

**GAMING FOR “GOOD GOVERNANCE” AND THE DEMOCRATIC IDEAL:  
FROM UNIVERSALIST RHETORIC TO PACIFIC REALITIES SEEN  
THROUGH A FIJIAN MICROSCOPE\***

[“The dogmas of the quite past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew.” (Abraham Lincoln, Message to Congress, 1 December 1862)]

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**I. INTRODUCTION**

The historical development of human rights law provides the normative basis for the right to democracy. There is a persuasive case to be made for a democratic tradition in international law. Richard. Barnes notes: “Even the strongest critics of democracy are not denying the value of the concept, but rather they are cautious about accepting it blindly and ignoring the consequences and other potentially valid ideological perspectives.”<sup>1</sup> The *Universal Declaration on Human Rights* is the premier instrument on the right to democracy, and it contains the clearest statement on the issue of democracy.<sup>2</sup> While General Assembly resolutions are often regarded as not binding,<sup>3</sup> it

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<sup>1</sup> R. Barnes, ‘Book Review, ‘Democratic Governance and International Law’ (2000) 8 *Indiana Journal of Global Legal Studies* 281, 297.

<sup>2</sup> Universal Declaration of Human Rights, G.A. Res 217A (III), U.N. Doc. A/810 (1948) [hereinafter referred to as *Universal Declaration of Human Rights*] art. 21.

<sup>3</sup> The conclusion that the resolutions are mere recommendations is based on narrow logic. If the fundamental principles of the United Nations are collectivism and sovereign equality, then one must concede at least that resolutions carry the moral force of the opinions of most sovereign states. *The General Assembly’s Uniting for Peace Resolution*, G.A. Res. 377A, U.N. GAOR, 5th Sess, Supp. No. 20, 302d plen. Mtg, [10]-[12], U.N. Doc. A/1775 (1950) demonstrated the residual legal capacity of the General Assembly. In any event, there can be no better evidence of a general practice accepted as law than the resolutions of states reached in the most widely representative and democratic organ

must be noted that the *Universal Declaration of Human Rights* is not just another General Assembly Resolution. “It has become an edifying referent for state constitutions, whose contents sometimes are a wholesale adoption of provisions of the Universal Declaration.”<sup>4</sup> Consequently, the conclusion that the declaration is a mere recommendation is based on narrow logic indeed. If the fundamental principles of the United Nations are collectivism and sovereign equality, then one must concede at least that the declaration carries the collective moral force of the opinions of most sovereign states. *The General Assembly’s Uniting for Peace Resolution*<sup>5</sup> demonstrated the residual legal capacity of the General Assembly. In any event, there can be no better evidence of a general practice accepted as law than a declaration of states reached in the most widely representative and democratic organ of the United Nations.

The influence of the *Universal Declaration of Human Rights* on subsequent international and regional developments regarding democratic governance is testament that it has effectively shed whatever stigma attended the circumstances of its birth. The eminence of the declaration is evident in its endorsement as a reflection of customary international law.<sup>6</sup> In fact the UN observes that the broadest legally binding human rights agreements, the *International Covenant on Economic, Social and Cultural Rights*<sup>7</sup> and the *International Covenant on Civil and Political Rights*<sup>8</sup>, have “take[n] the provisions of the Universal Declaration a step further by making them binding upon States parties”.<sup>9</sup>

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of the United Nations, and in the course of discussing issues under the Charter, which, juridically, is the constitution of the United Nations.

<sup>4</sup> R. Ezetah, ‘The Right to Democracy: A Qualitative Inquiry’ (1997) 22 *Brooklyn Journal of International Law* 495, 506-507.

<sup>5</sup> G.A. Res. 377A, U.N. GAOR, 5th Sess, Supp. No. 20, 302d plen. Mtg, [10]-[12], U.N. Doc. A/1775 (1950).

<sup>6</sup> The Universal Declaration is seen as having ‘evolved into the Magna Carta of the international human rights movement and the premier normative international instrument on the subject’, T. Buergenthal, ‘The Human Rights Revolution’ (1991) *St. Mary’s Law Journal* 3, 7; See, also, P. Alston, ‘The UN’s Human Rights Record: From San Francisco to Vienna and Beyond’ (1994) 16 *Human Rights Quarterly* 375, 376.

<sup>7</sup> *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, art 1, 993 UNTS.

<sup>8</sup> *International Covenant on Civil and Political Rights* (ICCPR), 16 December 1966, 999 UNTS 171, 6 ILM 368.

<sup>9</sup> See, *The United Nations at 50: Notes for Speakers* (1995) 52.

Article 21 of the *Universal Declaration of Human Rights* emphasises the overriding importance of the will of the people.<sup>10</sup> Therefore, a government that is not based on the consent of the governed is not democratic. In addition, the government must be substantially representative of all distinct groups in the country. It follows that representation should be manifest in active as opposed to nominal participation such that “representation and participation (are) experienced as part of a continuum”.<sup>11</sup> To be legitimate and democratic in international law, the emerging government must be based on the consent of the people and participants must be representative of all national and distinct political groups in the country, not just those with access to resources and votes.

In some countries, including several in Europe and elsewhere, the problem is just the opposite: elections frequently and often predictably result in governments that are too responsive to the popular will of an ethnic majority, and insufficiently attentive, or openly hostile to, minority group interests.<sup>12</sup> The classic result in such cases is the tyranny of the majority. In still other countries, elected governments abandon democratic principles altogether after attaining office.<sup>13</sup> In such cases, political actors make a mockery of traditional instruments and practices of democratic electoral practices. What is clear from the history of political evolution is that the acceptance, ownership, and entrenchment of democratic ideals and practices involves the infusion of democratic social organization in key state mechanisms besides the current over-reliance on formal procedural democratic processes. Concern with furthering democracy requires moving beyond the procedural motions of democracy, such as universal suffrage, to the realization of democracy in substance. While formal mechanisms may constitute necessary components of a democratic society, they fall far short of being sufficient in achieving the substance of democracy. Failure to provide sustained investment in the growth and strengthening of domestic roots in stake-holder communities will result in a poor crop at best, political conflict and war at worst.

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<sup>10</sup> *Universal Declaration of Human Rights* art. 21(3).

<sup>11</sup> See, P. Thornberry, ‘The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism’ in Tomuschat, C. (ed) *Modern Law of Self-Determination: Towards a Democratic Legitimacy Principle* (1993) 116.

<sup>12</sup> See, E. Mansfield and J. Snyder, ‘Democratisation and War’ (1995) 74 *Foreign Affairs* 70, 87.

<sup>13</sup> See, R. Rotberg, ‘Democracy in Africa: The Ballot Doesn’t Tell All’ *Christian Science Monitor* (1 May 1996) 19.

The international community has a crucial role to play in providing the right environment for new democracies to get off the ground. At both the international and regional level democracy has been recognised as an international norm. Unfortunately, however, support for democracy is still expressed in general terms. To this day, no clear-cut international consensus exists that adequately lays down the criteria that should be used to judge whether a particular government is substantively “democratic,” or not.<sup>14</sup> In part, this is because many states still do not share the West’s enthusiasm for liberal, parliamentary democracy.<sup>15</sup> Crucially also, many states that invoke the internal non-interference norm, proscribed under Article 2(7) of the *Charter of the United Nations*, remain firmly convinced that the character of a state’s government and the management of its internal affairs are fundamentally matters of domestic concern.<sup>16</sup> Some states, however, acknowledge that democratic governance has become a subject of international commitments and therefore of international concern, but believe strongly that change should be effected through dialogue and negotiation rather than through any other more pragmatic measures.<sup>17</sup> This is of course the ideal path, but it is a course that is open to be ignored or toyed with by those wishing to appear to be learning how to play fairly.

This Article canvasses the international rubric and dynamic that informs the democracy and good governance crusade before moving the discussion to a regional setting targeting Pacific Island Countries with Fiji as a case study. It seeks to argue that democratic experimentalism, not the so-called “McDonaldization” (globalization as homogenization) of the world, is important.<sup>18</sup> This is based on the premise that “McDonaldization” minimizes the complex way in which the local interacts with the

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<sup>14</sup> See, B. Roth, ‘Evaluating Democratic Progress: A Normative Theoretical Approach’ (1995) 9 *Ethics and International Affairs* 55.

<sup>15</sup> This enthusiasm is, however, not entirely free of problems. The mishandling of the situation in the Occupied Territories after a Hamas majority was elected to the Palestinian Legislature in early 2006 hardly provides much in the way of inducement for actors to step up on to the stage of electoral politics.

<sup>16</sup> See, G. Fox, ‘The Right to Political Participation in International Law’ (1992) 17 *Yale Journal of International Law* 539, 590-91.

<sup>17</sup> See, L. Damrosch, et al (eds) *Law and Force in the New International World Order* (1992) 4.

<sup>18</sup> See, generally Benjamin R. Barber, *Jihad vs. McWorld* (1995).

international.<sup>19</sup> The efficacy of democratic experimentalism is that it acknowledges that rights are not based on first principles, but that, they are inevitably socially constructed and historically contingent, and thus closely connected with both individual and group identity.<sup>20</sup>

## II. ENSHRINING & CHAMPIONING THE DEMOCRATIC IDEAL IN INTERNATIONAL LAW

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

The United Nations has promulgated instruments that are collectively equivalent to an International Bill of Rights<sup>23</sup> and helped gather international consensus for the idea that the populations of States have rights under international law. This extends to the protection of the rights, even against the government. Beginning with the *Charter of the United Nations* and the *Universal Declaration of Human Rights*, the United Nations has constructed a normative framework for the realisation of rights for the people.<sup>24</sup> The

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<sup>19</sup> See, Arjun Appadurai, Disjuncture and Difference in the Global Cultural Economy, in *Global Culture: Nationalism, Globalization and Modernity* 295, 304 (1990) (discussing complexity of globalization and the international implications stemming from ideas of nationhood).

<sup>20</sup> C. Sabel & M. Dorf, ‘A Constitution of Democratic Experimentalism’ (1998) 98 *Columbia Law Review* 267, 470-73.

<sup>21</sup> *Charter of the United Nations* art. 55(c).

<sup>22</sup> *Ibid* art. 56.

<sup>23</sup> The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and its two Optional Protocols.

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

framework has been sustained over time by the actions of States in signing and ratifying various international human rights and related instruments, some of which are now part of customary international law. The international collaborative efforts involving United Nations organs, human rights workers and others have helped publicise the plight of the oppressed millions who yearn for more personal liberties and freedom from arbitrary detention, execution and political purges.

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

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<sup>25</sup> *Universal Declaration of Human Rights*, above n 8, art. 21.

<sup>26</sup> *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, 999 UNTS 171, (1966) 6 *ILM* 368.

<sup>27</sup> *Ibid* art. 25.

<sup>28</sup> See H. Steiner, ‘Political Participation as a Human Right’ (1988) 1 *Harvard Human Rights Year Book* 77, 87-88, 90, 93.

<sup>29</sup> *Ibid* 91, noting that an amendment requiring a pluralist political party system was withdrawn as a concession to the Soviet Union.

<sup>30</sup> *Ibid* 93.

Tragically, outside of the decolonisation context, during the Cold War era, there was little international consensus on the requirements of democratic governance beyond the general but limited insistence on periodic and genuine elections found in the *ICCPR* and a number of other international legal instruments. As a result, states lacked generally accepted criteria by which to judge other states' compliance with substantive democratic principles.<sup>31</sup> With the end of the bi-polar ideological competition that characterized the Cold War,<sup>32</sup> there has been a widely publicized shift in the character of public pronouncements about democracy. More states have made, through treaty or by means of non-binding but still influential declarations, formal commitments to democratic governance.<sup>33</sup> In addition, states, international organisations, human rights tribunals and legal scholars have sought increasingly to imbue that commitment with some real content to move beyond the simple but vague commitment to free elections contained in the *ICCPR*.<sup>34</sup>

The democracy discourse, however, remains "straitjacketed" by Article 2(7) of the *Charter of the United Nations*, which prohibits intervention in the "domestic affairs" of other states. This Article remains a pillar of the *Charter of the United Nations* system and continues to cast a shadow over all debates relating to government legitimacy or illegitimacy. Accordingly, although many states have joined the promulgation of resolutions and declarations proclaiming support for democracy and the right of political participation,<sup>35</sup> they also stress that each state has the "sovereign right freely to choose and develop its political, social, economic and cultural systems, whether or not

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<sup>31</sup> See, T. Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46, 47, discussing the problems associated with examining and monitoring elections for compliance with the existing ambiguous standards.

<sup>32</sup> G. Fox and G. Nolte, 'Intolerant Democracies' (1995) *Harvard International Law Journal* 1, 5.

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

<sup>34</sup> See, Fox and Nolte, above n 32, 3-5, describing efforts of 'the international community to address the perennial question of what makes a state "democratic".'

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

they conform to the preferences of other states”.<sup>36</sup> Though the international community may, under Articles 55 and 56, promote state observance of the right of citizens to participate in their governance, there is no clear authority to mandate a particular allocation of decision-making power within a sovereign state. In any event, an election’s “genuineness” as referred to by both participation provisions, has no obvious criteria.

In a bid to give the participation provisions content and contour, in December 1988, the General Assembly called on the United Nations Human Rights Commission “to consider appropriate ways and means of enhancing the effectiveness of the principle of periodic and genuine elections,” albeit “in the context of full respect for the sovereignty of Member States”.<sup>37</sup> The result adopted by the Economic and Social Council in May 1989 was a “framework for future efforts,” the first heading of which was: “The will of the people expressed through periodic and genuine elections as the basis for the authority of government”,<sup>38</sup> a phrase that clears up the above-mentioned ambiguity in Article 21 of the *Universal Declaration of Human Rights*. The document included mention of “the right of citizens of a State to change their governmental system through appropriate constitutional means”, and “the right of candidates to put forward their political views, individually and in cooperation with others”, and the need for “independent supervision” of elections.<sup>39</sup>

Election monitoring by the UN in independent nations signaled the start of a new foray by the UN. UN-monitored elections became one of the most visible manifestations of the right of peoples under international law to a democratic form of government.<sup>40</sup> Governments’ recognition that their legitimacy depends on meeting a

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<sup>36</sup> *Enhancing the effectiveness of the principle of periodic and genuine elections*. GA Res 45/150, UN GAOR 3d Comm, 45th Sess, Supp No 49A, UN Doc A/45/766 (1990) at 255.

<sup>37</sup> GA Res 157, 43rd Sess, UN Doc A/RES/43/157 (1988).

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

<sup>39</sup> *Ibid* Agenda Item 12, at 1, 2.

<sup>40</sup> The legal basis to the right is found in Article 25 of the International Covenant on Civil and Political Rights, ratified by 100 nations:

Every citizen shall have the right and the opportunity... and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;



normative expectation of the community of states’<sup>41</sup> indicated that the norm was undergoing a period of definition and realization.

The 1990s witnessed a number of exciting new developments in the UN as it sought to match its democratic rhetoric with the necessary normative and institutional framework. In November 1991, the Secretary-General’s guidelines on elections monitoring were released.<sup>42</sup> In 1992, the General Assembly welcomed the Secretary-General’s plan to establish both a focal point and an Electoral Assistance Unit within the Secretariat, and to establish two trust funds for electoral work.<sup>43</sup> The Electoral Assistance Unit came into being in 1992.<sup>44</sup> The office became a Division in 1994, and is now located within the Department of Political Affairs.<sup>45</sup> In 1993, the General Assembly placed electoral assistance in the context of democracy promotion by including language on ensuring “the continuation and consolidation of the democratization process” in the body of the resolution.<sup>46</sup> This resolution also addressed some of the practical concerns emerging from the United Nations’ new work in the field.<sup>47</sup> In 1994, the General Assembly’s resolution supporting electoral work linked

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(c) To have access, on general term, of equality, to public service in her country. *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, 999 UNTS 171, (1966) 6 *ILM* 368.

<sup>41</sup> See, Franck, above n 31, 64 (Cold War impeded ability of Human Rights Committee to enforce participatory rights). During the debates over the adoption of the Universal Declaration of Human Rights, the Soviet Government strongly supported a concept of sovereignty that would allow a state a free hand within its own borders. Continuation of the Discussion on the Draft Universal Declaration of Human Rights: Report of the Third Committee, UN GAOR, 3d Sess, pt 1, 183d mtg. at 924, UN Doc A/777, at 922 (1948) (advocating a view of national sovereignty as ‘the right of a state to act according to its own will, never serving as a tool of the policy of another State...’).

<sup>42</sup> The Guidelines were approved by the General Assembly in December 1991. See GA Res 130, 46th Sess, UN Doc A/RES/46/130 (1991).

<sup>43</sup> See, GA Res 138, 47th Sess, UN Doc A/RES/47/138 (1992). The two trust funds were the United Nations Trust Fund for Elections Observation and the UNDP Trust Fund for Technical Assistance to Electoral Processes. See *id.* The same day, the yearly sovereignty resolution passed. See GA Res 130, 47th Sess, UN Doc A/RES/47/130 (1992).

<sup>44</sup> See, Electoral Assistance Division, Electoral Assistance website. <<http://www.un.org/Depts/dpa/docs>> at 18 May 2003.

<sup>45</sup> *Ibid.*

<sup>46</sup> GA Res 131, 48th Sess, para 4, UN Doc A/RES/48/131 (1993). The resolution also linked electoral work to the maturing human rights framework by recalling and affirming language from the World Conference on Human Rights’ Vienna Declaration and Programme of Action’s recognition that electoral assistance is ‘of particular importance in the strengthening and building of institutions relating to human rights and the strengthening of a pluralistic civil society...’ *Id.* at preamble.

<sup>47</sup> The 1993 resolution stressed the importance of adequate time in carrying out electoral work. It recommended that the United Nations ensure pre-election preparatory and post-election follow-up

human rights work and democratization. In 1995, the General Assembly passed its standard electoral assistance resolution, with the term “democratization” in its title.<sup>48</sup>

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

### III. THE VAGARIES OF ANCHORING DEMOCRACY IN INTERNATIONAL LAW & IN PRACTICE

The idea of democracy is supported by fundamental instruments of multilateralism. The *Charter of the United Nations* under Chapter I, art 1(2), provides that “the Purposes of the United Nations are . . . to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”.<sup>52</sup> Other important instruments articulating this right are the *Universal*

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work; it called on the focal point to undertake more intensive coordination efforts with other UN organs involved in electoral work, especially the Human Rights Centre and the United Nations Development Programme (UNDP); and it called for coordination with NGOs. See, *id.* The yearly sovereignty and non-interference resolution passed the same day. See GA Res 124, UN GAOR, 48th Sess, UN Doc A/RES/48/124 (1993).

<sup>48</sup> See, Strengthening the Role of the United Nations in Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections and the Promotion of Democracy, GA Res 185, UN GAOR, 50th Sess, Agenda Item 112(b), UN Doc A/RES/50/185 (1996). The 1995 resolution also changed the time frame for the Secretary-General’s reporting on electoral matters: instead of a yearly report to the General Assembly, he was requested to report back after two years. See, *id.*

<sup>49</sup> See, GA Res 146, 44th Sess, UN Doc A/RES/44/146 (1989); GA Res 147, 44th Sess, UN Doc A/RES/44/147 (1989).

<sup>50</sup> See, UN GAOR 3d Comm., 52d Sess, Agenda Item 112(b), UN Doc A/C.3/52/L.44 (1998) [subsequently passed as GA Res 119, 52d Sess, UN Doc A/Res/52/119 (1998)].

<sup>51</sup> See, UN GAOR 3d Comm., 52d Sess, Agenda Item 112(b), UN Doc A/C.3/52/L.44 (1999) [subsequently passed as GA Res 129, 52d Sess, UN Doc A/Res/52/129 (1999)].

<sup>52</sup> *Charter of the United Nations* art 1(2).

*Declaration of Human Rights*, the *International Covenant on Economic, Social, and Cultural Rights* and the *International Covenant on Civil and Political Rights*. The *Universal Declaration of Human Rights* states:

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

The *International Covenant on Economic, Social, and Cultural Rights* and the *International Covenant on Civil and Political Rights* provide that: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development”.<sup>54</sup> Professor Thomas Franck argues that these documents together with regional instruments constitute “a net of participatory entitlements”.<sup>55</sup> Commentators note that the right to democracy has developed within international agreements. Professor Thomas Franck finds that democracy, “while not yet fully word made law, is rapidly becoming in our time, a normative rule of the international system”.<sup>56</sup> On his part, Gregory Fox asserts that “parties to the major human rights conventions have created an international law of participatory rights”.<sup>57</sup>

International conferences in the 1990s further buttressed the entitlement to democracy. Key among these was the *Vienna Declaration*<sup>58</sup> of the United Nations World Conference on Human Rights, which “considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right”.<sup>59</sup> The participating states expressly defined self-

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<sup>53</sup> *Universal Declaration of Human Rights*, above n 8.

<sup>54</sup> *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, art 1, 993 UNTS 3; *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, 999 UNTS 171, 6 *ILM*, 356 at art 1.

<sup>55</sup> Franck, above n 31, 79.

<sup>56</sup> *Ibid* 46.

<sup>57</sup> Fox, above n 16, 607.

<sup>58</sup> ‘United Nations World Conference on Human Rights: Vienna Declaration and Program of Action.’ (1993) 32 *ILM*, 1661 at 1665 (‘*Vienna Declaration*’).

<sup>59</sup> *Ibid*. The World Conference on Human Rights was assembled in Vienna by the United Nations on June 14-25, 1993. Representatives of 171 States attended. The *Vienna Declaration* was adopted by acclamation on 25 June 1993: at 1661. The Vienna Declaration states that the focus of ‘cooperation, development and strengthening of human rights’ should be on ‘strengthening and building of institutions relating to human rights, strengthening of a pluralistic civil society and the protection of groups which have been rendered vulnerable.’ To this end, assistance is necessary for ‘the conduct of

determination to include a democratic entitlement, noting that it is through self-determination that peoples “freely determine their political status, and freely pursue their economic, social and cultural development”.<sup>60</sup> The *Vienna Declaration* further affirmed that the “World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right”.<sup>61</sup> The participating states asserted that “democracy, development and respect for human rights, and fundamental freedoms are interdependent and mutually reinforcing”. Finally, the participating states agreed that “democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives”.<sup>62</sup>

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

#### IV. ONE STEP FORWARD, TWO STEPS BACK: RESPONSES TO THE 2006 FIJI COUP

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

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free and fair elections, ... the strengthening of the rule of law, the promotion of freedom of expression and the administration of justice, and... the real and effective participation of the people in the decision- making processes’, at 1683.

<sup>60</sup> Ibid 1665.

<sup>61</sup> Ibid 1661.

<sup>62</sup> Ibid 1666.

Qarase as PM after the coup led by George Speight in 2000.

Despite the fact that this showdown had been anticipated for so long, it was remarkable how little was done to protect the government from such open internal hostility. In what unfolded, regional powers, such as Australia and New Zealand, along with the United Nations and the Commonwealth, and other regional international actors, appeared united in their criticism of the situation but were ultimately powerless to do or say much, except make strongly worded proclamations of discontent.<sup>63</sup> The most that the outgoing UN Secretary General, Kofi Annan, could do was to threaten to stop Fijian military personnel participating in UN Peacekeeping operations as a means of diminishing the international prestige of the Fijian defence forces.<sup>64</sup> In the face of such an egregious affront to constitutional rule, this seemed like a mere slap across the wrist. However, this was not the Honiara of 2003, or the Dili of 1999. Though there were some reports of violence and two civilians did die in military custody<sup>65</sup> the situation had not deteriorated into widespread violence.

Qarase's government did ask for military assistance from the Australian and New Zealand governments, but these requests were rejected. The Australian Government deployed a Task Group in early November 2006 but this was tasked with providing security and transport for up to 7000 Australian citizens still in Fiji. The Australian Defence Force ("ADF") Task Group included several naval vessels, transport aircraft, and an elite SAS contingent, along with other specialized evacuation and medical teams. Altogether, some 800 ADF personnel were involved.<sup>66</sup> In addition to this highly visible presence, controversy surrounded the arrival in Fiji of an SAS unit

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<sup>63</sup> 'Secretary-General Strongly Deplores Fiji Military's Seizure of Power,' SG/SM/1077, 5 December 2006.

<sup>64</sup> 'Condemning coup in Fiji, Annan urges return to constitutional rule,' *UN News Centre*, 5 December 2006 <<http://www.un.org/apps/news/story.asp?NewsID=20852&Cr=fiji&Cr1=>> at 15 July 2006.

<sup>65</sup> There are only two reports of deaths in which the military are implicated. Amnesty International ("AI") reported that Human Rights Watch, in a letter to the interim Prime Minister Bainimarama in early January 2007, called for an investigation into the death of Nimilote Verebasaga. Mr. Verebasaga was taken into military custody over a dispute with a neighbour and was pronounced dead on arrival at the Queen Elizabeth Barracks. A second man, Mr. Sakiusa Rabaka Ligaiviu, also died after allegedly being assaulted while in military custody. AI also reports an increasing number of requests for the urgent investigation of human rights abuses. Amnesty International, *Fiji's Coup Culture*. <[http://www.amnesty.org.au/Act\\_now/campaigns/asia\\_pacific/features/fijis\\_coup\\_culture](http://www.amnesty.org.au/Act_now/campaigns/asia_pacific/features/fijis_coup_culture)> at 20 July 2007.

<sup>66</sup> Department of Defence, *Planning to Support Australian Citizens in Fiji*, 20 December 2006 <<http://www.defence.gov.au/fijisupport/default.cfm>> at 20 July 2007.

complete with weapons and communications equipment.

In response to this military presence, Commodore Bainimarama made repeated announcements assuring that the Fijian military would provide adequate security and threatened to use force in retaliation to any uninvited foreign intervention. On November 26, over 1,000 armed RFMF reservists were recalled and put onto the streets of Suva in full combat fatigues as a demonstration of force. Interviewed during talks in New Zealand, Bainimarama described the act as preparation for the “clean-up” of the Qarase government.<sup>67</sup>

Despite the failure to protect the government from the military, the separate but unified responses to the coup give reason for a modicum of optimism. In the aftermath of the coup, and amidst a chorus of local and international condemnation, numerous states, including Australia, New Zealand, the United Kingdom, the United States, and the European Union, declared the suspension of a raft of bilateral assistance programs as well as a series of sanctions aimed at punishing Fiji’s hastily formed government. Where possible, “smart sanctions” were crafted to target the military and specific individuals rather than punishing the general population, which had already suffered prolonged and repeated periods of political instability. Specific measures ranged from imposing limitations on the travel of political and military leaders implicated in the coup (especially through the regional transit hubs provided by New Zealand) to the cancellation of foreign military assistance programs, and the imposition of embargoes on sales of military hardware to the Fijian defence forces.<sup>68</sup> Such measures, if they are sustained, will undoubtedly inconvenience the individuals responsible and possibly assist in weakening the military establishment over time.

But responding appropriately to offences against the democratic rights of people is one thing, protecting them from such offences occurring in the first place is another altogether, and it is one where the capacity and will of the international community have been found wanting. On this point, it is hard to miss the irony of the Fijian scenario. The

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<sup>67</sup> ‘Fiji military recalls 1,000 reservists for “clean-up”’, *ABC News Online*, 26 November 2006 <[http://www.australiandefencereport.com.au/11-06/fiji\\_military\\_recalls\\_1000\\_reser.htm](http://www.australiandefencereport.com.au/11-06/fiji_military_recalls_1000_reser.htm)> at 23 July 2007.

<sup>68</sup> See, *Statement of U.S. Policy Toward South Pacific Island Nations, including Australia and New Zealand*, Subcommittee on Asia, the Pacific, and the Global Environment House Committee on Foreign Affairs, Washington, DC, March 15 2007, <<http://www.state.gov/p/eap/rls/rm/2007/81777.htm>> at 15 July 2007

military (or at least Commodore Bainimarama) perceives itself as the rightful guardian of governance, not its enemy.<sup>69</sup>

This role is rapidly being formalised and entrenched across numerous branches of the Fijian government with the appointment of senior government positions being made by the military, sometimes with military personnel. As one commentator has observed: “It is clear that the military now seeks a more enlarged, permanent public role for itself. It does not wish to remain simply an institution of the state but seeks to play an important role in the affairs of the state... Along with the parliament and (until recently) the Great Council of Chiefs, the military regards itself as a major centre of power in Fiji.”<sup>70</sup>

In defence of these appointments, the new Director of Immigration, Viliame Naupoto (himself appointed by the military), has cited the high level of training received by the military and their “usefulness” to the nation building process. More worryingly though, Naupoto goes further, suggesting that the entrenching of the military in government is actually a way of addressing the problem of “coup culture”: “Military people are useful and it is my answer to killing the coup culture. If you keep using the military as a watchdog the chain might break and bite people.”<sup>71</sup> The implications of this logic are clear: the government is only safe from the military “watchdog” if the military itself is allowed to control the government. This is like suggesting that the only reason that coups take place is because the military exists. But in a modern democratic system, the watchdog is not responsible for holding the leash of government. The watchdog is charged with protecting the house, not occupying the master bedroom. Perhaps also, if as Naupoto suggests, coups are the result of the military’s disconnect from government, the real alternative is not to have a military in the first place.

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

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<sup>69</sup> *The Fiji Times*, 17 October 2006.

<sup>70</sup> B. Lal, ‘“Anxiety, Uncertainty, and Fear in our Land”: Fiji’s Road to Military Coup’ (2007) 96 *The Round Table* 135, 151.

<sup>71</sup> V. Raicola, ‘Naupoto backs military postings,’ *Fiji Times Online*, 23 July 2007 <<http://www.fijitimes.com/story.aspx?id=66968>> at 23 July 2007.

stable systems of democratic governance.

## V. BEYOND THE COUP: LOOKING BACK & LOOKING FORWARD

Looking at the political challenges faced by Fiji today, one is reminded of that often mentioned, but little understood, visionary model of early democratic government; 5<sup>th</sup> BCE Athens. Of course, one needs to be selective about which parts of the Athenian model one picks as providing any kind of *exemplum* for the modern world. It is useful, however, to briefly consider Cleisthenes' reforms from approximately 510 BCE, when he successfully transformed the basic form of political organisation away from kin-based group, by creating ten new "tribes." Each of the new tribes was composed of three *trittyes*. Each individual *trittys* represented a combination of unconnected *demes* (like small parish areas), so that one was from the city, one from the country and one was from the coastal regions. By bringing these disconnected political units together they were forced to act out of collective interest rather than divisive self-interest.<sup>72</sup>

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

The situation we see when looking back at Athens is quite similar to that which we have seen evolve in Fiji in recent times. The internal political conflict is no longer just focussed on divisions between Indo-Fijians and the indigenous Fijian population, though these are still present. Instead, we now see antagonism between the traditional power bases of the indigenous elite, notably the Methodist Church, the Great Council of Chiefs ("GCC"), and the military. Indeed Lal observes that the GCC was one of the most serious and unexpected casualties of the coup.<sup>73</sup> Like Athens, there is an urgent need for bold thinking and well-directed efforts to move out of the coup cycle, and into

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<sup>72</sup> 'Cleisthenes,' in S. Hornblower and A. Spawforth (eds) *The Oxford Classical Dictionary* (1999) 344.

<sup>73</sup> Lal, above n 70, 148.



a new period of stable constitutional rule where the people and government do not have to live with the expectation that the next coup is always just around the corner.

In order to complement existing measures taken against the military controlled government, efforts need to be made to bring together and facilitate discussion between representatives of each of the key local stakeholders. Crucial to this process will be the inclusion of the military. Though they can be easily seen as belligerents in the disturbance of the democratic process, their cooperation and participation in the bargaining process will continue to be fundamental to any lasting vision for Fijian society. The military is an important player in the old game of ethnic and identity politics in Fiji. While openly and strongly condemned by foreign governments and the international media, the military has had significant local support for the stated goals of, if not the methods, of its “clean-up” campaign within Fiji.<sup>74</sup> The reality is that instruments revered in the democracy/governance discourse in the West for measuring public opinion such as yes/no referendums, and single-issue election votes, etc. can be divisive and unsatisfactory in the particular context of Fiji. At the heart of this conundrum is the fact that there are two dominant layers of authority; one in the “formal” Westminster government model and another in the “informal” traditional leadership (the GCC and the church), which while lying outside the former nonetheless exerts a powerful influence particularly at the grassroots. This means that groups remain fluid and it is important that the interests they represent not become entrenched.

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

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<sup>74</sup> Ibid 148, 150.

Dorf and Sabel<sup>75</sup> articulate the primary tenets of a properly functioning democratic deliberation as an ongoing, argumentative process properly characterized not only by a respect for individual rights, but also by a strong sense of political participation and active citizenship.<sup>76</sup> Democratic experimentalism questions the ability of any group legitimately to speak for all of its members, on every issue, across time and space. It denies that there can be any unshakeable group-based “way to be” that can prescribe and predict individual potential in every respect. Thus it recognizes that important group identities, while they are entitled to space and respect, are nonetheless complicated and contestable.<sup>77</sup> Democratic experimentalism imagines a collaborative method of social problem solving that can only occur through an ongoing, open-minded and respectful dialogue between social stakeholders, primarily at the level of direct democracy.

Democratic experimentalism shows the influence of Roberto Mangabeira Unger’s important work on “radical democracy” based on a flexible, plastic structure that encourages and assumes constant revision by human agents. Unger points out the relevance of underlying institutional structures, what he calls “formative contexts,”<sup>78</sup> in shaping and limiting peoples’ imaginative assumptions about the range of options available to them. He criticizes existing social democratic norms for insulating their fundamental institutions from deep criticism and revision, for overemphasizing technocratic solutions to political problems, and for miring the delivery of social services in a bureaucratic, procedural ethic that disempowers and disengages citizens.<sup>79</sup>

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<sup>75</sup> J. Cohen, *On Democracy: Toward a Transformation of American Society* (1983); F. Michelman, ‘Symposium: The Republican Civic Tradition: Law’s Republic’ (1988) 97 *Yale Law Journal* 1493.

<sup>76</sup> C. Sabel and M. Dorf, ‘A Constitution of Democratic Experimentalism’ (1998) 98 *Columbia Law Review* 267, 293-314.

<sup>77</sup> See, M. Minow, *Not Only For Myself: Identity, Politics and the Law* (1997) 34-46, who has commented on the tendency, in group-based analysis, to reduce complex individuals to one identifying trait and then to imagine that they can be described for all purposes along that axis. There is also the related tendency to neglect intersectionality – the fact that all individuals are members of multiple groups to some degree – and there are problems with what Professor Minow calls group “boundaries, coherence, and content.” She points out that real-world group identities are blurry, fluid and contestable; to describe them otherwise is to do violence to the full personhood of its members. On the problem of essentialism, see also A. Harris, ‘Race and Essentialism in Feminist Legal Theory’ (1990) 42 *Stanford Law Review* 581.

<sup>78</sup> R.M. Unger, *Politics: Social Theory: Its Situation and Its Task* (1987) 130-31.

<sup>79</sup> R.M. Unger, *Politics: False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (1987) 585-86.

Unger advocates creating structures that are capable of deinsulating aggregated power (both in privileged populations and areas of governance) from democratic control. He asserts that a comprehensive understanding of citizens' legal rights should include "destabilization rights," which would allow citizens to challenge existing hierarchies of power and privilege and empower them to prevent factions from gaining a long-term hold upon the levers of social power.<sup>80</sup>

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

## VI. CONCLUSION

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

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<sup>80</sup> Ibid 530.

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

Ultimately, the international community may try to set certain standards for states to attain and it may even accept the charge of being the protector of last resort. But neither rights nor well-intentioned commitments to protect will be sufficient if political solutions are not resolved at their source in a manner that overcomes the many divisions that can be expected (and some that can not) in complex, multi-ethnic societies. If we can learn anything from the Athenians, it is not so much in the details of 5<sup>th</sup> century party politics; instead, it is actually the value of genuinely creative thinking; of vision. The Athenians were not conforming to any existing set of norms; they were creating them to suit their particular requirements. The alternative is that we will always be limited to repeating the errors of the past rather than being inspired by them.

At the start of the 21<sup>st</sup> century, the international community appears open, cosmopolitan, accommodating, and neutral with sovereignty seen as a set of powers and competencies that can be enjoyed by all states regardless of their particular cultural identities. However, it should not be forgotten that sovereignty is a flexible instrument that readily lends itself to the powerful imperatives of the civilizing mission, in part because through that mission, sovereignty extends and expands its reach and scope. Not surprising, the essential structure of the civilizing mission can readily be reconstructed in the contemporary vocabulary of human rights, governance, and economic liberalization. The so-called “McDonaldization” of the world minimizes the complex

way in which the local interacts with the international.<sup>81</sup> Much of what is described as “local culture” as opposed to “outside ideas” is in fact already a reflection of the global. In an observation that challenges “McDonaldization” (whose basis is “universalism”), Cristie L. Ford cautions:

...questions about language, identity, and culture cannot be contained within the abstract world of formal politics; in complicated and immediate ways, they spill over into the personal, cognitive, social, economic, and local realms. New stakeholders emerge and the community seems more diverse than ever.<sup>82</sup>

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<sup>81</sup> See, A. Appadurai, ‘Disjuncture and Difference in the Global Cultural Economy,’ in M. Featherstone (ed) *Global Culture: Nationalism, Globalization and Modernity* 295, 304 (1990) discussing complexity of globalization and the international implications stemming from ideas of nationhood.

<sup>82</sup> C. L. Ford, ‘In Search of the Qualitative Clear Majority: Democratic Experimentalism and the Quebec Secession Reference’ (2001) 39 *Alberta Law Review* 511, 513.