dark Ages into the light with scientific innovations being at the forefront, but the philosophical activity accompanying it radicalised the people not only on the European continent but also in the new British colony of America. Freedom to contract in economic relations was extended to governance and the political sphere through invention of the term the 'social contract'.

It is at this point in the history of humanity that 'natural law', invented as an idea in pre-Christian Greek times, came back to life in completely different circumstances to stand in contrast with another perspective based in the scientific methodology of

positivism. What seemed to be analysed together as both justice and law at the time of Aristotle now diverged into two different ways of seeing the social world. The two were worlds apart in perspective until now and, yet, it was in the subject of developing law and the legal system that attempts were first made to find ways to allow communication between the two while keeping them separate. The 'autopoietic' nature of the relationship is first revealed at this time.

The autopoietic connection between justice and law comes to light in thoughts of the philosophers, theologians and jurists of the 13th-17th centuries. The writings of Thomas Aquinas (1225-1274), for example, became available to jurists of the 13th century, in particular his treatise on four kinds of law: eternal, natural, human and divine'. 'Natural law' was human participation in the eternal law to be discovered by reason. As Aquinas said:³⁶⁴

... this is the first precept of law, that good is to be done and promoted, and evil is to be avoided. All other precepts of the natural law are based on this
...

The concept of 'reason' was being developed incrementally at this time but it was not until the work of renaissance Spanish philosopher and jurist Francisco de Vitoria (1483-1546) that the relationship between reason and law was made. This emerged in connection with advice sought by Charles V the Holy Roman Emperor and King of Spain on whether the native people found by Spanish conquistadors in the new world possessed 'reason'. Vitoria advised that they did because their customs appeared to be complex and sophisticated irrespective of their religion.³⁶⁵ A century later, Grotius (1583-1645), influenced by Vitoria, said people were *sui juris* (under their own jurisdiction or sovereign in their own right) and had rights as human beings and any breach of the autonomous jurisdiction should be punished.³⁶⁶

By the 18th century a link was being made between 'reason' and 'happiness', as well as a 'social contract' which took the discussion towards a decidedly legal/contractual

³⁶⁴ Thomas Aquinas "The Summa Theologica—First part of the Second Part" University of Windsor <<http://web2.uwindsor.ca/courses/philosophy/pinto/34-110-02/aquinas.PDF>>.

³⁶⁵ Vitoria was founder of the tradition in philosophy known as the School of Salamanca, and remembered particularly for his contributions to just war theory and international law. See André A Alves and José M Moreira "The Salamanca School" in John Meadowcroft (ed) *Major Conservative and Libertarian Thinkers* (Continuum International Publishing Group Inc, New York, 2010) vol 9.

³⁶⁶ See Charles S Edwards *Hugo Grotius: The Miracle of Holland: A Study of Political and Legal Thought* (Nelson Hall, Chicago, 1981).

direction. Emerich de Vattel (1714-67), for example, strongly influenced by Vitoria, Grotius and Gootfried Wilhelm Leibniz (1646-1715), defined 'mutual law' as 'a social contract' for respect for the betterment of mankind. In his *Law of Nations; or, Principles of the Law of Nature: Applied for the Conduct and Affairs of Nations and Sovereigns* he said:³⁶⁷

Since the object of the natural society established between all mankind is — that they should lend each other mutual assistance, in order to attain perfection themselves, and to render their condition as perfect as possible, — and since nations, considered as so many free persons living together in a state of nature, are bound to cultivate human society with each other, — the object of the great society established by nature between all nations is also the interchange of mutual assistance for their own improvement, and that of their condition.

It will be noted for later reference that Vattel's work found its way into the legal development of pre-colonial Fiji through the writings of a Frenchman, Charles St Julian, who was Fiji's first Chief Justice in the pre-Cession King Cakobau's government.

What these philosophers of the 13th–17th centuries were doing was setting the scene for the Enlightenment when ideas about obligations and duties (and 'justice') as an agreement were beginning to be considered as an element of governance in terms of 'humanity' rather than any specific nation state. Vattel, for example, referred to justice as essential to peaceful enjoyment and happiness:³⁶⁸

All nations are therefore under a strict obligation to cultivate justice towards each other, to observe it scrupulously, and carefully to abstain from everything that may violate it. Each ought to render to the others what belongs to them, to respect their rights, and to leave them in the peaceable enjoyment of them.

The key factor was use of 'reason' to deduce binding rules of law and morality. This perspective took the ideas back full circle to the Stoics of classical Greece. Similar to classical Greece, 17th century English law used the term 'law of nature' synonymously with the notion of 'reason'. The more well-known of the

³⁶⁷ Jon Roland (ed) Emerich de Vattel *Law of Nations; or Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns* (Digital ed, Constitution Society, 1999) <www.constitution.org> at Preliminaries, s 12.

³⁶⁸ At Book II, ch V, s 64.

Enlightenment thinkers, Thomas Hobbes, John Locke and Jean-Jacques Rousseau developed their ideas from these foundations. Two connected ideas, both grounded in classical Greek thought, were being promoted in a novel way at the time of the renaissance: the first was that 'happiness is the natural condition of mankind' and the second was that everyone should act 'mutually' to further or maximise each other's happiness. For Hobbes, Locke and Rousseau the idea of 'mutual' relations in society pre-determined the concept of the social contract in constitutional matters.

The kernel of the notion of justice, by this time, was being extracted from the idea of 'reason' in the sphere of law. Herein lay the connection between natural law and justice. What added to the mix and made it more philosophically interesting was the type of legal contract developing within capitalism as the new mode of production. Joseph H. Kary says the from the middle of the 14th century to the end of the 16th century the tort of assumpsit became significant to the operation of contracts as one could sue for the enforcement of a promise which gradually transformed into a general remedy for breach of contractual performance, leading to a specialised claim for the recovery of money owing under a contract.³⁶⁹ In *Slade's Case*, the turning point, assumpsit moved from being a residual category, applying only to agreements which did not fit the standard categories of common law, to becoming a general remedy for breach of agreements.³⁷⁰ This shift meant that a 'promise' became central to the making of a contract. Kary further says that when Hobbes' *Leviathan* was first published, the application of the new contract law principles to constitutional law was a current debate. According to Kary, Hobbes combined contract as a 'mutual agreement' and 'voluntary act of will' with the additional element of the 'choice to be bound'. Hobbes also linked his idea of contract, firstly, with the 'state of nature'; he said the law of nature was self-interest, that everyone was at war with each other. Secondly, Hobbes said everyone should enter into a 'social contract'. The social contract was an agreement to create a sovereign.³⁷¹ Sir Ernest Barker says in his *Introduction to Social Contract-Locke-Hume-Rousseau* that the idea of the social contract encompassed two ideas- both connected and distinguished- the contract of government (*pacte de gouvernement, the Herrschaftsvertrag*) and the contract of society (*pacte d'association, the Gesellschaftsvertrag*).³⁷²

³⁶⁹ Joseph H Kary "Contract Law and the Social Contract: What Legal History Can Teach Us about the Political Theory of Hobbes and Locke" (1999) 31 Ottawa L Rev 73 at 74–91. "Assumpsit" is a type of trespass due to deceit.

³⁷⁰ *Slade's Case* [1602] 4 Co Rep 91a, 76 ER 1072. Edward Coke was counsel for Slade who won.

³⁷¹ Kary, above n 369, at 77.

³⁷² *Social Contract: Locke-Hume-Rousseau with an Introduction by Sir Ernest Barker* (Oxford University Press, London, 1947) at xii.

Locke, instead, developed the idea of a social contract a little further and from a different perspective. Hobbes had written *Leviathan* practically in exile, at the time of the English Civil War; Locke on the other hand was influenced first-hand by revolutions in England at the time, bringing the notion of the social contract closer to his idea of justice. His *Two Treatises of Government* was published 40 years after *Leviathan* and in it he said that men had a responsibility to keep their promises: “the beginning of *Politick Society* depends on the consent of individuals”.³⁷³ He said the social contract had some essential elements: (i) established laws made known to the people; (ii) impartial judges to apply the laws, and (iii) the government to employ force only according to the laws.³⁷⁴ What is made clear in Locke is that the relationship between the government and the people is not a straight out contractual one; it also has an element of trust. Sir Ernest Barker says Locke's social contract created a trustee (government) by the people (trustor). The trustor/trustee relationship is a contractual one that creates rights in the beneficiary as against obligations in the trustor. Rebellions are ignited (and allowed) when this relationship breaks down.³⁷⁵

In this arena of thought, Jean-Jacques Rousseau (1721-1778) introduced the idea of 'general will'. His *Du Contrat Social ou Principes du Droit Politique*, published in 1762, had 'natural law' foundations, just like Locke, but was more closely attuned to Plato's *Republic*: the state being "a progressive force which lifts man gradually upward from his primitive condition" says Barker,³⁷⁶ and that:³⁷⁷

The need for self-preservation dictated a contract, formed by the free will of all; and the society so created resulted in the establishment of justice and the attainment of a higher ... morality.

The State must facilitate a "general will directed to the attainment of the general good".³⁷⁸

The philosophers noted above were not writing or expressing innovative ideas in a vacuum. Hobbes, Locke and Rousseau were conceptualising the different causes and justifications of revolutions in Europe and the United States. In his “The Nature of

³⁷³ Kary, above n 369, at 84–85.

³⁷⁴ At 85.

³⁷⁵ See Locke, above n 8, at 192.

³⁷⁶ *Social Contract*, above n 372, at xlii.

³⁷⁷ At xlii–xliii.

³⁷⁸ At xliv.

Rights in American Politics: A Comparison of Three Revolutions” Charles R. Kesler says the three respective revolutions of England, France and America differed in their 'very characters'. In England, the Glorious Revolution of 1688 was disguised as a 'succession crisis' and the 1688 English Bill of Rights spoke, not of the natural rights of man, but of the 'ancient rights and liberties' of the lords Spiritual and Temporal and Commons'. The American and French Revolutions, on the other hand, were creedal in nature, based on a belief in fundamental natural rights and were.³⁷⁹

... rhetorical shots meant to be heard around the world ... the French Declaration of the Rights of Man was meant to announce and solemnize the rights of man, not to announce the independence of one people from another as the American Declaration of Independence was intended to do.

The question is why these revolutions took place at all. They were violent and decisive but, for the people involved in them, inevitable. England, America and France obviously were at the stage of political, legal and social development which deemed these revolutions necessary. In England King Charles I was executed and his son Charles II spent most of his youth in exile. James II was deposed in 1688. At the time of William and Mary the Bill of Rights became non-negotiable and established parliament as the supreme authority of England; the main clauses were based on the 1628 Petition of Right. The Magna Carta, the Petition of Right and the Bill of Rights in combination currently remain as the constitutional law of Britain. Injustice was defined as non-representation of the people (parliament) and breach of the social contract as a trust between the monarch, the aristocracy and the 'commons'.

The American Revolution demanded the right of American settlers to equality with their British counterparts in political representation in the face of high taxation and having to provide goods for the British market. It was expected that since the American colony had been initiated as a royal charter it would supply goods and services to Britain as a 'privilege' as established by Norman monarchs for English merchants to settle outside England and facilitate international trade. From 1619 when the first representative assembly in America was convened in Jamestown,

³⁷⁹ Charles R Kesler “The Nature of Right in American Politics: A Comparison of Three Revolutions” (30 September 2008) The Heritage Foundation <www.heritage.org> at 2.

Virginia, to "establish one equal and uniform government over all Virginia"³⁸⁰ until the 1776 Declaration of Independence was adopted, declaring:³⁸¹

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. –That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, –That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government ...

the Magna Carta was seen by the various assemblies formed during this time as the standard against executive arbitrariness in the new world colony.

This sense of outrage at British arbitrariness did not extend to the Americans considering African slavery in the same light. Justice in the American context was only demanded against arbitrary government and inequality between the British and the Americans. This demand, not satisfied through negotiations or appeals for fairness, was resolved only through a declaration of independence, which also stated that.³⁸²

But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.

Again, in the American sense, tyranny was injustice. Representation, equality (of whites with whites) and lack of arbitrariness in government was 'justice'. Thomas Jefferson, as one of the architects of the Declaration, thought that John Locke was "one of the three greatest men that have ever lived"³⁸³ and, as Carl L. Becker said, "most Americans absorbed Locke's work as a kind of political gospel and the

³⁸⁰ "The 'Great Charter' and the First General Assembly" Jamestown Settlement and the American Revolution Museum at Yorktown <www.historyisfun.org>.

³⁸¹ "The Declaration of Independence–In Congress, July 4, 1776" UShistory.org <www.ushistory.org/declaration/document/>.

³⁸² "The Declaration of Independence–In Congress, July 4, 1776", above n 381.

³⁸³ Carl Lotus Becker *The Declaration of Independence: A Study on the History of Political Ideas* (Harcourt, Brace and Co, New York, 1922) at 140.

Declaration was similar to the phraseology of the Second Treatise on Government".³⁸⁴ The Bill of Rights established freedoms and rights as a separate entity from the new American Constitution.

The American Revolution influenced the revolution of France against the monarchy.³⁸⁵ The French Revolution was also instigated by what the people perceived as unfair taxation, arbitrary government as well as uneven wealth distribution.³⁸⁶ Added to this was the lack of freedom of speech promoted by the Roman Catholic Church as well as demand for land reform. The King of France attempted to negotiate his way out of the demands, even by agreeing to grant a constitution as a royal favour, culminating in the 1789 publication of the *Declaration of the Rights of Man and the Citizen*; however, eventually, he was imprisoned and executed. In 1793 the French *Declaration of the Rights of Man and Citizen* was enacted by popular referendum with additional clauses in it such as the right of rebellion as a "sacred" right and most "indispensable of duties"³⁸⁷ alongside acknowledgment of popular sovereignty over national sovereignty, social and economic equality, and the abolishment of slavery.

Kesler says that French accommodation of the social contract in France accords to some extent with the Rousseauian perspective, and can be distinguished from the American model. In the French model the reference to 'general will' signalled the collective nature of the principles whereas in the American model the government derived its legitimacy from consent of the governed.³⁸⁸

In all three revolutions noted above, the call for 'justice' was a cry for meaningful representation in government (government by consent), equality, freedoms and rights. The absence of these was considered to be injustice instigating the right or duty to rebel. By the 20th century these rights and freedoms, stemming from their natural law origins, became encapsulated in the Universal Declaration of Human Rights (UDHR)³⁸⁹ which was established as the world standard in response to the injustice

³⁸⁴ At 141.

³⁸⁵ See generally Samuel E Morison (ed) *Sources and Documents illustrating the American Revolution, 1764–1788* (2nd ed, Clarendon Press, Oxford, 1929).

³⁸⁶ See generally Norman Hampson *A Social History of the French Revolution* (Routledge, London, 1988).

³⁸⁷ "Declaration of the Rights of Man and Citizen from the Constitution of Year I (1793)" Columbia University <<http://www.columbia.edu/~iw6/docs/dec1793.html>> at art 35.

³⁸⁸ Kesler, above n 379, at 1–2.

³⁸⁹ *Universal Declaration of Human Rights*, GA Res 217A(III), A/RES/217(III) (1948).

faced by victims of Nazi Germany. Each nation state was obliged to affirm the contents of the UDHR if it wished to belong to the family of independent nations at all. However there was no 'right to rebel' in the UDHR; it was assumed that states who affirmed the provisions would then actively respect them. That idea proved not to be true as events post-UDHR affirmation showed, for example Bosnia and Rwanda as just two examples where genocide occurred in the same century.

The survey in this chapter of the developing and contingent notion of justice from time immemorial shows a very important extension of Teubner's point, and that is that 'justice' keeps law philosophically 'clean'. At the same time justice's vague nature allows it to be fashioned into a vehicle for transformation of the law if required. While not possessing a single definition, justice nevertheless shows an identifying core of behaviour and perspective- following it will literally lead to the greatest good for the greatest number in human society.

The definitions of justice that seem variously common to all societies and cultures over time and un-contradicted by any appear to be the following: right to be heard, equality, collective responsibility, agreement and consent, fair and independent delivery of law, rights, moral goodness, integrity of the social order, welfare of the whole society or common good, complete goodness, liberty and freedoms, social entitlement, divine order, wisdom, virtue, mercy, peaceful governance, mutual obligations and social contract, happiness, general good and representation of people in governance.

A social order, in light of these definitions of justice, would be legitimate.

The next chapter takes these definitions into the Fijian context. Fiji was colonised by Great Britain in 1874, though the influence of Enlightenment philosophies were present in Fiji sometime before then. The constitutions that were written in Fiji from the 1860s revealed the extent of this influence.

IV Chapter 3

Legitimacy of the Fijian Constitutional Framework

The two questions posed in the introduction of the thesis were (i) What makes constitutions legitimate and (ii) is the 2013 Constitution of Fiji legitimate?

The first question was answered in the previous chapter. A constitution (or constitutional order) is legitimate when justice is its invariant core feature, that is, when justice forms its very identity or the basic structure. I defined justice in all its manifestations in the previous chapter so that the quality and historical resonance of this attribute may not be in doubt.

With this in mind, the next question that needs to be answered in as comprehensive a way as possible is in relation to a specific constitution, namely the Fijian Constitution. Is the Fijian 2013 Constitution of Fiji legitimate?

The 2013 Constitution of Fiji was not devised in a vacuum. It came at the end of a series of formal written constitutions in Fiji which began in 1865. In total Fiji has promulgated, decreed or enacted seven (7) supreme and entrenched constitutions. Unlike the American constitution which used the format of amendments to keep the constitutional relationship between the state and the people current, Fiji tended to start afresh with each new document. Whether justice was the core invariant feature in any or all of its constitutions as the basic structure or identity, or was it merely law, is the subject of this chapter.

A Early Fijian (Pre-Colonial) Polity

Prior to European contact Fijian tribal polity was complex and, indeed, has remained so to the present day. Land was the basis of the social unit and was defended with ferocious capability. Each tribe was a 'state' in its own right and there was not yet a concept of Fijian 'statehood' encompassing all tribes, though allegiances through marriage were common.

In 1858 Wesleyan missionary Thomas Williams in his book *Fiji and the Fijians*³⁹⁰ established from his interviews with indigenous Fijians that the character of the rule

³⁹⁰ Thomas Williams *Fiji and the Fijians: The Islands and Their Inhabitants* (Fiji Museum, Suva, 1982) vol 1.

exercised by the chief (he called it “King”) was “purely despotic”:³⁹¹

The will of the King is, in most cases, law, and hence the nature of the government varies according to his personal character. The people have no choice in the state; nevertheless utmost respect is paid to ancient divisions of landed property, of family rank and official rights ... Men of rank and official importance are generally about the person of the Sovereign forming his council, and serving to check the exercise of his power. ... The head of each government is the Tui or Turaga Levu, a King of absolute power, who is, however, not unfrequently surrounded by those who exert an actual influence higher than his own, and whom, consequently, he is most careful not to offend. The person of high rank King ... is sacred. In some instances these Monarchs claim a divine origin, and, with a pride worthy of more classical examples, assert the rights of deity, and demand from their subjects respect for those claims. The Chiefs profess to derive their arbitrary power from the gods.

Williams uses the term 'justice' to describe the law of the land though it is clear from his descriptions that he was describing criminal penalties for offences such as murder, petty larceny, abduction, witchcraft, infringement of a *tabu* (taboo) disrespect to a chief, incendiarism and treason. The penalties for these offences were gruesome and included being clubbed to death, or being deprived of one's wife or land; a person was often judged in his absence and executed before he was aware that sentence had been passed against him, though forgiveness could also be granted.³⁹²

Williams knew that Fijian society was also changing as Fijians came in contact with Europeans. But he described the class structure prevailing at the time in some detail. He said it was strictly hierarchical with a stratified series of obligations and duties in a pyramid structure: Kings and Queens; Chiefs of large islands or districts; chiefs of towns, priests and 'mata-ni-vanuas (spokespersons and advisors of the chiefs); distinguished warriors of low birth and chiefs of the carpenters and turtle fishers, common people; and slaves. Williams described rank as being hereditary, descending through female (this is not invariant) with polygamy being widely practised by the chiefs who sometimes had as many as 50 wives.³⁹³

³⁹¹ At 22.

³⁹² At 42.

³⁹³ At 44.

Williams did not have the benefit of modern archaeological methods to identify the origins of the indigenous Fijians or *i-taukei* as they are called now, but we do know that they first arrived in Fiji about 3500 years ago from East Asia. Prior to these settlers the Lapita people were already resident in Fiji but what happened to them is unclear as there was only pottery but no written records left behind such as in Sumer and Mesopotamia or Indus. We can surmise, though, that the early Fijians then, as now, were highly structured in their social life and polity.³⁹⁴

In his *Leadership in Fiji*, RR Nayacakalou, writing about the modern indigenous (20th century) Fijian,³⁹⁵ says that traditional leadership remains a powerful force and traditional leaders wield great influence and power.³⁹⁶ The indigenous social structure, which is of longstanding origins, emanates from the village mainly of between 150–300 people as the primary unit of organisation, with a unitary authority structure at the top of which is the senior chief of the dominant lineage. The village has primary divisions (*mataqali*) and further sub-divisions called *tokatoka*. No village grouping could grow so large as to question the authority of the chief and create an imbalance; when that happened a new village would be formed.³⁹⁷ This explains the constant warfare that riddled Fiji prior to European arrival as the population expanded and new land for settlement became more scarce. Cannibalism was an important part of the rituals of both war and peace in traditional indigenous society.

The chiefly office conferred upon the chief a definite right, subject to some conditions, to make decisions on all matters affecting the group as a group. A chiefly title was normally inherited but there were circumstances when a warrior chief, though not a senior chief, could make a grab for it. One such chief was Cakobau who later became King of Fiji and was instrumental in negotiating a deed of cession with the British.

In the traditional Fijian system the practice of justice was through law. What was law was also just, that is, there was no separation. The social structure with its strict hierarchy determined the delivery of command type laws, quite often exercised arbitrarily, as Williams' account shows, and can be considered in light of Maine's observations that status was the foundation on which the law was based.

³⁹⁴ See Patrick V Kirch *The Lapita Peoples: Ancestors of the Oceanic World* (Blackwell, Oxford, 1997).

³⁹⁵ RR Nayacakalou *Leadership in Fiji* (Oxford University Press, Melbourne, 1975).

³⁹⁶ At 9.

³⁹⁷ At 14–15.

Traditional Fijian society was never static. Transformations in the social schema were taking place all the time due to Fiji's proximity with other islands such as Tonga and Samoa as apparently a lucrative trade was conducted by these peoples with one another prior to European arrival. Furthermore, Christianity, through Tonga, had also reached Fiji in the mid 1800s, though the clash that this contact involved was inclusive of both social and religious differences in world view. The missionaries wished to replace tribal laws with a code of civil regulations based on Christian principles.³⁹⁸

By 1847 Fiji exhibited a conglomeration of old indigenous values and laws, nascent Christian sentiments, and civil regulations for minimal law and order to satisfy the activities of the whalers, sailors, adventurers and others who had washed up on Fiji's shores one way or another. In this mix was a powerful Tongan chief, Enele Ma'afu who claimed sovereignty over the southern parts of the Fiji group on behalf of close neighbour Tonga. Ma'afu formed his own Constitution of the Tovata Federation and introduced a code of laws that had been drafted in Tonga in 1857. He appointed a Tongan magistrate in each principle village under his control to act as judges. An important clause of the code was s III (I) which declared equality in status between the chief and commoner in trials.³⁹⁹

In addition, the new laws made land sales more effective for Europeans who wished to establish plantations and purchase bech-de-mer and the highly prized sandalwood. The early laws, in code-like form, were more or less rules for management, to make life more stable and lucrative for chiefs, who stood to gain financially by the new arrangements with the newcomers, and for the Europeans also. It was the arrival of the Europeans who assisted and consolidated chiefly power that had the most impact on transforming the legal system in Fiji as both interests coincided for mutual benefit.

B Contact with Europeans

The first European to have sighted Fiji was Abel Tasman in 1647, though he could not make landfall due to bad weather. By 1788, when "New Holland" became a penal colony, regular contact between Fijians and Europeans was inevitable, though it did not immediately have much impact on the legal structure of Fiji. The year 1808, however, seems to be the decisive point for transformation when the ship *Eliza*

³⁹⁸ RA Derrick *A History of Fiji* (The Government Press, Suva, 1975) vol 1 at 6.

³⁹⁹ Peter France *The Charter of the Land: Custom and Colonization in Fiji* (Oxford University Press, Melbourne, 1969) at 31–36.

wrecked on one of Fiji's reefs. A survivor, Charles Savage, rescued Eliza's muskets and demonstrated their effectiveness in warfare to the chief Naulivou of Bau Island which was already a considerable powerhouse in Fijian polity.⁴⁰⁰ With the use of muskets Bau took advantage and ensured its supremacy over the rest of the Fijian tribes or small states as were developing at the same time.

By the mid 19th century Ratu Seru Cakobau had inherited the title of King of Bau and later, somewhat unilaterally, declared himself the King of Fiji which was resisted by some tribes, for example from those that had pled allegiance to Ma'afu, but was generally accepted by others who paid tribute to Bau.⁴⁰¹ By all accounts Ratu Seru Cakobau was a special character. He was full of personality and was a reputable warrior having won many wars over his rivals and having grabbed the chiefly title of Bau by sheer force rather than direct inheritance. His attitude towards the Europeans was also somewhat different. Their ideas were interesting to him and he converted to Christianity in 1854 renouncing cannibalism. Aided by the Europeans he developed his own legal system.

By the mid 19th century a significant number of Europeans had settled in Fiji or were periodic residents, arriving on occasion from Australia and New Zealand, and sometimes further afield, putting pressure on their respective governments to protect their interests through consulates which eventually became influential with the chiefs and powerful in their own right. Trading posts were established all over Fiji. Often successful traders were appointed consuls of their countries.⁴⁰² The burning down of the settler and American consulate J.B. Williams' trading store in 1849 was a decisive point for Fiji's transformation from an independent, though unstable, state to a British colony in 1874. Since Cakobau had declared himself Fiji's king many of the compensation claims by Europeans for various indigenous transgressions were made against him personally. The destruction of J.B. Williams property and looting by indigenous people who were under the authority of Cakobau translated into a claim against him by the American government. In addition, Cakobau had ordered a frigate from the Americans which he could not pay for and, in the end, the accumulation of claims for compensation, though exaggerated as a later congressional inquiry found, and the debt owed to the Americans for the ship, made him consider creative ways to extricate himself and Fiji out of his problems.⁴⁰³ Initially he made an offer to the

⁴⁰⁰ Derrick, above n 398, at 44.

⁴⁰¹ At 81.

⁴⁰² At 133.

⁴⁰³ Jean Brookes *International Rivalry in the Pacific Islands 1800-1875* (University of California Press, Berkeley, 1941) at chs XII, XV.

Melbourne Polynesian Company to transfer to them large tracts of land in return for payment of the debt. The Company partially paid the debt and acquired land as had been promised by Cakobau.⁴⁰⁴

The person most responsible for ensuring that Fiji would be attractive for Britain to acquire as another of its colonies was J.B. Thurston. Initially he was appointed Acting British Consul. In this he had to negotiate delicately between traditional Fijian loyalty to their own laws and structures which were robust and Europeans who had settled, in some cases for generations. These Europeans considered Fijians to be still primitive and simple and thus easily persuaded to permanently part with their assets, mainly land, at a fraction of its value. This attracted violence from the Fijians when they realised their land had been alienated forever. The two groups in Fiji were uneasily co-habiting but the laws that could have mediated the relationship were missing.

C Establishing Constitutional Law in Fiji Pre-Cession

By the 1860s Cakobau and his European advisors were already looking at ways to expand Bau's influence across the whole of Fiji. One of these ways was to draft a set of laws that would apply to both indigenous Fijians and Europeans. As soon as his kingly authority was recognised by the Europeans Cakobau seems to have become a 'constitutionalist'.⁴⁰⁵ In particular, he seems to have become aware of, and partial to, the Hawai'ian Constitution when King Kamehameha of Hawai'i adopted it.⁴⁰⁶

The 1860s idea of constitutionalism in Fiji was inevitably affected by the events all over the world especially Europe and America. In particular the 1850s constitutionalism was based on the French, American and English rights documents with which the Europeans in Fiji were familiar. Since both Europeans and indigenous Fijian chiefs such as Cakobau wanted centralised government for settlement, trade, law and order they began to plan for the formation of a new state-wide entity called the Fijian Confederation of 1865. The British representative in Fiji at the time, Colonel Smythe, had suggested that the best form of government for the time being would be a "native government aided by the counsels of respectable Europeans".⁴⁰⁷ The Fijian Confederation symbolised that relationship. By the 1860s most Fijian chiefs had European secretaries/interpreters. The very first constitutional document

⁴⁰⁴ Derrick, above n 398, at 180.

⁴⁰⁵ France, above n 399, at 73.

⁴⁰⁶ Constitution 1864 (Hawaii); and "Notes from Fiji" *The Sydney Morning Herald* (online ed, Sydney, 30 July 1867) at 2.

⁴⁰⁷ France, above n 399, at 73.

for the Confederation was organised by the British Consul Henry Michael Jones in 1865. On January 1st by circular he invited the chiefs of seven *matanitu* (large groupings of tribes or 'statehoods') to a meeting in the then capital Levuka. Initially this was called a 'Confederation of Chiefs' (a wholly European idea says France)⁴⁰⁸ which called itself the central government of all Fiji. At the meeting the chiefs agreed to meet annually thereafter and pass laws which would apply to the whole of the islands. Cakobau was elected the first President of the Confederation and a flag adopted.

Not all chiefs were included in the Confederation; Ma'afu did not arrive until the discussions were almost over and, apparently, some western chiefs were not present. Nevertheless, a public announcement of the resolutions of the meeting was made in the Melbourne Herald, sent as an advertisement by the Reverend James Calvert. The Preamble stated:⁴⁰⁹

The undersigned chiefs of Fiji, having assembled together on the 8th and 9th of May 1865, unanimously agreed to the following resolutions:

That the present condition of Fiji is such as to require a stronger and firmer form of government than it at present possesses- in order that the cause of union, justice and progress may be promoted.

That this object can be best effected by modelling a constitution adapted to the wants of the people and to the forms of the government hitherto in use among them.

The rest of the resolutions were about how the chiefs would foster the welfare of the people of Fiji, the annual election of President who would have command over the other chiefs, adopting a code of laws for all of Fiji, allowing indigenous law to prevail in the hands of individual chiefs, the tribal boundaries to be defined, the creation of independent states with autonomous taxation under individual traditional chiefs, and a declaration of peace and not war, with traitors to 'this Constitution' to be punished by the chiefs united.

The first constitutional document, though not yet a formal constitution, was the basis for forthcoming documents. Between 1865 and 1867 Cakobau thought to consolidate Bau's power by devising a supreme Constitution expressed as a "Bauan Declaration

⁴⁰⁸ At 73.

⁴⁰⁹ At 73.

of Rights". Thus the first Fijian Constitution was called the "Declaration of Rights for the Kingdom of Bau" and promulgated on 2nd May 1867. It was drafted by Cakobau's European Secretary, Samuel St John and was modelled on the Hawai'ian Constitution of 1864 which itself was modelled on the American Constitution of 1787. The articles of the Magna Carta had formed the basis of the constitutions and bills of rights of France, America and Britain and these, through the Europeans in Fiji and also the influence of the King Kamehameha of Hawai'i and his constitution of 1864, became the source of constitutionalism in Fiji creating its grundnorm.

The core features of the Confederation of the Kingdom of Bau were identical to the Hawai'ian Constitution except for the right to liberty contained in the Hawai'ian Constitution but missing from the Bauan document. Other rights that the Bauan Constitution did contain were right to life property and happiness, freedom of religion, freedom of speech, right to petition the king for redress, habeas corpus, trial by jury for rights breaches, right to due process, freedom from slavery, right to be free from unreasonable search and seizure, conduct of the government for the purpose of welfare of the people, the military to be subject to the laws of the land, and making just laws for protecting foreigners persons and property.⁴¹⁰

The provisions on government included naming the Kingdom of Bau a constitutional monarchy and stating that the supreme power was vested in the King for his lifetime. Subsequent paragraphs on the executive included provisions regarding the power of executive government (in the King) in relation to the army, convening chiefly meetings for the public good, appointment of ambassadors and consuls, and regulating currency. Other provisions determined the number and duties of ministers and his cabinet, as well as governors for the districts and islands under Bauan command. Provisions on the judiciary included references to having judges and magistrates guided by English or American laws and precedents or the "customs applicable to the particular case under adjudication".⁴¹¹ The final provision dealt with procedures for amendment to the constitution.

The Bauan Constitution was not the only one in existence at the time. In 1867, probably to off-set the power of the Bauan Constitution, Ma'afu from Tonga/Lau and two other chiefs from different parts of Fiji met to form a confederation and draft a constitution based on an earlier document dated 1865. However this measure collapsed due to lack of support by other chiefs and it was not until 1869 that another

⁴¹⁰ Bauan Declaration of Rights 1867 (Fiji).

⁴¹¹ Article LII.

one was drafted with more support. At the end of that decade both Bauan and Lauan (Tovata) Confederations were ready for an expanded state that would include the whole of Fiji.⁴¹²

By 1871 King Cakobau had decided to open land up for leasing to Europeans. But the ineffectiveness of the 1867 Constitution and government of Bau was apparent in the instability across Fiji created by clashes between Europeans and Fijians. After meetings of, and discussions between, a wide selection of delegates including those from the west, a new constitution was agreed. The Constitution Act of Fiji received Royal Assent (King Cakobau) on 18 August 1871 and the first meeting of the new Legislative Assembly was held in November 1871. The new constitution introduced in 1871 involved Ba, Nadroga, Nadi, the Yasawa group, and Rakiraki/Tavua as well as eastern Fiji. Many of the leading chiefs, including Ma'afu, had tendered their allegiance to the new government members. Ma'afu may have hoped that the government would fail and that he would be asked to take over the administration of all Fiji. This apparent consensus boded well for the new government in 1871, and Cakobau was proclaimed King of Fiji.⁴¹³

The new 1871 Constitution of Fiji was formulated in a much more definitive way to resemble the American Constitution. The Preamble read:⁴¹⁴

Whereas it is expedient for the Good Government of the White and Native Population of the Fiji Group of Islands to Establish a Constitution and Legislative House of Representatives therein; and whereas Delegates from amongst the White residents have been called together for that purpose: Be it therefore, Enacted by the King and the Delegates in Council now Assembled, as follows:

II God hath endowed all men with certain inalienable rights; among which are life, liberty, and the right of owning, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.

⁴¹² Derrick, above n 398, at 159–164.

⁴¹³ Matthew Spriggs and Deryk Scarr (eds) Aubrey Parke *Degei's Descendants: Spirits, Place and People in Pre-Cession Fiji* (ANU Press, Canberra, 2014) at 48–66.

⁴¹⁴ The Constitution of Fiji 1871, Preamble.

The 1871 Constitution also delivered a more sophisticated structure of government; the Legislative Council and Privy Council were both established with representation from Fijian provinces as well as white settlers.

The 1873 Constitution was similarly premised upon certain principles of natural law established in Europe at the onset of the Enlightenment. By now the first Chief Justice of Fiji in the Cakobau Government, Charles St Julian, originally French, had been appointed. St Julian was influenced by the ideas of Vattel. In 1872 he had published his *The International Status of Fiji: Political Rights, Liabilities, Duties and Privileges of British Subjects and Other Foreigners Residing in the Fijian Archipelago*.⁴¹⁵ In it St Julian said: "M. De Vattel is perhaps of all 'writers on International Law the one whose authority has been most cited and relied upon.'"⁴¹⁶

In his text, applying Vattel's principles, St Julian said that the laws of Fiji should also apply to foreigners, relating this to the concept of 'sovereignty'.

In all three constitutions of Fiji pre-cession the obligation of the King to conduct his government "for the common good" was evident and provided by way of either a clause in each constitution or by way of expressing inalienable rights.⁴¹⁷

Established wisdom suggests that the early constitutions were drafted by Europeans for them; however this is too simplistic an analysis in my view. Without Cakobau there would have been no government and his ability to draw in chiefs from all over Fiji in an alliance, even including Ma'a'fu, shows the stature of this high chief, later King. There was never any opposition to his kingship from other chiefs as he was already regarded as a warrior chief. Despite all the obstacles, including age catching up with him, Cakobau managed to place the constitutional government of Fiji on a solid footing pre-cession by incorporating all the elements of justice derived from constitutions as far away from Fiji as possible, indicating that the protections provided to the people within constitutions is not in any sense culturally specific. In a remote corner of the world a high chief, formally a cannibal and fierce warrior, found sufficient similarity between his version of justice and that expressed in the

⁴¹⁵ Charles St Julian *The International Status of Fiji: Political Rights, Liabilities, Duties and Privileges of British Subjects and Other Foreigners Residing in the Fijian Archipelago* (Cunningham & Co Printers, Sydney, 1872).

⁴¹⁶ At 4.

⁴¹⁷ Bauan Declaration of Rights 1867 (Fiji), art 1; The Constitution of Fiji 1871, art 1; and The Constitution of Fiji 1873 (Fiji), art 13. For a copy of the 1873 Constitution, see "The New Constitution for Fiji" *The Sydney Morning Herald* (online ed, Sydney, 4 November 1873) at 3.

constitutions of England, France and America to be able to establish a grundnorm that continues to re-surface in the Fijian constitutions, in varying degrees, to this day. The question to be answered later is whether the 2013 Constitution of Fiji complies with the grundnorm established as the state of Fiji was being formed in the 1800s.

D Cession

Despite good intentions on both sides pursuant to the 1873 Constitution, Europeans and Cakobau equally felt the time was right to cede Fiji to a world power. It was not immediately apparent that this would be Britain though all the signs pointed to it being the obvious choice. In negotiations with Britain for cession Cakobau wished to retain as much autonomy as possible for himself; however Britain required unconditional cession conceding only to the following article in the Deed:⁴¹⁸

4. That the absolute proprietorship of all lands not shown to be now alienated so as to have become bona fide the property of Europeans or other foreigners *or not now in the actual use or occupation of some Chief or tribe or not actually required for the probable future support and maintenance of some chief or tribe shall be and is hereby declared to be vested in Her said Majesty her heirs and successors.*

The emphasis indicates the difference between the Deed of Cession and other documents, for example the Treaty of Waitangi. This clause prevented any further alienation of Fijian land after Cession, thereby retaining 80 per cent of it in indigenous Fijian hands.

After Cession the constitutional law of Britain prevailed in Fiji, including the Magna Carta and the Bill of Rights of 1688. Justice was then understood in the same terms as expressed in the previous chapter. Fiji became as much a part of the history of western thoughts regarding justice, with one major difference, and that is that the people who were expected to abide by these notions were a different ethnic group with different social structures and politics than Europeans. But there was no obvious disparity between the understanding of the Europeans and the Fijians as to what was required for the delivery of the law. However, this notion of justice was disrupted by an economic decision to import Indian labourers to Fiji to help develop the new sugar industry that was being proposed by Fiji's first substantive governor, Sir Arthur

⁴¹⁸ "The Deed of Cession of Fiji to Great Britain—10 October, 1874" The University of the South Pacific <www.usp.ac.fj/> at art 4 (emphasis added).

Gordon.⁴¹⁹ Due to the events taking place in India against British colonisation, of which indenture was a consequence, the purportedly common understanding of what was just and unjust was subjected to severe stress in the industrial and political arena post cession.

E Indian Indenture

Contrary to common understanding and contrary to the situation in French and other British colonies, Indian indenture to Fiji was not a European innovation. As far back as 1871 Cakobau had petitioned the Indian (British) government directly to send Indian labourers, knowing that the blackbird trade in labour was diminishing and the European demand for labour for cotton was affecting the traditional Fijian labour structure. On 14th September 1872 (a full two years before cession) Thurston the English Consul, stating he was making enquiries on behalf of the Cakobau Government, wrote to the Indian Government:⁴²⁰

And there is no doubt whatever but that it would be quite competent for this Government to introduce and fully to enforce the provisions of any law which might be deemed necessary for the importation, the protection while in this Country, the proper payment and due return to India of Immigrant Coolie labourers.

The British Government refused to entertain the idea on the grounds that Fiji was not a British colony and that, so far, Indians were only being sent to Britain's colonies: "I am directed ... in reply to say that the Governor-General in Council regrets that he is not in a position at present to sanction the proposal".⁴²¹

Indians were allowed to provide labour in Fiji only after cession. Gordon had wanted to attract investment from the Colonial Sugar Refining Company of Australia (CSR) and sought a regular supply of labour for it. But by 1875 strict rules about importing Indian labour and their conditions of work, as well as their settlement or return to India had been imposed. Two years before the first arrival of Indians to Fiji the Indian (British) Government had established a policy that the Indian labourers' return passages to India would be commuted if they would accept a bounty or land grant and

⁴¹⁹ See generally Robert Miles *Capitalism and Unfree Labour: Anomaly or Necessity?* (Tavistock Publications, London, 1987).

⁴²⁰ Shaista Shameem "Lord Salisbury's Despatch: Legal Issues for Indo-Fijians" (LLM Thesis, Auckland University, 1998) at 96–98.

⁴²¹ *Despatch* (Secretary to the Government of India AO Hume, 24 December 1872).

chose to settle.⁴²² In reality neither a land grant or bounty was ever given to Indians who chose to settle in Fiji and this, for Fiji Indians, represents the real disjunction between justice and law in regards to their status in Fiji.

Indians were encouraged instead to enter into long term leases to grow sugar cane and over the years the insecurity of tenure in land instigated their political platforms, with the rallying cry of justice at its core, particularly through the National Federation Party which demanded equality for Indians in Fiji throughout the 20th century. The lack of security of tenure and Indians' precarious constitutional position can be described as a breach of the indenture contract with possible implications in future for compensation claims against the British Crown.⁴²³

F Independence and Constitutional Developments from 1970 to 1987

Between 1875 and 1970 under British law only the Magna Carta and the Bill of Rights of 1688 would have been relevant as constitutional documents for Fiji. Both were documents that were founded on calls for justice at the time but their effects in Fiji were negligible. Fiji was described as a “three-legged stool” by eminent chief Ratu Sir Lala Sukuna with the three legs representing Fijian land, Indian labour and European government, supposedly in balance but rarely so in practical terms.⁴²⁴ In reality the Indians resented the discriminatory European government and also constantly sought better arrangements and longer terms for land leases with the indigenous Fijians.

PG McHugh describes the 'legalism' that shaped the Crown's engagement with non-Christian societies as far back as the Tudor period. He said the common theme was "sovereign authority" (imperium) which was established and maintained through military force and legalism.⁴²⁵ It was designed to bolster expansion of the empire, including by use of Vattel's theory of international relations as being that of "independent and equal state sovereignty".⁴²⁶ Once this was accepted English attitudes towards non-Christian people changed. This was visible in Fiji. During most

⁴²² Lord Salisbury's Despatch 1875 (Indian Government, 3 May 1877).

⁴²³ Shameem, above n 420, at 129.

⁴²⁴ Deryck Scarr (ed) *Fiji: The Three Legged Stool—Selected Writings of Ratu Sir Lala Sukuna* (Macmillan Education Ltd, London and Basingstoke, 1984).

⁴²⁵ PG McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-determination* (Oxford University Press, Oxford, 2004) at 2–3.

⁴²⁶ At 110.

of British rule it was this sentiment of protection and trusteeship of the indigenous people that prevailed, including in discussions of independence in 1965.

It was not until the 1960s that legal principles other than those developed for law and order and the ordinary functioning of government were once again meaningfully discussed in Fiji after a hiatus of almost a century. By despatch dated 15th August 1963, the Secretary of State for the Colonies informed the Governor in Fiji that the time was approaching:⁴²⁷

... when the future relationship between Fiji and Britain should be clarified and codified, and will be glad, in consultation with representatives of the people of Fiji, to work out a constitutional framework which will preserve a continuing link with Britain and within which further progress can be made in the direction of internal self-government.

The Secretary of State for the Colonies proposed a Fiji Constitutional Conference to be held in 1965 so as to establish as wide an area of agreement as possible to the proposed constitutional framework. He outlined the objectives of the Conference as being:⁴²⁸

... to build on foundations already laid, to move towards a greater degree of internal self-governing than at present exists in Fiji ... to consider the development of the membership system: a strengthening and broadening of the elected element in the Legislative Council; and matters affecting the franchise. The Conference will no doubt wish to consider the adoption of certain generally accepted provisions designed to safeguard human rights, the public service and the judiciary.

The reference to safeguarding "human rights" was perhaps the most important element in this outline, signalling that the new constitution of Fiji was to be of a certain type including not just structural elements such as the functioning of government but also philosophical (natural law) principles.

The Conference was held at Marlborough House, London, from 26th July to 9th August 1965. Those attending the conference from Fiji were chosen to represent the different ethnic groups though not the Chinese or 'Part-European' communities. Six

⁴²⁷ Secretary of State for the Colonies "Fiji Constitutional Conference 1965" (speech to Parliament, London, October 1965).

⁴²⁸ Secretary of State for the Colonies, above n 427.

representatives of the European community, and six each of indigenous Fijians and Indians were selected. The Europeans were over-represented at the Conference as their population proportion did not justify the number chosen.

The Conference established two main constitutional precepts- the electoral system and the Bill of Rights. All participants agreed that the Bill of Rights would be superior to other laws and that laws inconsistent with it would be rendered void. Some issues were debated hotly but in the end consensus was reached on the main principles.

On 23rd September, by proclamation of the Acting Governor, the first 20th century Fijian Constitution came into effect. The very first chapter was titled “Protection of Fundamental Rights and Freedoms of the Individual”. The first section of that chapter stated:⁴²⁹

1. Whereas every person in Fiji is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-
 - (a) Life, liberty, security of the person and the protection of the law
 - (b) Freedom of conscience, of expression and of assembly and association; and
 - (c) Protection for the privacy of his home and other property and from deprivation of property without compensation,

The provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in these provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others and the public interest.

Following the preamble 16 clauses established specific rights and their limitations. It will be clear that these clauses resembled that universal natural law document drafted in 1948, the Universal Declaration of Human Rights which was the answer to calls of justice made immediately after World War II atrocities had been revealed and in

⁴²⁹ *Fiji Independence Document 1966* (Conference Report FCC65, 9 August 1965).

which both law, in the form of a firm formal structure of rights and obligations, as well as principles of the minimum standards of justice were contained. For the first time in Fiji's history the principles in a constitutional document were reinforced by enforcement provisions as constitutional redress to the Supreme Court was provided by law.

The 1966 Constitutional principles were very similar to the 18th century constitutions of King Cakobau, and so the grundnorm that had been established pre-Cession in Fiji resurfaced in its next document proclaimed in 1966. The one exception was the right to equality. The 1966 Constitution contained a saving clause on discrimination due to the fact that access to land was not based on the right to equality.⁴³⁰ Indigenous land was exclusively held by indigenous people as per Art 4 of the Deed of Cession and not available or accessible to all equally.

The 1966 Constitution was designed to establish Fijian self-governance as a gentle pathway to full independence. It served its purpose as the people prepared for full independence from Britain. Five years later another constitutional conference was held, once again at Marlborough House. This conference revealed something different; the main representatives were negotiating from a political party platform. To be sure the political parties were ethnic based- with the National Federation Party headed by lawyer Siddiq Koya (already Leader of Opposition in the transition arrangements) and the Alliance Party headed by Oxford educated high chief Ratu Kamisese Mara (already Chief Minister) but the two quickly agreed to a consensus on all main points. The agreement was that the lower house of parliament would contain an equal number of Indians and Fijians (12 each) for the common roll franchise and for the national roll franchise (10 each) and that the General franchise (Europeans, part-Europeans and others) would be allocated three seats under the common roll and five seats under the national roll.⁴³¹ Though the proportion of European population did not justify the number of seats allocated to it, such allocation revealed the extent of the power they were designed to wield, with the support of Britain, even in an independent Fiji.

The new Constitution also contained a strong Bill of Rights chapter. Signifying its importance, the “Fundamental Rights and Freedoms of the Individual” was the very first substantive chapter of the Constitution and placed immediately after two short declaratory chapters identifying the State of Fiji and establishing the supremacy of

⁴³⁰ The Constitution of Fiji 1966, s 13(5).

⁴³¹ See s 47.

the Constitution (chs I and II). As with all modern constitutions the positioning of the Bill of Rights chapter became quite crucial to its significance. It also signified the sentiment at the time held by influential constitutional theorists such as Professor SA de Smith, that the new commonwealth nations required a supreme Bill of Rights in their post-independence constitutional mechanisms to be able to balance the rights and responsibilities of diverse populations, previously managed by the colonial enterprise, for the avoidance of crises.

In his seminal work *The New Commonwealth and its Constitutions* Professor de Smith stated:⁴³²

[Constitutional bills of rights] can arrest a piecemeal erosion of basic freedoms. It can be used as a means of educating public opinion- and not only sophisticated opinion, but the body of opinion that is shaped in the schools and the villages- to respect the constitution and the values it enshrines. ... Clearly, then, there is a close correlation between allegiance to the general principles of constitutionalism and readiness to accept and abide by a justiciable constitutional bill of rights.

Professor de Smith wrote this just a year or so before the Fiji Conference. Its impact among British officials would not have been negligible since all new commonwealth states for the most part enacted supreme and entrenched Bills of Rights along with their Constitutions. The exceptions were the Dominions.

From independence to 1987 the Constitution of Fiji with its Bill of Rights was the 'higher law' against which all other laws were measured. These rights were rarely used, though they were justiciable, and very few were tested in court except in criminal cases, though even this was unusual. This stability, though uneasy at times, especially during elections which continued to be fought along ethnic lines, remained in place until 1987.

G The Coup d' État of 1987 and the Attempt at Forging a New Grundnorm in 1990

Until 1987 the ethnic majority party that had dominated parliament (since 1965) was the indigenous Fijian Alliance Party, with high chief Ratu Mara at its head. However in 1987 this dramatically changed when a new party, the Fiji Labour Party, was

⁴³² SA de Smith *The New Commonwealth and its Constitutions* (Stevens & Sons Ltd, London, 1964) at 210–215.

elected to power in April, claiming 28 of the 52 seats in the lower house. In just over two weeks, on May 14 a previously unknown military officer, Colonel Sitiveni Rabuka, accompanied by his balaclava-clad soldiers, walked into parliament and physically removed the newly elected (Bavadra) Labour Government from the seats. In press statements that followed, Rabuka and his supporters (one of whom was Indian politician and former academic Ahmed Ali) said they had removed the government because it was 'Indian dominated', deliberately overlooking the fact that the Labour Prime Minister, Timoci Bavadra, was indigenous Fijian and that, previously, the government had been indigenous Fijian dominated under Ratu Mara. Soon after, Ratu Mara was installed as caretaker Prime Minister, lending credence to the popular belief that the Alliance Party could not stomach its loss at the 1987 elections and had used the military backed by an insidious racist stance to provide justification for their reinstatement.

Whether the May 14 removal of government was an actual 'coup d'état' is an important legal question. A 'coup d'état' is translated as a 'hit at the state'⁴³³ and, thus, removal of a government which leaves the constitution and head of state intact is not technically a coup. Initially the Governor General as representative of the head of state, the Queen, remained in place and there were pertinent observations that he, also a high chief, was part of the conspiracy to remove the Labour Government.⁴³⁴ However a few months later, on 26th September, the head of state was also removed and Fiji became a Republic. A court challenge by Bavadra to have his government restored did not get past the preliminaries as judges were sacked or resigned.

Due to the fact that the coup used the subterfuge of indigenous rights to mask its outright racism, few countries, themselves reeling from the shock of various rightful indigenous claims over lost or confiscated land, felt they could intervene even through diplomatic channels. David Lange, Prime Minister of New Zealand at the time, himself a competent constitutional lawyer, was the one exception. He remarked on the widespread racial abuse of Indians both physically and in employment and social life but his was a lone voice in the international void. It was interesting that most outside support focused on the loss of democracy rather than the persecution of Indians that prevailed at the time. The injustice of this perspective did not fail to alert Indians to the precise nature of the problem, namely tyranny of the majority. The abuses that befell them were in direct contravention of the protections guaranteed by

⁴³³ See "Coup d'État" (2018) Linguee Dictionary French-English <www.linguee.com/french-english>.

⁴³⁴ Sanjay Ramesh "Back to the Fiji Coups" (January 1999) Pacific Islands Report, East-West Centre Pacific Islands Development Program <www.pireport.org/articles/1999/01/11/back-fiji-coups> at 1–2.

the 1970 Constitution which was a document derived from consensus between the major ethnic groups in Fiji, as well as international human rights law, which no one seemed to be able to invoke in the ten whole years between 1987 and 1997. Post 1987, 'justice' once more became a demand by the Indians despite the threats to their lives this attracted. For them none of the elements of justice identified in the previous chapter of this thesis was evident post-1987.

A new Constitution for Fiji was subsequently proposed by the Rabuka Government which installed itself soon after. It wanted to constitutionally entrench what it called 'indigenous rights', a pseudonym for 'indigenous supremacy'. The photograph at the end of this thesis is an example of the graffiti adorning the walls of Suva during this unsavoury period in Fiji's history.⁴³⁵ For Indians the lack of justice in the indenture period, as well as post-indenture in the denial of a grant of land despite Lord Salisbury's promise, was consolidated after the 1987 coup.

A draft constitution was circulated, presumably as an attempt at reaching consensus in the different ethnic groups but the final document was revised at the military barracks where it was discussed and approved only by the 70 member indigenous Great Council of Chiefs (GCC).⁴³⁶ The Indian community leaders were not part of this discussion and the great secrecy with which the final drafts were written shows that not too many of the other communities might have been consulted either. The GCC sent the approved draft to the cabinet and President for promulgation. On July 25 1990 Fiji had a new constitution.

The 1990 Constitution severely and unequivocally eroded the 1970 constitutional equal rights provisions of the non-indigenous communities. Indians (by now calling themselves Indo-Fijians) began to migrate in numbers to avoid the violence and structural discrimination, thus reducing their population in Fiji (the rapid population growth of Indians from the 1930s to 1960s had been a 'problem' over which the Europeans and indigenous chiefs had previously expressed concern). They became a minority population soon after. The racist policies in schools and the economy, permitted by the 1990 Constitution, affected the education of children, business applications and licenses, employment opportunities and promotions, political representation and all other spheres of public and private life.

⁴³⁵ I took this photograph in 1991 a year after the 1990 Constitution had been promulgated.

⁴³⁶ Stephen Sherlock "Constitutional and Political Change in Fiji—Research Paper 7 1997-98" (11 November 1997) Parliament of Australia <www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/>.

The 1990 Constitution made no pretence at being a consensual document. The introductory paragraphs stated that the new constitutional arrangements were not agreed by everyone:⁴³⁷

And whereas the events of 1987 were occasioned by a widespread belief that the 1970 Constitution was inadequate to give protection to the interests of the indigenous Fijian people, their values, traditions, customs, way of life, and economic well-being;

And whereas attempts to reach a consensus among all the people of Fiji as to the method whereby the said interests are to be protected have been protracted and difficult ...

Rights were generally the same as in the 1970 Constitution but the important right to equality and non-discrimination was severely limited. In particular Chapter III of the 1990 Constitution titled “Protection and Enhancement of Fijian and Rotuman Interests” was an overt affirmative action provision which masked constitutional discrimination expressed as a specific limitation of the Fundamental Rights and Freedoms (Chapter II) as follows:⁴³⁸

- 21 (1) Notwithstanding anything contained in Chapter II of this Constitution Parliament shall, with the object of promoting and safeguarding the economic, social, educational, cultural, traditional and other interests of the Fijian and Rotuman people, enact laws for those objects and shall direct the Government to adopt any programme or activity for the attainment of the said objects and the Government shall duly comply with such directions.
- (2) In carrying out any direction given under subsection (1) of this section, the Government through the Cabinet may -
 - (a) give directions to any department of Government, Commission or authority for the reservation of such proportions as it may deem reasonable of scholarships, training privileges or other special facilities provided by Government;

⁴³⁷ Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990, Preamble. Indo-Fijians were being asked to agree to become second-class citizens; it is no wonder that attempts to reach consensus on this point were “protracted and difficult”.

⁴³⁸ Chapter III, ss 21(1)–21(3). “Bose Levu Vakaturaga” was previously the Great Council of Chiefs which was not a constitutional body in the 1970 Constitution.

- (b) when any permit or licence for the operation of any trade or business is required by law, give such direction as may be required for the purpose of assisting Fijians and Rotumans to venture into business; and
 - (c) may give directions to any department of Government, Commission or authority for the purpose of the attainment of any of the objects specified under subsection (1) of this section;
- and the department or the Commission or the authority to which any direction under paragraph (a), (b) or (c) of this subsection is given shall comply with such directions
- (3) In the exercise of its functions under this section, the Cabinet shall act in consultation with the Bose Levu Vakaturaga or the Council of Rotuma, as the circumstances may require.

Aside from these racist provisions three others were added: (i) only ethnic Fijians could be prime minister and the President could only be appointed by the Great Council of Chiefs (s 83) (2); (ii) not less than 40 per cent of all civil service positions were to be reserved for indigenous Fijians and Rotumans (s 127(11)), and (iii) thirty seven of the seventy parliamentary seats were to be reserved for ethnic Fijians and only twenty seven for Indo-Fijians (ss 41(3) and (4)).

Fortunately the 1990 Constitution also mandated a review within seven years and soon after its promulgation, the two main opposition parties, the Fiji Labour Party and the National Federation Party, as well as several non-governmental organisations, began to lobby for a constitutional review. Former New Zealand Governor General (the late) Sir Paul Reeves, Militoni Leweniqila and Dr Brij Lal (the latter two were locals, representing the two main ethnic groups) were appointed as the constitutional commissioners to review the 1990 Constitution. They obtained public views from 1995 for a period of two years. After extensive consultations they formulated what was eventually enacted as the 1997 Constitution.

H The 1997 Constitution: A Document of Consensus

The 1997 Constitution was accepted by the people as a document that had been decided after proper consultation. The careful checks and balances drafted into the document were designed to represent once again equal justice as in the 1970 Constitution but with some modifications to encourage more political and ethnic

bargaining. The most significant provision was the Bill of Rights,⁴³⁹ again dominating the core provisions of the Constitution and was central to its functioning. The Bill of Rights bound parliament as well as the judiciary and all institutions of government both local and national, an improvement on the 1970 Constitution. It formed a supreme chapter within the supreme Constitution. Supplementing the Bill of Rights was an important additional chapter entitled Chapter II Compact which expressed the social contract nature of the Constitution. Section 6 of Chapter II stated:⁴⁴⁰

The people of the Fiji Islands recognise that, within the framework of this Constitution and the other laws of the State, the conduct of government is based on the following principles:

(a) The rights of all individuals, communities and groups are fully respected ...

The 1997 Constitution was seen to return to the original Fijian grundnorm based on three principles: supreme and justiciable rights and freedoms, free and full participation in the political sphere (even though some of the provisions on cabinet bargaining between the government and opposition could only have occurred in a more sincere environment and was considered to be a bit ambitious), and a parliamentary system based on consent.

On the occasion of the enactment of the 1997 Constitution by Parliament, Prime Minister Sitiveni Rabuka referred to it as “an expression of confidence and hope in our collective future ... a truly home grown Constitution which reflects “he dreams and wishes of every section of society”.⁴⁴¹

And on its legitimacy:⁴⁴²

Let us not forget that what will give legitimacy to our Constitution is the principle that it has been developed with the free and full participation of everyone, including all of us here as elected representatives of the people and that it provides for a system of Parliamentary Government based on the consent of the people ... Rather than just focussing on removing those

⁴³⁹ Constitution Amendment Act 1997 (Fiji), ch IV.

⁴⁴⁰ Section 6(a).

⁴⁴¹ (23 June 1997) Hansard [4483].

⁴⁴² At [4483].

aspects of the 1990 Constitution that have created and exacerbated divisions, misgivings and mistrust among our different ethnic communities, we have all agreed to develop it into a positive instrument of nation-building.

For three years after its enactment there was a period of relative calm in Fiji until, once again, the Fiji Labour Party won the elections, this time in 1999. The country was still getting used to dealing with a new party with a different perspective when on May 19 a civilian, George Speight, in a copycat move, took over parliament while one of the parliamentarians, Dr Tupeni Baba, was on his feet speaking, ironically, on the Social Justice Bill.⁴⁴³ Speight's attempted coup was again an outright racist action and there were some questions about who exactly was behind the take-over as, apart from Speight, no one claimed responsibility.

I The *Chandrika Prasad* Case and Restoring the 1997 Constitution

Nevertheless Speight first announced that he had abrogated the 1997 Constitution as not giving sufficient priority to indigenous matters. His group began publishing and 'gazetting' new decrees including on abrogation, new laws and even a bill of rights. Speight ran his government from parliament house with most of the parliamentarians held hostage at the same time (the hostage situation lasted 56 days).

However, the army commander Commodore Frank Bainimarama, in what looked like a puzzling move at the time, announced on May 30th, after unsuccessful attempts at negotiating the release of the hostages, that *he* was abrogating the 1997 Constitution. How this related to Speight's purported abrogation earlier was not entirely clear. By this time lawlessness was prevalent, curfew was on all the time and most people felt powerless to do anything in case it would trigger a killing spree in parliament house as was forewarned with one or two close calls when the Prime Minister Mahendra Chaudhry was taken out to the front lawn of parliament house on the assumption that he would be executed.

During this saga, and because of it, a small Indian rural community on the banks of one of the tributaries of the Rewa River close to Suva was being assaulted nightly by marauding indigenous villagers, their neighbours in fact, who grown up side by side with them, but racism recalled no such relationship. Children were harmed, old men

⁴⁴³ Conversation with former Labour parliamentarian, now Professor Tupeni Baba (10 June 2018).

assaulted; no one was spared.⁴⁴⁴ They were rescued by a group of urban Indian professionals who saw the need, and taken to an Internal Displaced Peoples' Camp. Chandrika Prasad was the representative of that community who was nominated to challenge the abrogation of the 1997 Constitution which, as he said, had protected his rights as a citizen of Fiji irrespective of his ethnicity and which Speight's and Bainimarama's constitutional abrogations were denying him. The *Prasad* case was won in the High Court and, backed by huge numbers of citizens by way of affidavits,⁴⁴⁵ also succeeded in the Court of Appeal. The 1997 Constitution was back through judicial activism initially of Gates J and then of a strong Court of Appeal Bench which included all overseas judges (from New Zealand, Australia, Papua New Guinea and Tonga). Fresh elections were held after Chaudhry requested it; however, Qarase returned as Prime Minister, in a slight majority government, from a new ethnic supremacist political party whose manifesto was not obvious until much later.

Between 2001 and 2009 the 1997 Constitution's Bill of Rights was used extensively by the Fiji Human Rights Commission on behalf of complainants or as *amicus curiae* to bring sweeping changes, based on justice expressed in the Bill, to the regime of law in Fiji.⁴⁴⁶ Justice became law's contingent attribute in the Teubner sense. Under it the Death Penalty was abolished as a cruel and degrading punishment, the crime of sodomy in the Penal Code was invalidated by the courts on the grounds that sexual orientation was protected by the Constitution, the right to a lawyer was affirmed, prisoners' rights to decent prison conditions were declared, forced evictions stopped and disability rights affirmed. In addition, the Commission entered into a compact with the Disciplined Services (Military, Police and Prisons) for it to respect all human rights enshrined in the Constitution and in international law since the Constitution had made international law mandatory for the courts to consider in human rights cases. The Commission also found a justiciable 'right to environment' in the Constitution and established a partnership with the Tuvaluan Government to move this right forward to the international arena.⁴⁴⁷

However, while the Constitution was solidly in favour of social justice and rights, the government was not. The Qarase Government, which had won an interim position

⁴⁴⁴ Alex Spillius "Fijian gangs wage terror campaign against Indians" *The Telegraph* (online ed, United Kingdom, 15 June 2000).

⁴⁴⁵ Listed at the end of the Court of Appeal Judgment. *The Republic of Fiji v Prasad*, above n 3.

⁴⁴⁶ See the *Annual Reports of the Fiji Human Rights Commission* (Fiji Human Rights Commission) from 2001–2009.

⁴⁴⁷ "Reference on the Right to Environment" Asia Pacific Forum of National Human Rights Institutions <www.asiapacificforum.net/support/advice-and-expertise/acj/environment/>.

under Bainimarama after Speight had been arrested, and later won elections, began a campaign of persecution of people other than indigenous Fijians. The targets, in fact, were once again, mainly Indians. Three of the initiatives were (i) the Blueprint which shamelessly promoted indigenous supremacy again in breach of the Constitution;⁴⁴⁸ and (ii) the Qoliqoli Bill which, along with (iii) the Indigenous Claims Bill, would have the effect of removing constitutionally protected property rights of at least 50 per cent of the population and also of causing serious havoc and violence among the indigenous population.⁴⁴⁹

The Human Rights Commission, the Fiji Law Society and opposition political parties all made submissions against these Bills before Parliament and programmes, to no avail. The parliamentary majority that the government held was likely to ensure their passing and adoption as law. In the meantime, the Military Commander and the Prime Minister fell out, some say over corruption, others say over the proposed bills which had security implications. The Human Rights Commission was asked to advise the Commander on the implications of the proposals for national security, and thus breaches of human rights.

In the escalating tension between the army and Qarase's government, Qarase attempted to invoke the Biketawa Agreement,⁴⁵⁰ and in anticipation, somewhat prematurely, a naval vessel was despatched to Fiji by the Australian Government. It was found waiting within Fijian waters by the Australian media which had hired a local pilot to find it. It was only found when a helicopter fell off the deck in deep water killing the pilots on board. As soon as the vessel's presence was publicised in Fiji, the President of Fiji, Ratu Josefa Iloilo, asked Prime Minister Qarase to advise him about its presence but the Prime Minister did not do so. Yet, the 1997 Constitution required the Prime Minister to keep the President informed on all matters affecting the State. The President told the army commander that the Prime Minister had not come to see him as requested. The army commander told the President that the Prime Minister needed to be removed. The President agreed and the Prime Minister and his government were removed the next day, on 6th December 2006. The President was also temporarily removed in order to effect the removal of

⁴⁴⁸ "Blueprint for the Protection of Fijian & Rotuman Rights and Interests, and the Advancement of their Development" (17 July 2000) Maori News Online–Fiji Coup Supplement <<https://maorinews.com/karere/fiji/blueprint.htm>>.

⁴⁴⁹ "Two bills at heart of Fiji coup tension" *The New Zealand Herald* (online ed, Auckland, 2 November 2006).

⁴⁵⁰ *Biketawa Declaration* (2000). For the text, see "Biketawa Declaration" Pacific Islands Forum Secretariat <www.forumsec.org>.

government by Bainimarama who said he was "'stepping into the shoes' of ... the president" to do so.⁴⁵¹ An interim government was formed in early January and Bainimarama was made interim Prime Minister but no parliament was to be held for another seven years.

J The 2006–2009 Constitutional Events

Between 2006 and 2009 the Constitution of 1997 and the Head of State remained in place. All actions and promulgations of the Interim Government were carried out pursuant to the Constitution. At the same time the deposed Prime Minister Laisenia Qarase and his government mounted a constitutional challenge to their removal. While the court matter proceeded the Interim Government began holding consultations for a review of the 1997 Constitution. It convened a broad consultative forum called the *National Council for Building a Better Fiji (NCBBF)* for the purposes of drafting a Charter, consistent with the 1997 Constitution, to be determined by a broad cross-section of the community.

The first meeting of the *NCBBF* was held in January 2008 and, in August, its product, *The People's Charter for Change, Peace and Progress* was released.⁴⁵² It was a consensus document agreed by a wide range of stakeholders in Fiji including political parties, civil society groups, public officers including the military and traditional leaders. While not explicitly stating that the Constitution would be amended in accordance with the principles of the *People's Charter*, the recommendations pointed to that aim. The fact that Laisenia Qarase lost his government's application to be restored as Prime Minister in the High Court in 2008 fortified the Interim Government's position that some significant amendments to the 1997 Constitution could be made in line with the *People's Charter* for a new path to a non-racial, less corrupt Fiji.

In the Qarase matter the High Court had ruled that the President of Fiji had prerogative power to dismiss a Prime Minister. Qarase appealed to the Court of Appeal and in April 2009 the Court (mainly an Australian bench) decided that the President of Fiji did not have the constitutional power to remove the Prime Minister and the government.⁴⁵³ The Court of Appeal also refused leave to the Interim

⁴⁵¹ "The commander improvises" *The Economist* (online ed, London, 11 January 2007).

⁴⁵² National Council for Building A Better Fiji *People's Charter for Change, Peace & Progress* (2008).

⁴⁵³ *Qarase v Bainimarama* [2008] FJHC 241 <www.paclii.org>; and *Qarase v Bainimarama* [2009] FJCA 9 <www.paclii.org>.

Government to appeal to the Supreme Court. The very next day the President announced that he had abrogated the 1997 Constitution and was appointing an Interim Government with Bainimarama at its head for the sake of stability.⁴⁵⁴

Which of the two events, the 2006 removal of government or the 2009 removal of the Constitution was a “coup d'état” is an interesting question for constitutional lawyers. Brookfield says that the definition of a “coup d'état”, derived from Luttwak's *Coup d'état: A Practical Handbook* is “the infiltration of a small but significant segment of the state apparatus, which is then used to displace the government from its control of the remainder”.⁴⁵⁵ In light of this definition, written by an academic with a military background in Britain, France and United States, the 2006 removal of government in Fiji could not have been a coup. On the other hand, the abrogation of the Constitution in April 2009 could be regarded as a coup as that is when the 'small but significant segment of state apparatus', namely the Constitution, was removed. The Head of State, though, remained the same after his abrogation of the Constitution.

In my view, expressed at the time, there was a very important legal difference between the President's power to remove a government and his power to remove a constitution. The Constitution of 1997 had made provision for amending or reviewing a Constitution and the President had no role in it. The fact that a President could not remove a Constitution was fortified by the constitutional Preamble: “We, the People of the Fiji Islands ... give ourselves this Constitution”.⁴⁵⁶

No one appeared to have the power to remove the Constitution apart from the people themselves through the mechanisms provided by the Constitution. This was also the principle established by the *Prasad* cases in 2000/2001. Removal of an unjust government may have been possible through constitutional prerogative power; however removal of the constitution itself was unlawful as there was no constitutional power given to the President to remove a constitution even in an emergency. This could have been challenged once again through the courts.

However there was no opportunity to make an application to challenge the abrogation since the courts were ousted from jurisdiction to hear any such challenge. Very quickly the Attorney General's Office began drafting decrees which forestalled any

⁴⁵⁴ Josefa Iloilo, President of Fiji "Speech to the Nation" (Suva, 10 April 2009).

⁴⁵⁵ E Luttwak *Coup d'état: A Practical Handbook* (Harvard University Press, Cambridge, 1968) at 2 as cited in Brookfield, above n 1, at 217.

⁴⁵⁶ Constitution Amendment Act 1997 (Fiji), Preamble.

attempt to seek restoration of the constitution in the courts. The main Decree which ousted the court's jurisdiction on constitutional challenges present and future was the Administration of Justice Decree No 9 of 2009. This Decree stated as follows:⁴⁵⁷

Notwithstanding anything contained in this Decree or any other law, no Court shall have the 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.

Such a Decree represented an arbitrary exercise of power and interfered with the court's ability to adjudicate pursuant to the separation of powers doctrine. From the perspective of Lord Cooke's dictum, it removed the right of citizens to resort to the ordinary courts for the determination of their rights as a fundamental right that not even a parliament could remove. Pursuant to this principle, neither the President of Fiji nor anyone else could claim any lawful power to prohibit a challenge to the abrogation of the 1997 Constitution.

K The 2013 Constitution

From 2009 until 2012 many decrees, without the consent of the people, were promulgated. In 2012 a Constitutional Commission was appointed to draft a new constitution.⁴⁵⁸ Over a nine month period, the five constitutional commissioners consulted widely, though whether their final product was the result of these consultations is not clear. In any event, the Bainimarama government rejected the Commission's draft. The main bone of contention appeared to be the Commission's proposal to constitutionally establish a non-elected National People's Assembly to elect the President of Fiji.⁴⁵⁹

Consequently, the Constitutional Commission was terminated before it could deliver its final product. Instead, another draft constitution was produced, although the composition of the drafting committee was a secret. This draft was released for

⁴⁵⁷ Administration of Justice Decree 2009 (Fiji), s 5(3) (emphasis added).

⁴⁵⁸ "Yashi Ghai speaks on Fiji constitution plan" *Radio New Zealand* (online ed, New Zealand, 13 March 2012).

⁴⁵⁹ This was to be a large (and probably unwieldy) body made up of civil society organizations, as well as parliamentarians and others. By now the Bainimarama Government and the Commission had fallen out over other matters.

comments in early 2013, with the final version being released in August of the same year. The Fiji Constitution of 2013 apparently had some consultation with the people of Fiji but there is not much evidence that these were robustly carried out or that the people's views were incorporated.

At this point it is appropriate to be reminded of Professor Brookfield's definition of the "legitimacy" of an order as opposed to its "legality":⁴⁶⁰

I think one must accept that the test of success and effectiveness, necessarily a limited test, is generally sufficient for revolutionary legality. Success and effectiveness will, it is likely, also provide a minimal measure of legitimacy, in that some justice according to law will be done. But 'considerations of morality and justice' may still deny full legitimacy to a regime that is judicially recognized as legal because it passes that limited but sufficient test.

Then it remains possible that, in some extreme circumstances in a particular legal order, considerations of morality and justice may provide a basis for a legal challenge to the validity of particular laws of an oppressive regime, whether the regime is long-established or is the creation of a more or less recent revolution that satisfies the test of success and effectiveness. But in relation to the status of a regime of the latter sort, and the order of which it is part, the consideration of morality and justice generally go to its legitimacy rather than its legality.

It is worth re-visiting the Grenada case of *Mitchell v Director of Public Prosecutions* to point to the relationship between 'rights' and 'legitimacy' in a constitutional order.⁴⁶¹ Haynes, P, in laying down the requisite principles of legitimacy of a new order, stated inter alia: "(iv) it must not impair the just rights of citizens under the Constitution."⁴⁶²

In light of these principles, I now pose two questions in relation to the events of 2009 and 2013:

- (i) whether the 2009 abrogation of the 1997 Constitution qualifies as impairment of just rights, and

⁴⁶⁰ Brookfield, above at n 1, at 34.

⁴⁶¹ *Mitchell v Director of Public Prosecutions*, above n 9.

⁴⁶² At 88.

- (ii) whether the promulgation of the new 2013 Constitution similarly qualifies as impairment of just rights.

In his *Prasad* (High Court) decision, Justice Gates said, in relation to the military government's attempt to alter the equality provisions of the 1997 Constitution:⁴⁶³

Nor was it necessary to seek to dilute rights in the Constitution granted to its inhabitants by the people's democratically elected representatives. Any decree in which it was sought to do so, would be unlawful at least to that extent, such as for example section 19(7)(g) of the Interim Military Government Decree No. 7 the Fundamental Rights and Freedoms Decree 2000 purporting to narrow the meaning of equality in section 38 of the Constitution.

In light of this ratio in the *Prasad* case, the answer to my question (i) above is that the 2009 abrogation of the 1997 Constitution of Fiji did indeed have the effect of impairing just rights not merely by the act of abrogation but also by the subsequent Decrees diluting and/or removing the rights provided in the Constitution. The new laws promulgated after the abrogation did not uphold the 1997 constitutional rights. Furthermore, the new Human Rights Commission Decree No 10 of 2009 narrowed down the previously broad definition of "human rights". The new Decree stated as follows:⁴⁶⁴

... "human rights" means the rights embodied in those United Nations Covenants and Conventions on Human Rights *which are ratified by the State of Fiji, and the rights and freedoms as may be prescribed by the President by Decree* ...

This definition is quite different from that provided in the original Human Rights Commission Act of 1999 which was also abrogated along with the Constitution: "human rights" means the rights embodied in the United Nations Covenants and Conventions on Human Rights and includes the rights and freedoms set out in the Bill of Rights".⁴⁶⁵

Thus the abrogation of the 1997 Constitution as well as the new Decree on Human Rights do qualify as impairment of just rights provided by those enactments.

⁴⁶³ *Prasad v Republic of Fiji*, above n 3, under Doctrine of Necessity. He also said, "the courts must decide" if a question was brought before them on the lawfulness of a claimed abrogation, under Duty of the Judiciary.

⁴⁶⁴ Human Rights Commission Decree 2009 (Fiji), s 2 (emphasis added).

⁴⁶⁵ Human Rights Commission Act 1999 (Fiji), s 2.

My next question (ii) above asks whether the 2013 Constitution impairs just rights. This can be answered by considering the relative importance given to rights in the interpretation ss of the 1997 and 2013 Constitutions respectively. Section 43(2) of the 1997 Constitution stated:⁴⁶⁶

In interpreting the provisions of this Chapter, the courts must promote the values that underlie a democratic society based on freedom and equality and *must*, if relevant, have regard to public international law applicable to the protection of the rights set in this chapter.

On the other hand, s 7(1)(b) of the 2013 Constitution states:⁴⁶⁷

... when interpreting and applying this Chapter, a court, tribunal or other authority ... *may*, if relevant, consider international law applicable to the protection of the rights and freedoms in this Chapter.

No evidence is provided that such fundamental alteration to the ambit of human rights protection was agreed by the people of Fiji. Obviously, such an amendment to the definition of rights, against all international law,⁴⁶⁸ in the new decrees and constitutional documents is an impairment of people's just rights.

Furthermore, 'just rights' must be complemented by 'fair adjudication'. To assert that there is 'justice' without its adjunct, 'fair adjudication', is merely a hollow mantra. Lord Cooke had expressed it well by "doubting the power of Parliament 'to take away the rights of citizens to resort to the ordinary Courts of law for the determination of their rights'".⁴⁶⁹ The concept of 'fair adjudication' is linked not only to access to justice but also to that important constitutional principle, independence of the mechanism/s of adjudication. In this regard, independence of the mechanisms of adjudication is associated with the 'doctrine of separation of powers'.

⁴⁶⁶ Constitution Amendment Act 1997 (Fiji), s 43(2) (emphasis added).

⁴⁶⁷ Constitution of the Republic of Fiji 2013, s 7(1)(b) (emphasis added).

⁴⁶⁸ International human rights principles state that human rights are inherent to the human person. They are not something that can be "prescribed by the President by Decree" as the Human Rights Commission Decree 2009 pronounced.

⁴⁶⁹ *New Zealand Drivers Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA) at 390 as cited in Brookfield, above n 1, at 94.

In his article, “Separation of Powers: Judicial Independence”, Sam J. Ervin Jr says:⁴⁷⁰

The separation of powers doctrine grew out of centuries of political and philosophical development. Its origins can be traced to the fourth century B.C. when Aristotle, in his treatise entitled *Politics*, described three agencies of government: the general assembly, the public officials, and the judiciary. In republican Rome, there was a somewhat similar system consisting of public assemblies, the senate, and the public officials, all operating on a principle of checks and balances. Following the fall of the Roman Empire, Europe became fragmented into nation-states, and from the end of the Middle Ages until the eighteenth century the dominant governmental structure consisted of a concentrated power residing in hereditary rulers, the sole exception being the development of the English Parliament in the seventeenth century. With the birth of Parliament, the theory of three branches of government reappeared, this time embodied in John Locke's *Two Treatises of Government* (1689), where these three powers were defined as "legislative," "executive," and "federative."

Ervin says that it was Montesquieu who developed the equal status of each institution further:⁴⁷¹

When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehension might arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separate from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

How does Ervin’s account of the origins, definition and significance of the separation of powers doctrine assist with consideration of whether ‘fair adjudication’ is protected in the 2013 Fijian Constitution? A reading of s 173(5) of the 2013 Constitution shows that s 5 of the Administration of Justice Decree 2009, which

⁴⁷⁰ Sam J Ervin Jr “Separation of Powers: Judicial Independence” (1970) 35 Law & Contemp Probs 108 at 108 (footnotes omitted).

⁴⁷¹ At 109.

prohibited the courts from entertaining any challenge to the abrogation of the 1997 Constitution, remains in force despite the repeal of the Decree itself.

Such interference with the principle of ‘fair adjudication’ has not gone unnoticed by others outside of the Fijian state. On 31st October 2014, pursuant to the Universal Periodic Review (UPR) of Fiji conducted by the UN Human Rights Council, the following recommendation was made:⁴⁷²

101.31 Amend the legislative and constitutional framework to maintain the separation of powers and cease any executive interference with the independence of the judiciary and lawyers, and ensure that the processes governing the qualification and discipline of lawyers and judges are free from political interference ...

In its March 2015 response, the Fiji Government said that it did not accept this recommendation due to the fact that the doctrine of separation of powers was enshrined in the new Constitution.⁴⁷³ But of course s 173(5) of the Constitution vividly shows that it is not.

Thus, based on the *Prasad* High Court decision, the 2013 Constitution itself, the 2015 Human Rights Council Report and other authorities noted above, clearly, ‘just rights’ and ‘fair adjudication’ have not been protected in Fiji since 2009.

The next question is whether the people of Fiji might have agreed to have their Bill of Rights ‘diluted’, their ‘just rights’ impaired or their access to ‘fair adjudication’ removed. This would point to whether there is consensus or general will exhibited in favour of the 2013 Constitution. Again, the Fiji UPR process is relevant. The Human Rights Council in October 2014 recommended the Fiji Government to:⁴⁷⁴

101.10 Establish a Constitutional Commission to conduct a comprehensive review of the 2013 Constitution and carry out national consultations to ensure that the Constitution is reflective of the will of the people ...

⁴⁷² Human Rights Council *Report of the Working Group on the Universal Periodic Review* A/HRC/28/8 (2014) at 22.

⁴⁷³ Human Rights Council *Report of the Working Group on the Universal Periodic Review—Addendum* A/HRC/28/8/Add.1 (2015) at 7.

⁴⁷⁴ Human Rights Council, above n 472, at 21.

It is to be noted that this recommendation by the UPR Working Group on Fiji was made just over six weeks after the 2014 election results in which Bainimarama's party won the majority 32 out of 50 seats in parliament.⁴⁷⁵ It shows that, despite the success of the drafters of the 2013 Constitution in the elections, it may have been obvious to the UPR Working Group that there is a consensus ('will of the people') deficit in respect of the Constitution under which the elections were held.

In opposition to this point of view, it can be claimed that success for the Bainimarama Government in the 2014 elections pursuant to the 2013 Constitution makes the new constitutional order legal, if not legitimate. However, as I have shown in the previous chapter, there is no law without justice, no legality without legitimacy. Moreover, research shows that majority voting in certain situations, while presuming legality, may indicate a different type of problem- voter manipulation. In an interesting essay titled "Beat Me if You Can: The Fairness of Elections in Dictatorship", Masaaki Higashijima says that while different types of election fraud, namely, "rigging elections through vote stuffing, violent repression, and the manipulation of election rules and institutions"⁴⁷⁶ are well-known, claims to success in elections must be placed under even greater scrutiny because:⁴⁷⁷

Instead of resorting to electoral fraud, dictators with rich resources can mobilize voters through large-scale economic distribution implementing expansionary economic policies. Loosening fiscal policies and strengthening pork barrel politics, authoritarian leaders can create public employment, adopt tax exemption for party supporters and the poor, provide bonus for public employees, construct infrastructure and implement other forms of public goods provision, all of which are not illegal but make it possible for them to garner voluntary political support.

He also says:⁴⁷⁸

Importantly, relying more on manipulation of economic policy instruments, dictators can increase the credibility of election results, which helps them

⁴⁷⁵ The UPR Working Group is made up of other nation states in the United Nations so the UPR process is a peer review.

⁴⁷⁶ Masaaki Higashijima "Beat Me if You Can: The Fairness of Elections in Dictatorship" (winning essay of annual International IDEA/Electoral Integrity Project (Harvard University & University of Sydney) award for best graduate student paper on electoral integrity, Michigan State University, 2014) at 4.

⁴⁷⁷ At 13.

⁴⁷⁸ At 13, 35.

send a clear signal of regime invincibility. ... the mere existence of free and fair elections does not necessarily lead to further democratization in dictatorial countries.

The Multinational Observer Group which monitored Fiji's 2014 elections found no evidence of fraud,⁴⁷⁹ and clearly, it would have been difficult to stuff ballot boxes during the one-day election. That is not to say, however, that manipulation of votes did not take place through the "manipulation of economic policy instruments". In its election campaign, the Bainimarama government claimed that it had improved the lives of the people of Fiji during its term in office. As early as 2013 in his Budget speech Bainimarama had already signalled his proposed party's campaign strategy:⁴⁸⁰

We have made government services more readily available to more people than ever before. We have reformed social welfare to give more help to the neediest while creating opportunities for them. We have established partnerships with the private sector and are reforming state owned enterprises. We have revitalised the sugar industry, created a sustainable mahogany industry, and made our ports efficient. We have embarked on an ambitious program to correct the deplorable condition of our roads. We have begun reforming the civil service to make it more professional, accountable, and results-oriented.

In January 2014, just before he announced the name of his political party, he told a gathering:⁴⁸¹

Gone are the days in Fiji when Government came to look at what you needed, pretended to listen and then went away and did nothing. My Government is here to serve, to improve the quality of your lives and provide opportunities for you and your families.

We cared that you didn't have access to power, that many of you couldn't afford generators, that your evenings were filled with dim lights from candlepower and kerosene. We cared that some of you couldn't afford to send your children to school, so we got rid of the fees and are opening up

⁴⁷⁹ Lincoln Tan "Fiji First Party will form new Fiji government" *The New Zealand Herald* (online ed, Auckland, 19 September 2014).

⁴⁸⁰ Frank Bainimarama, Prime Minister of Fiji "2014 National Budget Announcement" (FRA Complex, Suva, 8 November 2013) at 1.

⁴⁸¹ Frank Bainimarama, Prime Minister of Fiji "Speech at the Commissioning of Dreketi Grid Extension" (Maramarua Primary School, Dreketi, 16 January 2014).

new schools to provide every Fijian with education and the opportunities that come with it.

We cared that your road was a rough track that became a mud track in wet weather, that your children had to walk through to go to school, that it took you too long to get medical help, too long to get to Labasa, too long to get to Nabouwalu.

We cared, we acted and we've delivered. And I am humbled by the number of people who have come up to thank me and have told me how much that commitment has meant to them. In turn, I want to pay tribute to the Board, management and workers of the FEA, and its contractors, who have made this project possible. You have done us all proud and we thank you for your service.

With the 24-million dollars set aside in this year's budget to continue our electrification program, we look forward to soon strengthening the supply to the Tavua-Korovou corridor. This will allow rural communities and businesses in Ra and Tailevu to enjoy the same benefits that have now come to Seaqaqa, Batiri and Dreketi.

Fiji has also signed an agreement with the People's Republic of China to construct a 700 kilowatt Mini Hydro Power Plant in Taveuni.

Both these speeches show that Bainimarama's government could be seen to fit within the second of Higashijima's categories- that of "manipulation of economic policy instruments" prior to elections to gain votes that were purportedly voluntarily given in favour of the 2013 Constitution. While election promises and resort to so-called evidence of past social service provisions are normal in all contexts, Fiji's unique historical conditions between 2009 and 2013 allows us a measure of scepticism.

It was therefore appropriate that, despite the 2014 election results, the UPR Working Group would recommend that Fiji should review whether the Constitution is reflective of the 'will of the people' since, as Higashijima noted, "the mere existence of free and fair elections does not necessarily lead to further democratization in dictatorial countries".⁴⁸² The Fiji Government did not accept this recommendation and stated ironically that a change in the Constitution can only be done according to its own mechanisms.

⁴⁸² Higashijima, above n 476, at 35.

In this chapter on Fiji I have considered whether justice was an element of the Fijian legal landscape from earliest times to the present. Not much remains from early accounts of Fiji to suggest that justice and law were two distinct attributes of pre-European society. The command-type authoritarian rule inflicted on village people by the chiefs would have been considered to be 'just' in the sentiment of the times. Colonial European society introduced another type of justice, no less distinct from law, though the sentiments of the English Magna Carta and the Bill of Rights were the subtle sub-text of colonial rule. Colonial rule would have proceeded on the basis of the Hobbesian idea of society rather than that of John Locke. At the same time, the Deed of Cession illustrated consent of the indigenous chiefs to cession.

After 1960 when constitutional talks for independence became imminent, the Bill of Rights, representing all elements of justice in the international legal arena was established as a core supreme and entrenched law for the people of Fiji. This was aborted in 1987 when a coup d'état removed the guarantees of justice and, in 1990 imposed an unjust (and therefore illegal and illegitimate) constitution.

The 1997 Constitution restored justice in the constitution by consent of the people by a careful balance of the rights of the people and the obligations of the government as a matter of trust. The Social Compact chapter also illustrated a contractual relationship between the state and the people. The 2000 attempted coup purported to remove it once again but it was restored by the *Prasad* case. In 2009 justice was once again removed by the Administration of Justice Decree, illustrating that the use of the word 'justice' can sometimes be used to refer to its very opposite. In 2013 the quality of justice to which people had felt entitled, by way of the 1997 Constitution, was missing from a document that also did not appear to have the consent of the people. Subsequent elections did not bring about legitimacy since the document, purportedly the Constitution, that permitted these elections to take place was enacted without consent. The process of drafting the Constitution was itself unjust and therefore unlawful. It is important to question whether the 'right to rebel' looms large in such a situation.

In the next chapter, given the perspectives explored in previous chapters, I consider how one could, possibly, draft a hypothetical constitution for Fiji within which the core invariant feature, or the identity of 'justice' is embedded through the methodology of 'autopoiesis' outlined in the first chapter of the thesis. The consent of the people would be essential to provide legitimacy/legality in any such document; the point is to draft a document in such a way that it would attract that consent.

V Chapter 4

Drafting a Legitimate Fijian Constitution

In his speech in preparation for the 2018 national elections Sitiveni Rabuka said that the 2013 Constitution had an "impressive array of rights" but also an impressive list of limitations to those rights.⁴⁸³ As the architect of the 1997 Constitution Rabuka was able to make this statement. He promised to review the 2013 Constitution if his party, SODELPA (Social Democratic Liberal Party), won the elections. It would have been interesting to see to what extent the 1997 Constitution would have been considered in any such review. SODELPA lost the elections with a smaller margin than anticipated.

In the previous chapter I showed that there were serious limitations to the rights provided in the 2013 Constitution which were not present in the 1997 Constitution. The rest of the Constitutional provisions (some new) on governance, structure of the government, voting mechanisms, the role of the military in state affairs, social, cultural and economic rights, and environmental rights do not mean much if some of the rights in the Bill of Rights are not as justiciable as they were under the previous consensus-based Constitution.

Should another review take place, the 1997 Constitution would be a good place to start, with the new elements from the 2013 Constitution used to expand the rights chapter of the 1997 Constitution but not to undermine it, as is the case currently. In this review it would be best to keep in mind the statement of Thomas Jefferson in a letter written to the Republicans of Washington County, Maryland on 31 March 1809: "[T]he care of human life & happiness, & not their destruction, is the first & only legitimate object of good government."⁴⁸⁴

This was the foundational philosophy of the American Declaration of Independence on which, subsequently, the American Constitution was based. Respect for human life and happiness remains the core value of Justice, as defined since time immemorial by human society. The care of human life and happiness is certainly not the core identifier of *injustice* as that would constitute a philosophical contradiction.

⁴⁸³ "Hollow promises of rights, says Rabuka" *The Fiji Times* (online ed, Suva, 14 April 2018). In May, Rabuka was charged with an electoral offence. Talebula Kate "SODELPA leader Rabuka appears in court" *The Fiji Times* (online ed, Suva, 25 May 2018).

⁴⁸⁴ "Thomas Jefferson to the Republicans of Washington County, Maryland, 31 March 1809" Founders Online <<https://founders.archives.gov/>>.

Crafting a Constitution that identifies, with integrity, "the care of human life and happiness and not their destruction" requires close attention to be paid by drafters to two matters: (i) Content and (ii) Structure. A Justice-identified Constitution would include the elements of justice defined by human society in its variety of legal texts and which were set out at the end of Chapter 2 of the thesis, namely: *right to be heard, equality, collective responsibility, agreement and consent, fair and independent delivery of law, rights, moral goodness, integrity of the social order, welfare of the whole society or common good, complete goodness, liberty and freedoms, social entitlement, divine order, wisdom, virtue, mercy, peaceful governance, mutual obligations and social contract, happiness, general good and representation of people in governance*. As we have seen in the previous chapter, under the 2013 Constitution, the 'right to be heard' and 'fair and independent delivery of law' (access to courts), 'agreement and consent', 'mutual obligations and social contract' (called 'Compact' which was Chapter 2 of the 1997 Constitution) are all missing. The Compact chapter had spelt out the 'conduct of government' as an undertaking. Also missing is the Social Justice Chapter 5 of the 1997 Constitution. The expanded Bill of Rights in the 2013 Constitution does not compensate for these two omitted chapters.

This gap throws into question and undermines the rights given in the balance. Unlike the 1997 Constitution which treated rights as god-given (roots in the 'divine' as the natural law thinkers saw them) and an aspect of the human condition, the 2013 Constitution defines rights as those that are "ratified by the State of Fiji" or are "prescribed by the President by Decree".⁴⁸⁵ Section 7(1)(b) of the Constitution which provides the courts with the discretion to decide what international laws are applicable to the Fiji context (unlike the 1997 Constitution which made it mandatory for them to do so) is another obstacle to seeing the 2013 Constitution identified by justice. Thus the content and scope of just rights in a Constitution goes to the legitimacy of that Constitution and the legitimacy of the order which will prevail after the Constitution is adopted.

However, content and scope are not the only attributes of a legitimate constitution. Decisions about the placement of provisions, the extent and quality of limitations, the positioning of rights and existence and placing of social compact provisions within the overall structure and, in general, the extent of embeddedness of justice in all the provisions and in the 'basic structure' of the constitution, is what defines a legitimate constitution from a purely legal one, irrespective of how it was enacted. As in the

⁴⁸⁵ Human Rights Commission Decree 2009 (Fiji), s 2.

case of South Africa recently, and reminding ourselves of Brookfield's caution that "democratic majoritarianism in Fiji, as in New Zealand and elsewhere, does not provide the sole criterion for legitimacy",⁴⁸⁶ we know that a parliament can pass a non-legitimate constitution but that process does not necessarily make it legitimate. In my view it does not even make it legal if the core value of a constitution is injustice, as in the 1990 Constitution of Fiji, and as the House of Lords showed in *Openheimer v Cattermole*.

It will be noted that the grundnorm established in Fiji even prior to Cession was defined by rights. The early Constitutions of King Cakobau's Government and the Confederation that came afterwards included the core value of justice as was defined at the time by the English, American and French constitutional documents. It was a new grundnorm, replacing the arbitrary law of tribal social life, and was adopted as a voluntary sentiment by a far-sighted Fijian king who had the wisdom to realise that times were changing, making a concerted effort to embrace those changes for the common good. Afterwards, in the newly independent Fiji, the Constitution of 1970 was built on the foundation of the early constitutions by making rights current, based on the Universal Declaration of Human Rights. This constitution placed the rights chapter at the very front of that Constitution indicating the significance and centrality of justice, defined as respect for 'rights' in the supreme law of Fiji. While the 1990 Constitution attempted to eradicate justice from the law this did not last long and the 1997 Constitution restored it even more robustly, not only in content but also in structure since the Bill of Rights chapter of the Constitution, with its specific wording, trumped other chapters. As such the 1997 Constitution was closer to the pre-Cession Cakobau constitutions and the 1970 Constitution.

At this juncture it is appropriate to return to Teubner and his remarks about the connection between justice and law- that justice is law's contingent side or, as I think, that justice keeps law philosophically clean. Teubner said that: "Justice is confronted with the primary closure of law" (ratio, recursive chains of court judgments, legislative and contractual acts) which "itself [can become] a major source of injustice".⁴⁸⁷ However, justice and law do not operate mutually exclusively when it comes to legitimacy. Justice is embedded in a legitimate constitution structurally as well as in content. The Systems methodology of autopoiesis, allows us not only to understand how this can be done, but also to make it practically possible.

⁴⁸⁶ Brookfield, above n 1, at 187.

⁴⁸⁷ Teubner, above n 141, at 10.

Teubner has said that the value of autopoiesis to legal theory lies in what it reveals about the conditions, mechanisms and consequences of mutual interference between law and other social domains outside of the law. He says that the "quality of the legalization process may change if the legal system becomes aware of the autopoietic character of its surrounding social systems and adapts its normative structures to it".⁴⁸⁸ However, the mechanics of how this is to be done is more clearly defined by physicist Hugo Urrestarazu whose work shows that there are ways of sustaining a system's lifespan without the external features of it unpredictably disrupting its basic structure. He shows the technique of achieving stability by searching for "a describable feature of the dynamic system that remains invariant throughout".⁴⁸⁹ This evokes the Indian Supreme Court's decision in the *Kesavananda* case⁴⁹⁰ about the effects of an amendment to the constitution on its basic structure- that the Indian Constitution's basic structure cannot be disrupted even by a parliament. It is also reminiscent of Sir Robin Cooke's dictum that some common law rights lie so deep that not even parliament can remove them. By using Urrestarazu's formulation a constitutional 'frontier' can be devised as a 'shield' or compensating mechanism so that the basic structure or dynamic of a system withstands disruption.

Justice, for me, as defined above, is the core invariant feature that can act as a shield, a frontier, or a compensating mechanism in a constitution. That is what gives a constitution and a constitutional order legitimacy. In the case of Fiji, the 1997 Constitution contained the following elements indicating irrevocable legitimacy: (i) it was formulated by consent; (ii) it had a robust set of rights embedded as the core value which made it supreme even within the Constitution; (iii) it contained an open right to redress not only to the courts, including by petition, but also to international human rights mechanisms through the courts which judges, between 2001 and 2009, actively applied; (iv) it had a compact chapter which spelled out the respective duties and obligations not only between the state and the people as a matter of trust but also those between the people themselves as a social contract; (v) it had a social justice and affirmative action chapter giving privileges for a period of time to those disadvantaged in society, and (vi) it had a set of reasonable limitations for the common good which reflected the broad Article 29 UDHR limitation which was expressed as the phrase "in the interests of national security, public safety, public

⁴⁸⁸ Teubner, above n 171, at 300.

⁴⁸⁹ Urrestarazu, above n 174, at 52.

⁴⁹⁰ *Bharati v State*, above n 197.

order, public morality or public health", as long as those limitations were "reasonable and justifiable in a free and democratic society".⁴⁹¹

The 1997 Constitution did not, however, include the right to rebel, nor was there any mechanism installed for constitutional survival in the face of external perturbations in the form of abrogations by a head of state, the military or a civilian. *Chandrika Prasad*, though, had shown that it was not that easy to abrogate the 1997 Constitution. Yet it was indeed (purportedly) abrogated in April 2009, illustrating that the invariant core mechanisms in the 1997 Constitution were not sufficiently strong to withstand its professed removal (I use the words 'purported' and 'professed' here because unless the courts have been allowed to address the Constitution's actual removal it is not clear that it has been removed, irrespective of the promulgation of the 2013 Constitution as, even in the Kelsen formulation, this constitution's 'effectiveness' or 'success', and therefore 'legitimacy', were never legally tested or determined).

The Methodology chapter of the thesis pointed to a number of theoretical foundations that were thought to be useful for the construction of a legitimate constitution. These were (i) Legal Praxis; (ii) Natural Law as the foundation of a constitutional document; (iii) Positivist rules about effectiveness of a constitutional order; and (iv) autopoiesis methodology derived from Systems Theory to make it possible for a closed system such as law to be responsive to its contingent side, justice, so that in the event that law becomes strained, it can communicate through its open side with justice to restore balance in itself. The combination of the above in crafting a new constitution requires what Loughlin called "constitutional imagination" which allows for less constitutional hierarchy and the intervention of more deliberative dialogue, to obtain consent, in the interest of public service.

The question is whether there is anything new in this approach which would make a constitution stronger and less susceptible to abrogations and therefore carry less risk of interference by maleficent forces acting against the public interest. It should be noted that two of the three abrogations of the Fijian Constitution (in the year 2000 a purported abrogation, the court said) were justified on the normally acceptable sentiments of indigenous rights. Yet beneath the indigenous rights cries, though masked by calls for 'justice', was racial prejudice which would become discrimination had the mechanisms of the state been given full authority to give effect to that

⁴⁹¹ Multiple articles in the Constitution Amendment Act 1997 (Fiji) use this language. See *Universal Declaration of Human Rights*, above n 389, art 29.

prejudice. This had happened with the 1990 Constitution as pointed out in the previous chapter. The related question is whether indigenous supremacy, within the international legal mechanisms provided for indigenous rights,⁴⁹² can even be advocated as being 'just'.

No will ever be able to justify any kind of racial or ethnic supremacy on the basis of international human rights documents. This is especially if such ideas of supremacy are accompanied by violence against a targeted group. It would be too reminiscent of Nazi Germany, Bosnia and Rwanda in the 20th century. This perspective is obviously different from a situation which triggers the 'right to rebel' obligation as expressed by John Locke and the relevant provisions in the French and American constitutions (in the latter case the Declaration of Independence) which are justified on the grounds of freedom *from* oppression and does not give licence or freedom *to* oppress. Furthermore, stemming from Weber's idea that the state has the monopoly on the use of force,⁴⁹³ a state is required under international law to have control over the legitimate use of force. The key word is 'legitimate' in the use of force.

One could say that since a legitimate constitution or constitutional order is derived from consent of the people to it that should be sufficient to hold it safe from interference or abrogation. The problem here is the notion of 'consent'. If consent is derived from the majoritarianism principle there will always be pockets of civilians or others from the minorities which have not consented. Democratic consent does not mean universal consent. In such cases the minorities may well object to 'tyranny of the majority' which gives them reason, or the right, to rebel. But the robustness of the American and French Constitutions (or the Declaration of the Rights of Man and of the Citizen in it) despite the over three centuries of their functioning shows that a Constitution can stand the test of time for both minority and majority populations. It pays to consider what makes them so sustainable over time and irrespective of realities such as slavery which, as in the American Constitution, relates to the three-fifths clause (art I, s 2, of the United States Constitution of 1787). The sustainability in the American Constitution comes from the ability to make consensual amendments to it. Thus the three-fifths clause was nullified by Amendments XIII, IV and V after the American Civil War. The process of introducing amendments to the American Constitution is based on obtaining a supermajority vote in a joint resolution of the

⁴⁹² For example, the *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/RES/61/295 (2007).

⁴⁹³ See generally Max Weber "Politics as Vocation" in Tony Waters and Dagmar Waters (translators) (eds) *Weber's Rationalism and Modern Society* (Palgrave Macmillan, New York, 2015) 129.

Congress and the Senate, as well as obtaining agreement of the legislators of three fourths of the states. The possibility of calling state conventions to obtain ratification of an amendment is an alternative.

The imperishability of the American and French Constitutions in rights terms should be considered for an enquiry into whether both the content and structure of a constitution, as well as the kind of consent required for its approval or ratification, are needed to ensure not only its sustainability and relevance over time but also its survival.

In any Constitution, for its legitimacy to be without question, a number of different ingredients need to be mixed cohesively together for effectiveness and success. The first is the history of the formation of the state to which that Constitution refers. In the American constitutional origins this is the Declaration of Independence which is a statement of natural law. The Constitution itself is a statement of positive law, defining the structures of government, but the expectation is that the positivist constitution would rely on the natural law Declaration for its validity and sustainability. The Preamble of the French Constitution of 1958 states that: "The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789".⁴⁹⁴ The 1997 Fijian Constitution in its Preamble sought the blessing of God and then stated the history of the Fijian people through its constitutional milestones, including the 1987 abrogation of the 1970 Constitution and recognition of all who had made their home in Fiji. Thus the 1997 Constitution was founded on natural law principles. The 2013 Constitution is more of a positivist document which merely 'recognises' the various groups living in Fiji and their commitment to *inter alia* human rights, justice, and national sovereignty.

The second ingredient for a legitimate Constitution is the state's expressed commitment to its people through various means, for example a justiciable compact chapter and bill of rights which bind the state and all its agencies such as the judiciary, the executive and parliament. A social compact chapter ('social contract in the Enlightenment thinkers' sense) and a bill of rights with supremacy within a Constitution (all state agencies and other laws and constitutional provisions are bound by it) which may otherwise be a positivist one indicates a move towards a document that is defined by justice since this, along with 'morality' defined as 'rights', is the core value in constitutions emanating from the Natural Law perspective.

⁴⁹⁴ "Constitution of October 4, 1958" Conseil Constitutionnel <www.conseil-constitutionnel.fr/> at 3.

The third ingredient is appropriate structure of the Constitution. The placing of the social compact and bill of rights chapters shows their relative priority in the 1997 Constitution. Section 21(2) of the 1997 Constitution placed limitations on the Bill of Rights only pursuant to laws of general application permitted by the Bill of Rights chapter and to derogations permitted by emergency powers in Chapter 14. This clause gave the Bill of Rights chapter its supremacy in relation not only to ordinary laws but to other provisions of the Constitution. On the other hand the 2013 Constitution's Chapter 2 Bill of Rights at ss 6(5)(a), (b) and (c) make it possible for other provisions in the Constitution, as well as other ordinary laws or actions taken under other laws, to limit the Bill of Rights. These limitations place the Bill of Rights in the 2013 Constitution precariously at a lower level than was the case in the 1997 Constitution. Rights have been demoted in the 2013 Constitution, as is also indicated by the discretion given to the courts not to refer to international human rights law in cases before them.

The fourth ingredient is consent. When the phrase 'We the People' is used, it needs to demonstrably show that it includes all the people. The last document that had the agreement of all the people, due to the fact that anyone who wished to be represented in the discussion of it could be, was the *People's Charter* drafted by the National Council for Building a Better Fiji (NCBBF). There is no mention of this body or this Charter in the 2013 Constitution. Thus consent is the missing component of the 2013 Constitution.

If all the above four ingredients are present in a Constitution of Fiji, given its history, one could safely say that it would be a legitimate Constitution. However, there is more to it than content and widespread consent. Irrespective of consent there needs to be protection of the Constitution from abrogation by anyone with a cause or reason to do so. Protection of a Constitution can be obtained by two means- (i) the ability of a drafter to use a certain methodology to draft the necessary ingredients into every chapter of the constitution to facilitate an appropriate and agreed content, and (ii) the ability of the people to protect their constitution, physically if need be, pursuant to a lawful 'right to rebel' clause. They will only do the latter if (i) they are a part of the constitutional drafting mechanisms and thus include the duty to rebel in case of threats to the Constitution, and (ii) they use a certain foundational word or phrase to ground the Constitution into something that makes sense to them, as individuals, as part of their community, and as part of the national agenda in which they have a stake. In this particular sense the compact between the state and its people becomes

vital. There has to be an expressed appreciation of the social contract and just nature of governance.

In terms of the both the first items above, the concept of autopoiesis becomes important to illustrate that a constitution will have woven into it the specific content and double entrenchment of the required clauses. In terms of both the second, the word 'justice' in all its manifestations would be the key concept that needs to be woven into the Constitution and the removal of it would trigger the duty to rebel. The 'right to rebel' clause would be provided at the Preamble stage to indicate protection by the people of their constitution which they have helped formulate with consent.

I have drafted such a Constitution for Fiji (Constitution 20XX) which cannot be reproduced in this thesis as it needs more space than currently possible. The core methodological device is autopoiesis which is used to craft the concept of 'justice' as defined in chapter 2 into the Constitution. The brackets refer to specific provisions.

A Drafting a Fijian Constitution through Autopoiesis

Any document that has 'justice' drafted into it autopoietically would show that it:

- (i) is dynamic (is a living document amenable to amendments for justice similar to the American Constitution but not amenable to any assault, even by parliament, to its basic structure);
- (ii) is self-defining, self-referencing, self-producing, self-healing, self-maintaining (preservative) and self-controlling in the face of external perturbations so that the constitution itself is not deleted (the basic structure remains robust as indicated in the Indian *Kesavananda* case). Related to this is that it will have structures favourable to itself which can survive through the passage of time and counteract perturbations that would otherwise lead to disintegration;
- (iii) has structure-determined self-organization (there is a reason for clauses appearing in certain places in the Constitution), and has self-sustained structure-determined mechanisms available to mitigate threats;
- (iv) is able to provide multiplicity of solutions to mitigate disintegration despite chaos (for example an independent judiciary, a supreme Bill of Rights which can stand alone, and separation of powers);

- (v) has survival knowledge (right to rebel to threats to the Constitution - in the Preamble);
- (vi) uses its own information to enhance its survival (Preamble paragraphs on history of the constitutional development);
- (vii) has organizational variance, accommodating structural change by maintenance of conservative properties and has the ability to search for a feature that remains invariant throughout any transitions affecting its components (despite other changes the concept of 'justice' remains intact; Parliament; unimpaired just rights; and justiciable social contract and Bill of Rights as the fundamental base);
- (viii) has boundaries which are protective and can limit perturbations so that their effect is minor; boundaries can also act as a mediating structure, by interacting, absorbing or transmitting information to limit disintegration (a closed system which relies on precedents and constitutional history; Preamble; reference to international human rights law);
- (ix) reacts instantaneously to environmental changes so that they have minimal effect (the right to remedy and petition to the courts in case of threat; role of the military to protect the Constitution; President's prerogative power as head of state to protect the Constitution with the aid of the military and police)
- (x) whose ultimate aim is conservation of the entire autopoietic constitutional system as a 'global steady state', despite the possibility of fragmentation (Interpretation; Enforcement);
- (xi) Can change its structure, component membership and medium objects but the organisation is preserved as long as a compensating mechanism is available after each encounter (Enforcement, right to rebel clause)

Thus Constitution 20XX specifically can be drafted as follows:

(a) Constitution 20XX: content

- (i) the last consensus-based (legitimate') constitution of Fiji- that of 1997 (Preamble (e))

- (ii) the last consensual principles developed by a cross-section of the Fijian community, represented by the *People's Charter for Change, Peace and Progress* (2008) which itself took the 1997 Constitution as its reference point (Preamble (f))
- (iii) the basis of earliest consensual ('legitimate') constitutions of Fiji which were agreed pre-Cession, namely the Constitutions of 1867, 1871 and 1873 (Recalling paragraph)
- (iv) the historically developed notion of 'consensus', in the social contract sense of the people contracting with each other to respect 'unimpaired just rights' and, subsequently, creating a fiduciary duty in the state to protect, without abuse of trust, this relationship of the people to each other, as also expressed in the Social Compact provisions of the 1997 Constitution (Recognising paragraph; preamble of section 20; section 41; chapter 8)
- (v) the 21st century evolution of justice and 'unimpaired just rights' in the Universal Declaration of Human Rights to which Fiji is a party through the Vienna Declaration of Human Rights of June 1993 (Committing and Reaffirming paragraphs) and referencing the principles of the *Mitchell v DPP* case of Grenada.
- (vi) the Bill of Rights chapter which recalls protection and promotion of all international human rights law (Chapter 2)
- (vii) the core nature of the human rights chapter for the constitutional system (Emphasising..Preamble of chapter 2)
- (viii) the social contract basis of rights (Committing ... Preamble of Chapter 2)
- (ix) the supreme and entrenched nature of the Constitution and the supreme and entrenched nature of the Bill of Rights chapter 2 (section 2(1) and (2; chapter 3))
- (x) the head of state with the help of the military as protector of the Constitution (chapter 4; section 104; section 109 section 112)

- (xi) the boundaries of the international and national constitutional spaces (section 3 Interpretation; section 5 application).
- (xii) the right to social justice (and development) (section 33)
- (xiii) separation of powers (section 40; section 44; chapter 9; chapter 12)
- (b) *Constitution 20XX: dynamic structure*

The structure of Constitution 20XX is constructed autopoietically as follows:

- (i) Each chapter is prefaced by the justice/rights principle pertaining to the contents of that chapter
- (ii) Each chapter, though autonomous in its subject matter, has an interactive relationship to other chapters in the expression of the fundamental principles of the constitution which is the subject of chapter 2 of the Constitution.
- (iii) The application and enforcement mechanisms for breach provided in the constitution are as relevant for each of the chapters as for the Constitution as a whole. Right to rebel clause.
- (iv) Enforcement provisions can be optimally enforced through the principle of separation of powers as provided.
- (v) The autopoietic core of the constitution, identified as 'justice' is revealed in (i) preambular paragraphs which set out the social contract aspect of the entire constitution, (ii) Chapter 2 Bill of Rights, (iii) preambles of each chapter, (iv) Chapter 9 The Judiciary, and (v) Chapter 12 Accountability.

The schema over the next three pages illustrates the properties of autopoiesis linked to the relevant clauses of Constitution 20XX.

<u>An Autopoietic Constitutional System</u>	<u>Constitution 20XX</u>
Is dynamic	Links to previous legitimate constitutions in preamble (living document)
Is self-defining, self-referencing, self-producing, self-healing, self-maintaining and self-controlling despite external perturbations.	Section 2 (1) supreme Constitution, (2) inconsistent law invalid to the extent of the inconsistency; Preamble Bill of Rights Chapter 2
Has structure-determined self-organisation	Core rights expressed as preamble of each chapter (new)
Has favourable structures which can survive through the passage of time and counteract perturbations that would otherwise lead to disintegration	Chapter 14 Amendment of the Constitution restricted except by informed consent.
Has preservative qualities despite fragmentation brought about through (re)production of the system	Section 5 Application of the Constitution: Justice and rights as its core.
Has self-sustained structure- determined mechanisms available to mitigate threats	Separation of powers: chapter 9 independence of the judiciary
Is able to provide multiplicity of solutions to mitigate disintegration despite chaos	Section 44 Constitutional Court; section 45 Human Rights Commission; chapter 4 Executive Authority of the President; section 112 Republic of the Military Forces; chapter 8 Councils of Influence; chapter 9 Judiciary; chapter 12 Part 2 Ombudsman; chapter 14 Amendment of Constitution

Has survival knowledge	Preamble: <i>'As God is our Witness we give ourselves this Constitution'</i> ; Preamble.
Uses its own information to enhance its survival	Preamble paragraphs
Has organizational variance: accommodates structural change by maintenance of conservative properties	Chapter 3 Parliament; Unimpaired Just Rights (Bill of Rights)
Has the ability to search for a feature that remains invariant throughout any transitions affecting its components	Justiciable social contract as fundamental basis of a constitution Preamble and section 33.
Has boundaries which are protective and can limit perturbations so that their effect is minor; or are mediating structures which interact, absorb or transmit information to limit disintegration	Preamble last paragraph; section 3 reference to international human rights law

Reacts instantaneously to environmental changes so they have minimal effect	Section 112 Republic of the Fiji Military Forces; Section 86 President's prerogative power
Is repeatedly available for compensation for disruptions	Chapter 13 Emergency Powers
Whose ultimate aim is conservation of the entire autopoietic system as a 'global steady state'	Section 3 Interpretation of the Constitution Section 44 Enforcement
Can change its structure, component membership and medium objects but the organization is preserved as long as a compensating mechanism is available after each encounter	Section 44 Enforcement Right to rebel clause

It will be seen from the schema above that an autopoietic constitution can be drafted to withstand perturbations (as much as possible) which may arise from the internal or external environments.

What is also to be added to Constitution 20XX is the 'right to rebel'. The Federal German Republic included the right to rebel as follows: "All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available."⁴⁹⁵

Thus, Constitution 20XX should be able to consolidate, through constitutional imagination, the following key attributes: (a) justice as the core invariant element woven, following the Croatian example, autopoietically into its very fabric; (b) acknowledgement of the trust and social contract nature of the state/people, people/people relationships which therefore would be both vertical and horizontal in

⁴⁹⁵ Christian Tomuschat and others (translators) *Basic Law for the Federal Republic of Germany*—23 May 1949—Last amended on 13 July 2017 (German Bundestag, Berlin, 2018) at art 20(4).

the constitutional structure; and (c) Praxis (including legal praxis) namely the 'right to rebel'.

To express it unequivocally in relation to the Fijian experience, a Constitution enacted by the people with the core presumptive values and 'lineage' of 'justice', fair adjudication' and 'consensus/general will' as its invariant features could withstand any internal or external threat to its existence. The people, as representatives of the 'general will', would form the 'structure determined compensating mechanism' to defy and combat perturbations such as attempts to abrogate the Constitution without their consent.

VI Conclusion

This thesis has several different strands which draws upon discrete areas of legal analysis to find the answers to the questions raised in it from the perspective of feminist methodology in scholarship. It began with the principal question: 'what makes Constitutions Legitimate?' It attempted to find the answer to this main question by providing a legal analysis of constitutions and legitimacy through the example of the Fijian context. Thus my initial inquiry was approached from the general to the specific, using the deductive method of legal reasoning. The early reference and influence of Frederick Brookfield in this inquiry was obvious from his observation, quoted on the very first page of the introduction to the thesis, that in a regime and the order of which it is a part, considerations of morality and justice generally go to its legitimacy rather than legality. For significant jurists like Brookfield, who relied on leading decisions on constitutional law from the early Pakistani cases to the most recent Fijian High Court and Court of Appeal decisions in *Prasad v the Republic of Fiji* /*The Republic of Fiji v Prasad* for his observations about the difference between legality and legitimacy of a legal order, legitimacy and legality are two different things, though overlapping.

However, more recent jurisprudence suggests that the purported difference between legality and legitimacy, though important to investigate and closely scrutinize for its properties, may be less relevant for those who wish to employ the tactic of legal praxis to bring about social change in the pursuit of justice. Or, if relevant at all, it would be only to bring the two concepts of legality and legitimacy together as seamlessly as possible to ensure that lack of legitimacy also indicates lack of legality thus triggering the right to rebel as stated in John Locke's *Two Treatises of Government*. Indeed the end result of this initial scrutiny from both the legal and political sense was that a new perspective ought to be, referencing Thornhill and Ashenden, that no coercive laws are likely to be perceived as legitimate, meaning that there is no distinction between legality and legitimacy. Once this conclusion was reached the next questions that arose as a consequence of this finding could be addressed.

If, therefore, lack of justice (and morality, as Brookfield said) indicated the absence of both legality and legitimacy, the question of what might constitute these two concepts became critical to analysing whether there was legitimacy or legality in the contemporary Fijian context. First, morality. Morality, in the non-religious sense, is determined in the recent literature as rights. Rights are defined specifically by the

Universal Declaration of Human Rights and are thus less problematic to investigate. The fact that human rights are considered to be god-given, and removed or limited reasonably and justifiably by the state or government in only a very specific set of circumstances (such as emergency), is an indication that morality's roots in the divine continue to be accepted even in the otherwise secular concept of rights.

Justice, on the other hand, is a highly contentious and contradictory concept. There is no exact legal definition of justice. Teubner, himself a precise legal theorist, has said that his articles on justice more than any other made him suffer most from self-doubts and were his most painful pieces of work. If justice is a core value of legitimacy and legality how does any constitutional theorist ensure that he or she has an explicit definition of it? Moreover, another question also arises: is there a common definition of justice that would serve the purpose of constitutional legality and legitimacy both? And, how have law and justice related to each other in time and space?

Thus began my historical inquiry into the expressions of justice since the beginning of written legal history, in Chapter 2 of the thesis. Investigations showed that the term justice was as relevant in the past in all societies as it is today. However, while law was often delivered as justice, the absence of justice in the law, on the occasions when this became obvious, inevitably had disastrous consequences for those who pretended law and justice were the same thing. Revolutions were motivated by the absence or even the perception of absence of justice in law and governance. These revolutions, in turn, spawned rights talk, thus linking justice with morality. In combination these concepts initially determined legitimacy in both the literature and legal decisions and later determined legality in the literature, though not yet fully in the courts.

The survey of the jurisprudence of justice in Chapter 2 showed that, eventually, the definitions of justice in some combination (not all) were developed as follows: right to be heard, equality (defined at times as equivalence), collective responsibility, agreement and consent, fair and independent delivery of law, rights, moral goodness, integrity of the social order, welfare of the whole society or common good, complete goodness, liberty and freedoms, social entitlement, divine order, wisdom, virtue, mercy, peaceful governance, mutual obligations and social contract, happiness, general good and representation of people in governance. From this array of qualities of justice, which were not always available uniformly to everyone all the time, there had to be something, a single core value, that everyone could agree with despite the varieties of social formations in which these ideas arose. It seemed to me that fair adjudication (free and independent delivery of law) was a non-controversial quality of

justice, as lack of it would be injustice. But above that is the court's ability to deliver justice or declare what the law is. Access to the mechanisms of justice in whatever form (courts, monarchs, councils) rises above all the other definitions of justice. Not even democracy or representation could trump this quality of justice. In countries with written and supreme constitutions the courts would be entitled to find a piece of legislation invalid despite it being passed by parliament. Even in countries without written constitutions access to courts would be a core value of justice. Lack of justice would trigger the right to rebel clause in a constitution if it had been included or a revolution. Legal Praxis or guerilla lawyering would be one of the ways in which this demand for justice could be expressed.

Having defined justice as having a range of qualities with emphasis on the common good value of access to the courts and fair and independent adjudication once courts were reached, my attention then turned to the Fijian context in Chapter 3. Fiji has enacted, promulgated and decreed seven constitutions from 1865 until 2013`. Each of them contained a Bill of Rights though the extent of justiciability of these rights were never an issue until the 2013 Constitution. The epitome of justiciability of the Bill of Rights was found in the post independence 1970 Constitution and in the 1997 Constitution. While the 1990 Constitution diminished the rights of Indians and other ethnic minorities, access to the courts for determination of the rights was never an issue. Thus, under the 1990 Constitution, while fair and independent delivery of law was in question since the constitution itself was racist and the courts could only interpret it within those limited confines, any litigant or petitioner could apply to the courts for the declaration of his or her rights at any time. Courts were then able to have the opportunity to find a way around the limitations. There were no ouster clauses except for the immunity provisions protecting those who had taken part in the 1987 coup d'état.

The justiciability situation in the 2013 Constitution is remarkably different. Section 174 denies access to the courts in any constitutional challenges whatsoever. It constitutionally entrenches the Administration of Justice Decree 2009 though the Decree itself has been repealed. Section 174 limits access to the courts in such wide terms that justice itself and the fair and independent delivery of law are denied constitutionally; thus both legality and legitimacy of the 2013 Constitution of Fiji are compromised. In the Lockean sense, the right to rebel would be triggered by the existence of such a clause in the Constitution.

Chapter 4 then addresses how a Fijian Constitution with justice as its core invariant value could be drafted. At the beginning of this chapter I had noted that the thesis had

different strands with discrete bodies of legal analysis that had bearing on the subject matter. In Chapter 1 I had addressed one of them, Systems Theory and, through it, autopoiesis as a methodology of drafting. It may not be entirely clear how autopoiesis can be more relevant to drafting a constitution when normal drafting techniques will do. However the emphasis for me is not merely the method of drafting but the methodology of drafting. Drafting a piece of legislation requires perspective and not just technical skill. This becomes clear when one sees the structure of a piece of law which contains objectives and purpose. This point is particularly crucial to understand for constitutional drafting because courts invariably utilize the purposive approach to constitutional interpretation and often refer to the intention of the legislature or other entity in their decisions. The value of autopoiesis lies in showing how a system survives despite perturbations and assaults against its very core structure or its integrity. Until now autopoiesis has merely been described in the literature. Its usefulness as a methodology of drafting law has not yet been tested. Drafting a constitution with justice, including full and free access to the mechanisms of justice, can only be achieved with that aim in mind. If justice is to be a core value of a Fijian Constitution the way in which autopoiesis functions to ensure survival of an element will ensure that justice is not only the core value but that its qualities are emphasized and protected in every clause. What this may look like in real terms is the subject of Chapter 4. The emphasis is on drafting a new (constitutional) grundnorm that would imbue the entire society with the qualities of justice defined throughout the centuries of human existence. And in case of any threat to it, free and unfettered access to the courts would ensure that the integrity of the core value remains intact.

In summary this thesis, which asks the question: what makes a Constitution Legitimate? states that justice and rights make a constitution not only legitimate but also legal. In reference to Fiji I state that out of all the Constitutions of Fiji, from 1865 to the present, only the 2013 Constitution has delivered (and protected) injustice and is therefore unlawful despite its supposed extensive range of social, political and economic rights, effectiveness, purported success or, indeed, the established structures of governance which is the conventional indication of every constitutional purpose. There has been no access to the courts to test its legality, legitimacy, success and efficacy. If there is no access to the mechanisms of justice to test it, expressions of disenchantment with it and opposition to it have much validity. In such circumstances the agreement of the body politic in the *People's Charter* has greater authenticity than the 2013 Constitution.

In view of this tempestuous situation, it is only a matter of time before the right to rebel is triggered in the public's minds with its obvious consequences for violence on the one side and retaliatory repression by the state on the other.



VII Bibliography

A Cases

1 New Zealand

New Zealand Drivers' Assoc v New Zealand Road Carriers [1982] 1 NZLR 374 (CA).

Taylor v New Zealand Poultry Board [1984] 1 NZLR 394 (CA).

2 European Court of Human Rights

Sporrong and Lonnroth v Sweden (7151/75 & 7152/75) ECHR 23 September 1982.

3 Fiji

Bavadra v Attorney-General [1987] SPLR 95, [1988] LRC 13.

Prasad v Republic of Fiji (No 5) [2000] FJHC 273, [2000] 2 FLR 115.

Qarase v Bainimarama [2008] FJHC 241 <www.pacii.org>.

Qarase v Bainimarama [2009] FJCA 9 <www.pacii.org>.

The Republic of Fiji v Prasad [2001] FJCA 2.

4 Ghana

Sallah v The Attorney General of Ghana [1970] Constitutional Supreme Court 8.

5 Grenada

Mitchell v Director of Public Prosecutions [1986] LRC (Const) 35 (Grenada CA).

6 India

Bharati v State of Kerala [1973] 4 SCC 225.

7 *Pakistan*

Bhutto v Chief of Army Staff [1977] PLD 657 (SC).

Jilani v The Government of Punjab [1972] PLD 139 (SC).

State v Dosso [1958] PLD 533 (SC).

8 *Rhodesia*

Madzimbamuto v Lardner Burke [1968] 3 All ER 561.

Madzimbamuto v Lardner Burke [1969] 1 AC 645 (PC).

Ndholovu v The Queen [1968] 4 SALR 515.

9 *Uganda*

Uganda v Commissioner of Prisons ex parte Matovu [1966] EA 514.

10 *United Kingdom*

Oppenheimer v Cattermole [1976] AC 249 (HL).

Re Pinochet HL Oral Judgment 17 December 1998
<<https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm>>.

Slade's Case [1602] 4 Co Rep 91a, 76 ER 1072.

11 *United States*

Brown v Board of Education 347 US 483 (1954).

B Constitutions, Legislation, and Parliamentary Material

1 *Fiji*

Bauan Declaration of Rights 1867.

Constitution Amendment Act 1997.

Constitution of the Republic of Fiji 2013.

Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990.

Declaration of Rights 1865.

The Constitution of Fiji 1871.

The Constitution of Fiji 1873.

The Constitution of Fiji 1966.

The Constitution of Fiji 1970.

Tovata i Viti 1867.

Administration of Justice Decree 2009.

Decree 1 2000 (George Speight Government).

Human Rights Commission Act 1999.

Human Rights Commission Decree 2009.

Indigenous Claims Tribunal Bill 2006.

Qoliqoli Bill 2006.

(23 June 1997) Hansard.

2 *Hawai`i*

Constitution 1864.

3 *South Africa*

Constitution of the Republic of South Africa 1996.

4 *United Kingdom*

Petition of Rights 1628.

Bill of Rights 1689.

Human Rights Act 1998.

C UN and Regional Materials

Biketawa Declaration (2000).

Human Rights Council *Report of the Working Group on the Universal Periodic Review* A/HRC/28/8 (2014).

Human Rights Council *Report of the Working Group on the Universal Periodic Review–Addendum* A/HRC/28/8/Add.1 (2015).

Universal Declaration of Human Rights, GA Res 217A(III), A/RES/217(III) (1948).

United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, A/RES/61/295 (2007).

D Books, Chapters in Books, and Other Texts

Ancient Laws and Institutes of England (The Commissioner on the Public Records of the Kingdom, 1840).

George B Adams *The Origin of the English Constitution* (Beard Books, Washington DC, 2002).

André A Alves and José M Moreira "The Salamanca School" in John Meadowcroft (ed) *Major Conservative and Libertarian Thinkers* (Continuum International Publishing Group Inc, New York, 2010) vol 9.

JH Baker *An Introduction to English Legal History* (2nd ed, Butterworths, London, 1979).

Charles M Bakewell (ed) *Plato The Republic* (Charles Scribner's Sons, New York, 1956).

John Beames *A Translation of Glanville* (John Byrne & Co, Washington DC, 1900).

Carl Lotus Becker *The Declaration of Independence: A Study on the History of Political Ideas* (Harcourt, Brace and Co, New York, 1922).

John Bednarz Jr (translator) with Dirk Baecker, Niklas Luhmann *Social Systems* (Stanford University Press, Stanford, 1995).

Jean Brookes *International Rivalry in the Pacific Islands 1800-1875* (University of California Press, Berkeley, 1941).

Frederick Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999).

Frederick Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (2nd ed, Auckland University Press, Auckland, 2006).

Trevor Bryce *Life and Society in the Hittite World* (Oxford University Press, Oxford, 2002).

William W Buckland *A Manual of Roman Private Law* (2nd ed, Cambridge University Press, London, 1939).

Edward Bulwer-Lytton *Richelieu: Or the Conspiracy* (Harper, New York, 1839).

Mai Chen and Geoffrey Palmer *Public Law in New Zealand: Cases, Materials, Commentary and Questions* (Oxford University Press, Auckland, 1993).

Peter Critchley "The Philosophy of Praxis-The Democratisation of Philosophy, Politics and Power" in *Beyond Modernity and Post-Modernity* (1997) <www.academia.edu> vol 2.

RA Derrick *A History of Fiji* (The Government Press, Suva, 1975) vol 1.

René Descartes *Discourse On Method* (Macmillan, New York, 1986).

SA de Smith *The New Commonwealth and its Constitutions* (Stevens & Sons Ltd, London, 1964).

Wendy Doniger with Brian K Smith (translator) *The Laws of Manu* (Penguin Books, New Delhi, 1991).

George Dunbar *History of India From Earliest Times to the Present Day* (Nicholson and Watson Ltd, London, 1943) vol 1.

Will Durrant, *The Story of Civilization: the Life of Greece* (Simon & Shuster, New York, 1966).

Charles S Edwards *Hugo Grotius: The Miracle of Holland: A Study of Political and Legal Thought* (Nelson Hall, Chicago, 1981).

William Ellis (translator) *The Politics of Aristotle or a Treatise of Government* (JM Dent and Sons, London, 1947).

Friedrich Engels *The Origin of the Family, Private Property and the State* (Resistance Books, Sydney, 2004).

David H Fischer *Paul Revere's Ride* (Oxford University Press, Oxford, 1994).

Benjamin Foster "Social Reform in Mesopotamia" in K Irani and Morris Silver (eds) *Social Justice in the Ancient World* (Greenwood Press, Westport, 1995).

Peter France *The Charter of the Land: Custom and Colonization in Fiji* (Oxford University Press, Melbourne, 1969).

John Gillingham (translator) Hans E Mayer *The Crusades* (Oxford University Press, Oxford, 1972).

Janelle Greenberg *The Radical Face of the Ancient Constitution: St Edward's 'Laws' in Early Modern Political Thought* (Cambridge University Press, Cambridge, 2006).

John Hale *The Civilization of Europe in the Renaissance* (Harper Collins Publishers, London, 1993).

GDG Hall (translator) (ed) *The Treatise on the Laws and Customs of the Kingdom of England* (Oxford University Press, Oxford, 2002).

Norman Hampson *A Social History of the French Revolution* (Routledge, London, 1988).

Charles H Haskins *Norman Institutions* (The Law Book Exchange Limited, Harvard University Press, Cambridge, 2007).

Thomas Hobbes *Leviathan* (JM Dent & Sons, London, 1949).

Gerald Horne *The White Pacific: U.S. Imperialism and Black Slavery in the South Seas After the Civil War* (University of Hawai'i Press, Honolulu, 2007).

David Hume *The History of England from the Invasion of Julius Caesar to The Revolution in 1688* (Liberty Fund, Indianapolis, 1983).

Waheed Husain *The Administration of Justice during the Muslim Rule in India* (University of Calcutta Press, Calcutta, 1934).

Arthur D Innes *A History of England and the British Empire* (Rivingtons, London, 1914) vols I–IV.

Lisa Jardine *Worldly Goods: A New History of the Renaissance* (Macmillan, London, 1996).

John Keay *A History of India* (Harper Collins Publishers, New Delhi, 2007).

David Lindsay Keir *The Constitutional History of Modern Britain since 1485* (8th ed, Adams and Charles Black, London, 1966).

Arthur B Keith *A Constitutional History of India 1600-1935* (Methuen & Co Ltd, London, 1938).

Hans Kelsen *General Theory of Law and State* (Harvard University Press, Cambridge, 1945).

Patrick V Kirch *The Lapita Peoples: Ancestors of the Oceanic World* (Blackwell, Oxford, 1997).

Bernard Knollenberg *Growth of the American Revolution 1766-1775* (Free Press, New York, 1975).

Robert D Knudsen and Ali M Knudsen (translators) Jan Dengerink *The Idea of Justice in Christian Perspective* (Wedge Publishing Foundation, Toronto, 1978).

Desmond Lee (translator) Plato *The Republic* (2nd ed, Penguin Books, London, 1974).

TG Leesen *Gaius Meets Cicero: Law and Rhetoric in the School Controversies* (Brill, Leiden, 2009).

Lord Lloyd of Hampstead and MDA Freeman *Lloyd's Introduction to Jurisprudence* (5th ed, Stevens and Sons, London, 1985).

John Locke *Two Treatises of Civil Government* (JM Dent and Sons Ltd, London, 1924).

Niklas Luhmann *Essays on Self-Reference* (Columbia University Press, New York, 1990).

Niklas Luhmann *Law as a Social System* (Oxford University Press, Oxford, 2004).

E Luttwak *Coup d'état: A Practical Handbook* (Harvard University Press, Cambridge, 1968).

Ernest Mackay *The Indus Civilization* (Lovat Dickson & Thompson Ltd, London, 1935).

Henry Maine *Ancient Law* (JM Dent & Sons Ltd, London, 1917).

Karl Marx *Capital* (Penguin Classics, London, 1991) vol III.

Karl Marx *Grundrisse* (Penguin Books, London, 1973).

Karl Marx *Marx/Engels Selected Works* (Progress Publishers, Moscow, 1969).

Karl Marx "The German Ideology: Part I" in Robert C Tucker (ed) *The Marx-Engels Reader* (2nd ed, WW Norton & Co Inc, New York, 1978).

Karl Marx "Theses on Feuerbach" in Robert C Tucker (ed) *The Marx-Engels Reader* (2nd ed, WW Norton & Co Inc, New York, 1978).

Karl Marx and Friedrich Engels *On Colonialism* (Progress Publishers, Moscow, 1959).

Karl Marx and Friedrich Engels *The Communist Manifesto* (Progress Publishers, Moscow, 1969).

Humberto Maturana and Francisco Varela *Autopoiesis and Cognition: The Realization of the Living* (Reidel Publishing Company, Dordrecht, 1980).

William A McDevitte and William S Bohn (translators) Julius Caesar *The Gallic Wars* (Red and Black Publishers, St Petersburg (Florida), 1869) Book 6.

PG McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-determination* (Oxford University Press, Oxford, 2004).

Robert Miles *Capitalism and Unfree Labour: Anomaly or Necessity?* (Tavistock Publications, London, 1987).

Samuel E Morison (ed) *Sources and Documents illustrating the American Revolution, 1764–1788* (2nd ed, Clarendon Press, Oxford, 1929).

RR Nayacakalou *Leadership in Fiji* (Oxford University Press, Melbourne, 1975).

Robert Nicole *Disturbing History: Resistance in Early Colonial Fiji* (University of Hawaii Press, Honolulu, 2011).

Michael Oakeshott *Rationalism in Politics and Other Essays* (Basic Books Pub Co, New York, 1962).

Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa, New Zealand* (Victoria University Press, Wellington, 2016).

Evegny Pashukanis *The General Theory of Law and Marxism* (Academic Press, London, 1980).

Frederick Pollock and Frederic William Maitland *The History of English Law before the Time of Edward I* (2nd ed, Cambridge University Press, Cambridge, 1898).

Kunwar Deo Prasad *Taxation in Ancient India From the Earliest Times up to the Guptas* (Mittal Publications, Delhi, 1987).

Jean Jacques Rousseau *Du Contrat Social ou Principes du Droit Politique* (Mark Michel Ray, Amsterdam, 1862).

Omid Safi *A Biography: Memories of Muhammad – Why the Prophet Matters* (HarperCollins, New York, 2010).

Trevor J Saunders (reviser) TA Sinclair (translator) Aristotle *The Politics* (Revised ed, Penguin Books, London, 1981).

Deryck Scarr (ed) *Fiji: The Three Legged Stool–Selected Writings of Ratu Sir Lala Sukuna* (Macmillan Education Ltd, London and Basingstoke, 1984).

Amartya Sen *The Idea of Justice* (Harvard University Press, Cambridge, 2009).

TA Sinclair (translator) Aristotle *The Politics* (Penguin Books, London, 1962).

Social Contract: Locke-Hume-Rousseau with an Introduction by Sir Ernest Barker (Oxford University Press, London, 1947).

Matthew Spriggs and Deryk Scarr (eds) Aubrey Parke *Degei's Descendants: Spirits, Place and People in Pre-Cession Fiji* (ANU Press, Canberra, 2014).

Francis R Steele *The Code of Lipit-Ishtar* (The University Museum - University of Pennsylvania, Philadelphia).

Charles St Julian *The International Status of Fiji: Political Rights, Liabilities, Duties and Privileges of British Subjects and Other Foreigners Residing in the Fijian Archipelago* (Cunningham & Co Printers, Sydney, 1872).

Ronald Syme *The Roman Revolution* (Clarendon Press, Oxford, 1939).

AE Taylor (translator) Plato *The Laws* (JM Dent & Sons, London, 1960).

Gunther Teubner “Alienating Justice: On the Social Surplus Value of the Twelfth Camel” in David Nelken and Jirí Pribán (eds) *Consequences of Legal Autopoiesis* (Dartmouth, Aldershot, 2001).

Gunther Teubner *Law as an Autopoietic System* (Blackwell, Oxford, 1993).

Chris Thornhill and Samantha Ashenden (eds) *Legality and Legitimacy: Normative and Sociological Approaches* (Nomos Publishers, Baden Baden, 2010).

Jindra Tichy and Graham Oddie “Is the Treaty of Waitangi a Social Contract?” in Roy W Perrett and Graham Oddie (eds) *Justice, Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992).

Jeffrey H Tigay *The Evolution of the Gilgamesh Epic* (University of Pennsylvania Press, Philadelphia, 1982).

Christian Tomuschat and others (translators) *Basic Law for the Federal Republic of Germany—23 May 1949—Last amended on 13 July 2017* (German Bundestag, Berlin, 2018).

Hugh Tredennick (translator) Plato *The Last Days of Socrates* (Guild Publishing, London, 1992).

Ralph V Turner *King John: England's Evil King?* (The History Press, The Mill Brimscombe Port Stroud, 2009).

Paul Vinogradoff “Feudalism” in *Cambridge Medieval History* (1924) vol 3.

Max Weber *Economy and Society* (University of California Press, 1978).

Max Weber “Politics as Vocation” in Tony Waters and Dagmar Waters (translators) (eds) *Weber's Rationalism and Modern Society* (Palgrave Macmillan, New York, 2015).

D Kelly Weisberg (ed) *Feminist Legal Theory: Foundations* (Temple University Press, Philadelphia, 1993).

Thomas Williams *Fiji and the Fijians: The Islands and Their Inhabitants* (Fiji Museum, Suva, 1982) vol 1.

Danilo Zolo "The Epistemological Status of the Theory of Autopoiesis and its Application to the Social Sciences" in Alberto Febbrajo and Gunther Teubner (eds) *European Lawbook in the Sociology of Law: State, Law, Economy as Autopoietic Systems: Regulation and Autonomy in a New Perspective* (Giuffree, Milan, 1992).

E Journal Articles

Harold J Berman "The Influence of Christianity upon the Development of Law" (1959) 12 Okla L Rev 86.

Surendra Bhandari "The Ancient and Modern Thinking about Justice: An Appraisal of the Positive Paradigm and the Influence of International Law" (2014) 13 Ritsumeikan Annual Review of International Studies 1.

Robert Blackburn "Enacting a Written Constitution for the United Kingdom" (2015) 36 Stat LR 1.

George Callan-Woywod and David A Duquette "Marx's Theory of Ethical Justice" (1979) 6 Auslegung: A Journal of Philosophy 75.

Natalie Cowley "What is Praxis? Discussed in relation to Hegel, Marx, Nietzsche and Sartre" (2008) 4 Te Kura Kete Aronui Graduate and Postgraduate E-Journal - Faculty of Arts and Social Sciences.

SA de Smith "Constitutional Lawyers in Revolutionary Situations" (1968) 7 W Ontario L Rev 93.

Sian Elias "Fundamentals: A Constitutional Conversation" (2011) 19(1) Waikato L Rev 1.

Sam J Ervin Jr "Separation of Powers: Judicial Independence" (1970) 35 Law & Contemp Probs 108.

Andreas Fischer-Lescano "Critical Systems Theory" (2012) 38 PSC 3.

Sanford E Gaines "Reflexive Law as a Legal Paradigm for Sustainable Development" (2002–2003) 10 Buff Envtl LJ 1.

Tom Ginsburg, Daniel Lansberg-Rodriguez and Mila Versteeg "When to Overthrow your Government: The Right to Resist in the World's Constitutions" (2013) 60 UCLA L Rev 1184.

JW Harris "When and Why Does the Grundnorm Change?" (1971) 29 CLJ 103.

RH Helms "Natural Law and Human Rights in English Law: From Bracton to Blackstone" (2005) 3 Ave Maria L Rev 1.

Ashly Hinmon "Achieving Justice through Rebellious Lawyering: Restructuring Systems of Law and Power for Social Change" (2010) 6(1) The Modern American 15.

Faith Rivers James "Leadership and Social Justice Lawyering" (2012) 52 Santa Clara L Rev 971.

Joseph H Kary "Contract Law and the Social Contract: What Legal History Can Teach Us about the Political Theory of Hobbes and Locke" (1999) 31 Ottawa L Rev 73.

Hans Kelsen "Law, State and Justice in the Pure Theory of Law" (1948) 57 Yale LJ 377.

Michael King "The 'Truth' About Autopoiesis" (1993) 20 JL & Soc 218.

Karen L Loewy "Lawyering for Social Change" (2000) 27 Fordham Urb LJ 1869.

Martin Loughlin "The Constitutional Imagination" (2015) 78 MLR 1.

Niklas Luhmann "The World Society as a Social System" (1982) 8 International Journal of General Systems 131.

Matej Makarovič "Some Problems in Luhmann's Social Systems Theory: Differentiation, Integration and Planning" (2001) 17(37–38) Družboslovne razprave 59.

JG Manning "The Representation of Justice in Ancient Egypt" (2012) 24 Yale JL & Human 111.

Aldo Mascareno "Ethics of contingency beyond the praxis of reflexive law" (2006) 12 Soziale Systeme 274.

Ralf Michaels "The True Lex Mercatoria: Law Beyond the State" (2007) 14 Ind J of Global Legal Stud 447.

Martha Minow "Lawyering for Human Dignity" (2002) 11 Am U J Gender Soc Pol'y & L 143.

Dawn Oliver "Written Constitutions: Principles and Problems" (1992) 45 Parliamentary Affairs 135.

Michael Perry "The Morality of Human Rights" (2013) 50 San Diego L Rev 775.

J Dyneley Prince "Review: The Code of Hammurabi"(1904) 8 The American Journal of Theology 601.

Paul Reeves "The Making of the Fijian Constitution" (1998) 107 Journal of the Polynesian Society 223.

Jelena Ristik "Right to Property: From the Magna Carta to the European Convention on Human Rights" (2015) 11(1) SEEU Review Special Ed Magna Carta 800th 145.

Miriam Theresa Rooney "Law Without Justice?—The Kelsen and Hall Theories Compared" (1948) 23 Notre Dame L Rev 140.

Charles P Sherman "The Basilica. A Ninth Century Roman Law Code Which Became the First Civil Code of Modern Greece a Thousand Years Later" (1918) 66 U Pa L Rev 363.

Charles P Sherman "The Romanization of English Law" (1914) 23 Yale LJ 318.

Manoj Kumar Sinha "Hinduism and international humanitarian law" (2005) 87 International Review of the Red Cross 285.

Gunther Teubner "Autopoiesis in Law and Society: A Rejoinder to Blankenburg" (1984) 18 Law & Soc'y Rev 291.

Gunther Teubner "Self-subversive Justice: Contingency or Transcendence Formula of Law" (2009) 72 MLR 1.

Jeremy Waldron "Kant's Legal Positivism" (1996) 109 Harv L Rev 1535.

Alan Watson "The Evolution of Law: The Roman System of Contracts" (1984) 2 Law & Hist Rev 1.

George Williams "The Case that Stopped a Coup? The Rule of Law and Constitutionalism in Fiji" (2001) 1 OUCLJ 73.

Andrew Woodcock "Jacques Maritain: Natural Law and the Universal Declaration of Human Rights" (2006) 8 Journal of the History of International Law 245.

Fareed Zakaria "The Rise of Illiberal Democracy" (1997) 76(6) Foreign Affairs 22.

Mauro Zamboni "Interview with Gunther Teubner: Frankfurt (Germany), December 2010" (2012) 35(4) Retfærd 3.

F Reports

Annual Reports of the Fiji Human Rights Commission (Fiji Human Rights Commission) from 2001–2009.

Fiji Independence Document 1966 (Conference Report FCC65, 9 August 1965).

G Electronic and Internet Library Sources

Thomas Aquinas "The Summa Theologica—First part of the Second Part" University of Windsor <<http://web2.uwindsor.ca/courses/philosophy/pinto/34-110-02/aquinas.PDF>>.

"Biketawa Declaration" Pacific Islands Forum Secretariat <www.forumsec.org>.

"Blueprint for the Protection of Fijian & Rotuman Rights and Interests, and the Advancement of their Development" (17 July 2000) Maori News Online–Fiji Coup Supplement <<https://maorinews.com/karere/fiji/blueprint.htm>>.

Fred Blume (translator) "Concerning the Composition of a New Code" in Timothy Kearley (ed) *Annotated Justinian Code* (2nd ed) University of Wyoming College of Law George William Hopper Law Library <www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2/> Book I.

"Brehon Law" The Courts Service of Ireland <www.courts.ie>.

"Charter of Liberties of King Henry I: AD 1100" (1999) The Center for Constitutional Studies, National Humanities Institute <www.nhinet.org/ccs/docs.htm>.

"Constitution of October 4, 1958" Conseil Constitutionnel <www.conseil-constitutionnel.fr/>.

"coup d'État" (2018) Linguee Dictionary French-English <www.linguee.com/french-english>.

David Crowther "The Charter of Liberties of Stephen" The History of England <<https://thehistoryofengland.co.uk>>.

Manusmruti Dahan Din "Why did Dr Babasaheb Ambedkar publicly burn the Manusmriti on Dec. 25, 1927?" (24 December 2017) Sabrang <<https://sabrangindia.in>>.

"Declaration of the Rights of Man and Citizen from the Constitution of Year I (1793)" Columbia University <<http://www.columbia.edu/~iw6/docs/dec1793.html>>.

Daniel J Elazar "Deuteronomy as Israel's Ancient Constitution: Some Preliminary Reflections" Jerusalem Center for Public Affairs <<http://jcpa.org/>>.

William P Hall "Kororoit Institute Working Paper No 2: Physical Basis for the Emergence of Autopoiesis, Cognition and Knowledge" (24 November 2011) Kororoit Institute Proponents and Supporters Assoc Inc <<http://kororoit.org>>.

Paul Halsall (ed) "Alfred and Guthrum's Peace" (February 1996) Fordham University Internet Medieval Sourcebook <<https://sourcebooks.fordham.edu>>.

Paul Halsall (ed) "The Anglo-Saxon Doms, 560-975" (June 1998) Fordham University Internet Medieval Sourcebook <<https://sourcebooks.fordham.edu>>.

Paul Halsall (ed) "The Code of the Nislim, c. 1650-1500 BCE" (August 1998) Fordham University Internet Ancient History Sourcebook <<https://sourcebooks.fordham.edu/>>.

Xavier Hildegard (translator) "The Magna Carta of England, 1215" (2001) Magna Carta Plus <www.magnacartaplus.org>.

"Hollow promises of rights, says Rabuka" *The Fiji Times* (online ed, Suva, 14 April 2018).

Talebula Kate "SODELPA leader Rabuka appears in court" *The Fiji Times* (online ed, Suva, 25 May 2018).

Frederic G Kenyon (translator) Aristotle *The Athenian Constitution* (eBook ed, Project Gutenberg, 2008).

Charles R Kesler "The Nature of Right in American Politics: A Comparison of Three Revolutions" (30 September 2008) The Heritage Foundation <www.heritage.org>.

Muhammad Zafrullah Khan *The Concept of Justice in Islam* (Bait-ul-Zafar, Hollis) <<https://www.alislam.org/library/books/The-Concept-of-Justice-in-Islam.pdf>>.

LW King (translator) "The Code of Hammurabi" The Avalon Project - Yale Law School Lillian Goldman Law Library <<http://avalon.law.yale.edu/ancient/hamframe.asp>>.

Sharon Krause "Moral Sentiment and the Politics of Human Rights" (October 2010) Jason Swadley (ed) *The Art of Theory: Conversations in Political Philosophy* <www.artoftheory.com>.

Ismail I Nawwab, Paul F Hoye and Peter C Speers (eds) "Islam and Islamic History and The Middle East" (21 May 2017) IslamiCity <www.islamicity.org>.

"Notes from Fiji" *The Sydney Morning Herald* (online ed, Sydney, 30 July 1867).

“Provisions of Oxford (1258) and Westminster (1259)” England calling
<<https://englandcalling.wordpress.com>>.

Sanjay Ramesh "Back to the Fiji Coups" (January 1999) Pacific Islands Report, East-West Centre Pacific Islands Development Program
<www.pireport.org/articles/1999/01/11/back-fiji-coups>.

"Reference on the Right to Environment" Asia Pacific Forum of National Human Rights Institutions <www.asiapacificforum.net/support/advice-and-expertise/acj/environment/>.

Jon Roland (ed) Emerich de Vattel *Law of Nations; or Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns* (Digital ed, Constitution Society, 1999) <www.constitution.org>.

Samuel P Scott (translator) (ed) *The Civil Law* (The Central Trust Co, Cincinnati, 1932) Constitution Society <www.constitution.org/sps/sps.htm>.

Samuel P Scott (translator) (ed) "The Institutes of Gaius - The Four Commentaries of Gaius on the Institutes of the Civil Law - First Commentary" in *The Civil Law* (The Central Trust Co, Cincinnati, 1932) Constitution Society
<www.constitution.org/sps/sps.htm> vol 1.

Samuel P Scott (translator) (ed) *The Visigothic Code* (Boston Book Co, Boston, 1910) The Library of Iberian Resources Online
<<http://libro.uca.edu/vcode/visigoths.htm>>.

AM Sellar (translator) *Bede's Ecclesiastical History of England* (George Bell and Sons, London, 1907) The Project Gutenberg <www.gutenberg.org>.

Stephen Sherlock "Constitutional and Political Change in Fiji—Research Paper 7 1997-98" (11 November 1997) Parliament of Australia
<www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/>.

Alex Spillius "Fijian gangs wage terror campaign against Indians" *The Telegraph* (online ed, United Kingdom, 15 June 2000).

Muhammad Tahir-ul-Qadri *The Constitution of Medina [63 Constitutional Articles]* (eBook ed, Minhaj-ul-Quran Publications, 2012) <www.minhajpublications.com>.

Lincoln Tan "Fiji First Party will form new Fiji government" *The New Zealand Herald* (online ed, Auckland, 19 September 2014).

"The commander improvises" *The Economist* (online ed, London, 11 January 2007).

"The Declaration of Independence—In Congress, July 4, 1776" UShistory.org <www.ushistory.org/declaration/document/>.

"The Deed of Cession of Fiji to Great Britain—10 October, 1874" The University of the South Pacific <www.usp.ac.fj/>.

"The 'Great Charter' and the First General Assembly" Jamestown Settlement and the American Revolution Museum at Yorktown <www.historyisfun.org>.

"The Last Sermon of Prophet Muhammad" (1990) Islamic Civilization <www.cyberistan.org/islamic/sermon.html>.

"The New Constitution for Fiji" *The Sydney Morning Herald* (online ed, Sydney, 4 November 1873).

"Thomas Jefferson to the Republicans of Washington County, Maryland, 31 March 1809" Founders Online <<https://founders.archives.gov/>>.

Robert Trout "Life, Liberty and The Pursuit of Happiness: How the Natural Law Concept of Gottfried Wilhelm Leibniz Inspired America's Founding Fathers" The Schiller Institute <<https://archive.schillerinstitute.com>> reprinted from (1997) VI(1) Fidelio Magazine.

"Two bills at heart of Fiji coup tension" *The New Zealand Herald* (online ed, Auckland, 2 November 2006).

Hugo Urrestarazu "Autopoietic Systems: A Generalised Explanatory Approach – Part 2" (2011) 7 Constructivist Foundations 48 <www.univie.ac.at/constructivism/journal>.

"Yashi Ghai speaks on Fiji constitution plan" *Radio New Zealand* (online ed, New Zealand, 13 March 2012).

H Theses

Shaista Shameem "Lord Salisbury's Despatch: Legal Issues for Indo-Fijians" (LLM Thesis, Auckland University, 1998).

Shaista Shameem "Sugar and Spice: Wealth Accumulation and the Labour of Indian Women in Fiji 1879-1930" (PhD Thesis, University of Waikato, 1991).

Juliele Maria Sievers "A Philosophical Reading of Legal Positivism" (PhD in Philosophy Thesis, Université Charles de Gaulle - Lille III, 2015).

I Other

Frank Bainimarama, Prime Minister of Fiji "2014 National Budget Announcement" (FRA Complex, Suva, 8 November 2013).

Frank Bainimarama, Prime Minister of Fiji "Speech at the Commissioning of Dreketi Grid Extension" (Maramarua Primary School, Dreketi, 16 January 2014).

Conversation with former Labour parliamentarian, now Professor Tupeni Baba (10 June 2018).

Despatch (Secretary to the Government of India AO Hume, 24 December 1872).

Rob van Gestel, Hans-W Micklitz and Miguel Poiares Maduro *EUI Working Papers-Law 2012/13-Department of Law: Methodology in the New Legal World* (European University Institute, Florence, 2012).

Masaaki Higashijima "Beat Me if You Can: The Fairness of Elections in Dictatorship" (winning essay of annual International IDEA/Electoral Integrity Project (Harvard University & University of Sydney) award for best graduate student paper on electoral integrity, Michigan State University, 2014).

Josefa Iloilo, President of Fiji "Speech to the Nation" (Suva, 10 April 2009).

Karl-Heinz Ladeur *EUI Working Papers-Law No 99/3-The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern Law: From the Hierarchy of Norms to the Heterarchy of Changing Patterns of Legal Inter-relationships* (European University Institute, Florence, 1999).

Zvonimir Lauc "The Vertical Separation of Powers" (paper presented at the World Congress of the IACL, Oslo, June 2014).

Lord Salisbury's Despatch 1875 (Indian Government, 3 May 1877).

National Council for Building A Better Fiji *People's Charter for Change, Peace & Progress* (2008).

Malcolm Peltu (ed) Gunther Teubner "Law as an Autopoietic System" (reports on presentations at LSE Complexity Study Group Meeting No 3 "Can Social Systems be Viewed as Autopoietic", London, 18 June 1997).

Malcolm Peltu (ed) Helmut Willke "Autopoiesis and Organised Complexity" (reports on presentations at LSE Complexity Study Group Meeting No 3 "Can Social Systems be Viewed as Autopoietic", London, 18 June 1997).