The Law, Reform, Development and Nation Building[1]

Nazhat Shameem

'I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regime of their barbarous ancestors'.

Thomas Jefferson in a letter to Samuel Kercheval, Monticello, July 12, 1816.

World history is abundant with examples of law reform, some more violent than others. Reform of the law, like any change, is often painful, and difficult even when effected through the democratic process of consultation, and parliamentary debate. Those who force change and reform upon nations and populations often have to confront the wrath of the King, the anger of the Church and the resistance of the politically correct. The mantra of the latter must surely be; let us rock no boat nor adopt any law which is likely to lead us into unpopularity and criticism.

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One of the best examples of violent (and probably politically incorrect) reform in history is the story of William Tyndale from the era of King Henry VIII. Henry, of course, is now famous for leading Parliament into the separation of England from the authority of the Catholic Church at the Vatican, and for his fondness for divorcing/beheading/imprisoning his various wives before making off with new ones. However, fundamental to the reforms of this era was the cleric William Tyndale, whose book "Obedience of a Christian Man" argued that because the Bible made no mention of the Pope, or of bishops, abbots or the ecclesiastic courts, therefore true Christianity required the governance of the Church, by the state, and by a "true Christian prince", without interference from the Pope. Henry VIII approved of these sentiments, because it allowed him to sign the new law passed by Parliament, the Act in Restraint of Appeals 1533 which declared that: "This realm of England is an empire … governed by one supreme head and king … furnished with plenary, whole and entire power … without restraint or provocation to any foreign princes or potentates of the world." However, when the law marches to the beat of reform, kings have rarely been able to stop the advance. Certainly, Henry VIII's reforms began something unstoppable.

A rebellious German monk, Martin Luther began to preach in Saxony in 1517, his ninety-five propositions, which were an attack on what he saw as the indulgences of the Roman Church. His movement began the Protestant Reformation. At about the same time, William Tyndale himself decided that it was time that the Bible be made accessible to ordinary people, by a translation from Latin to English. Despite vigorous and furious opposition from the Church, and from Henry, Tyndale laboured to render the word of God into ordinary English. In 1526, by running from one printing press to another in Europe he managed to produce 3000 copies of the New Testament printed in the German city of Worms. The translations were smuggled into England in casks of wax and grain. He managed to dodge the long arm of the Church and the King until in 1530, he wrote in a publication 'The Practice of Prostates' that the Bible did not authorize Henry to divorce Katherine of Aragon, or to marry Anne Boleyn. It was his death sentence, and he was burnt to death on 6th October 1536. As he died he cried 'Lord, open the King of England's eyes!' However, those are not the words the world now remembers of this reformer. What we remember now is his translation: 'In the begynnynge was the worde and the worde was

God …. In it was lyfe and the lyfe was the light of men. And the light shyneth in the darkness, but the darkness comprehended it not'.

The reform of the Church was followed just over a hundred years later by the reform of English government. That reform was driven by a man who is probably the most remarkable man in English history, Oliver Cromwell. It was he who forced the wavering judges to sign the death warrant of Charles I, after the Civil War between the King and Parliament, and after the trial of Charles for treason. The personality of Cromwell leads us to question the theory that reform is driven not by individuals but by social change itself. Cromwell was a mixture of the arrogant and the humble, and his strength of character came largely from his austere Puritan belief which rejected what he saw as the corruption in the High Church. Yet he suppressed his opponents with brutality and his treatment of the Catholics in Ireland is remembered by Catholics to this day. He believed that government should be 'for the people's good, not what pleases them' and for five years he imposed on the people of England a daily diet of piety. He legislated virtue, and enforced through military governors a ban on Sunday sports, horseracing, dancing, wrestling and shooting. Swearing led to whipping. Adulterers were sentenced to death and fornicators sent to prison. Yet his religious reforms were rarely enforced, and when he died the nation rejoiced. Clearly too much reform was unpalatable to the English people, especially when enforced by a puritanical leader. Nevertheless, Cromwell's revolution reformed English government in the most fundamental way. Neither the Church, nor the King was ever to have the same power again, although arguably Parliamentary power was to wax and wane over the next century.

Nevertheless, reform thereafter was driven, not by the dictates of the King, or the Pope or by the victors of war but by the ambitions and rivalries of the middle classes, and of the Anglican and Catholic populations. Indeed when James II was deposed by his own daughter and son-in-law William and Mary of Orange, the event was termed "the Glorious Revolution." It was supposedly a revolution to mark the beginning of a constitutional monarchy in England and of the triumph of Parliament over the King. Yet the Revolution was more apparent than real. A promised Bill of Rights gave no assurances to individuals as to the protection of rights, and William of Orange ruled England in the same way as his predecessors did. What really drove reform were the new thinkers of the age, Robert Boyle with his definition of chemical elements, Edmund Halley

with his work on comets, Christopher Wren with his new vision on the rebuilding of London after the great fire and Isaac Newton. Newton's explanation about how the universe operated, by logical mechanical laws, altered human thought. Reason, logic, deduction and science replaced blind faith and superstition. The glorious revolution then, that truly transformed society, was not one which was the result of the deposing of kings. It was in the exploring of new ideas and ideologies.

Reform, the most fundamental type of reform, of the laws and of governments and of the constitution is driven by the minds and beliefs of people. It comes from the realization that old beliefs are no longer valid, and that change must be embraced for the greater good.

The modern State has seen many such revolutions in thought. For instance, in the birth of the American Constitution, it was obvious that sovereignty had finally moved to the people. 'We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity do ordain and establish this Constitution for the United States of America'.

The modern State rests then on both an ideal, and on an intellectual revolution about the source of State power. The ideal is that all individuals are equal and have the right of rule. The intellectual revolution identified the source of State power as the will of the people. Whether we call it a contract between government and the State in the Rousseau model, or the will of the majority, the real source of power in the modern State, certainly by the end of the 18th Century, was the people.

Yet real reform was yet to begin. As nations developed, as empires grew beyond Europe and Asia and the Americas, the mechanics of government required the creation of more and more institutions of State, designed to reflect 'the will of the people'. Increasingly however, there were concerns about the rights of minorities. Thomas Jefferson, the third President of the United States said in his inaugural address –'All …. will bear in mind this sacred principle that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable, that the minority possess their equal rights, which equal laws must protect, and to violate which would be oppression'.

Yet what would continue to challenge the intellectual revolu-

tion is the meaning of equality and to whom this right extended. The treatment of women, of the African-American, of the citizens of the many colonial acquisitions of the European states, of prisoners-of-war, of the Jews and the gypsies and the homosexuals, would continue to challenge the fabric of the modern state until the 21st Century. A challenge to equality then is a challenge to the foundations of the modern state. Inequality denies the sovereignty of the people. Ideas of equality in the early part of the 20th Century did not include the equality of women. For a change in that intellectual ideal, history had to wait for the hunger strikes of the suffragettes, for Emmeline Pankhurst, and for modern feminist ideology which challenges all political thought and theory. At the turn of the 20th Century, equality only meant the equality of men, and specifically of men of one racial origin.

Law reform in the modern State is driven, then, in two ways. The first is by the executive to entrench sovereignty and individual equality for the public good. The second is by the institutions of State, to reflect changes in ideologies and theories about how the State should be run, and how equality and justice must be effected.

Law reform, if it is to be based on sound ideology, is about driving the principles of modern government. Jefferson summarised these well in 1801: 'Equal and exact justice to all men, of whatever state or persuasion, religious or political; peace, commerce, and honest friendship, with all nations – entangling alliances with none …'

Equal and exact justice. The most fundamental principle of justice. 'To no man will we deny justice'. There are many areas of reform which have emerged from this most fundamental idea. For the purpose of this paper, I will focus on corruption although in passing it is also worth mentioning that in no area of justice is equality more tested than in the area of the equality of gender justice. But that is a subject for another day and another audience.

If the laws are to treat all persons, the King, the Church, the government, the majority and the minorities in a uniform way, then those who commit one of our oldest crimes, that of corruption, must be brought to justice in the same way as those who break into homes, or steal from their employers. Yet this has not been so. Indeed the one law which exposes the hypocrisy of the modern democratic state is the law which allows corruption to thrive with impunity. The lack of law reform in this area has been the result of the lack of intellectual development on the crimes of the powerful.

In the past 40 years, in the Asia-Pacific region, and in the past 20 in Fiji, corruption has repeatedly been identified as a major obstacle to the development of nations. Corruption prevents the growth of economies, but in a recent UNDP publication (Perspectives on Corruption and Human Development – ed Rajivan and Gampat 2009) corruption is linked to debilitating human development. The preface reads:

> The onus of anti-corruption efforts is placed on developing countries governments, absolving the international community, donor countries and private corporations of their share of responsibility. Yet it is increasingly acknowledged that a society plagued by pervasive corruption cannot be fair, just or equitable. This is so because corruption weakens systems of control – political, legal, economic and social – denying basic human rights. This further increases the vulnerability of the poor, powerless and disenfranchised who are left to cope with the daily consequences of corruption in the regulatory and social sectors that are crucial to their already fragile livelihoods.

Corruption, then strikes at the heart of the modern State because it strikes at the heart of the equality of all persons. It denies the sovereignty of the people. It makes a nonsense of Tyndale's struggles to bring God's word to the ordinary people, of Cromwell's battle to revive the voice of the ordinary man through Parliament and of the intellectual revolution that gave the American people their revolution, and women their right to equality.

Yet efforts to legislate and reform the law on corruption have been painful. Those who have tried have been destined to have at least their reputations burnt at the stake. And it is easy to see why. Law reform which makes corruption easier to prosecute, attacks those who abuse power and who have benefitted from the weaknesses of institutions of the State whose supposed role was to fight corruption. Corruption is a crime committed by those who hold power and authority. These same people have for centuries also controlled the institutions of the State set up to hold them accountable – the judiciary, the police, the Reserve Bank, Commerce Commissions, the DPP's Office, the Auditor-General's Office, and Parliamentary Disciplinary Bodies. Yet these are the very institutions set up by the modern democratic State to check the power of those who govern on behalf of the people.

In Fiji law reform in this area of the law has been non-existent until 2007. Yet this is despite several celebrated fraud and corruption cases in which the law has been found wanting. The Flour Mills case, the National Bank of Fiji, and the Agriculture Scam are just three examples. Prosecutors prior to the reforms of 2007 and 2009 were forced to prosecute the most serious fraud and corruption as 'abuse of office' a statutory child of the old common law offence of "misconduct in public office" and which carried (until this year) a maximum penalty of 2 years imprisonment, and 4 years if the prosecution could prove personal gain. The maximum penalty is now (under the Crimes Decree), 10 years imprisonment and for 17 if done gain.

The Reserve Bank report on the National Bank of Fiji put losses through reckless lending without security at $220 million in 1995. The late Savenaca Siwatibau, a former Governor of the Reserve Bank said this of the ill-fated Bank:

> The board of the NBF by all accounts was not up to the onerous tasks which fiduciaries are expected to discharge. While there were members of the board who had the required technical skills, the board as a whole appeared not to fully understand what was going on and was certainly not strong enough to guide, direct and control the activities of management. Or if they actually were aware of the dangerous trajectory of the bank to its ultimate destruction, collectively they were not strong enough to act decisively and firmly to avoid that certain fate.

Doug Munro, Michael White and Roman Grynberg in the preface to their book 'Crisis: Collapse of the National Bank of Fiji (2002) were even more severe. Pointing out that the NBF Crisis which came in the midst of the Asian financial crisis resulted in one of Fiji's worst recessions post-independence, they said:

> It must be added that the NBF crisis was not the only financial scandal in Fiji's recent history, only the most serious. Also under siege in 1995 were the Fiji Housing Authority, the Fiji Development Bank, the Fiji Broadcasting Commission, the Fiji Public Service Credit Union, the Public Trustee's Office, and the Methodist Church; while in 1997 the police were investigating corruption in the Customs Department, the Housing Authority, the Companies Office and the Registrar-General's Department. To all appearances, a culture of mismanagement and corruption was not confined to the NBF but widespread.

Very few charges were laid in any of these cases. With the exception of the Housing Authority, charges which were laid were dismissed for want of evidence. The only convictions in the NBF investigations were set aside on appeal on the ground of unconstitutional delay. The delay in investigation and prosecution had been caused by inadequate laws, insufficient police resources, antiquated court procedures (Fiji still had the old-fashioned oral preliminary inquiry) and an untrained judiciary.

Despite the obvious failures of the justice system in the NBF crisis, the laws were not reformed. Post-2000, we experienced the Agriculture scam. Whether it was a case of political corruption, or financial opportunism and greed, or simply shocking public financial mismanagement, the jury is still deliberating. However the tax payers lost $18 million in a period of 2 years. The money was never recovered.

And still there was no law reform. What can be said about such political obstinacy in the face of blatant corruption? Grynberg, Munro and White called the fiasco a case of complete institutional failure. But such failure still fails to explain the lack of subsequent legal or institutional reform. Even if the law creating corruption offences was too hard to reform (and I don't believe that this was the case), at least institutional steps could have been taken to strengthen the institutions charged with the legal and fiduciary duty, to deal with the crisis. No such steps were taken.

The situation was ripe for another financial scam. A scam such as the Agriculture scam. Would the Agriculture Scam have occurred had better corruption and corporate laws been passed in Fiji? The existence of strong corporate laws in Australia has not prevented the collapse of major companies in that country. For instance the Corporations Act 2001 passed laws about the liability of directors of companies and about their criminal responsibility, enforced by the ASIC. The Act states that the duties of directors include the duty to act in good faith, to act in the best interests of the company, to avoid conflicts of interest, to act honestly, to exercise care and diligence, to prevent the company trading while it is unable to pay its debts and to assist the liquidator if the company is being wound up. Any director who fails to perform his or her duties commits an offence and is liable to fines of up to $200,000 or imprisonment for up to 5 years (or both). An erring director may also be found to have con-

travened a civil penalty provision which may lead to fines of up to $200,000, an order to compensate the company and an order prohibiting the director from managing a company for a specified term of years.

An interesting provision is section 184(2) of the Corporations Act. It provides:

> A director, other officer or employee of a corporation commits an offence if they use their position dishonestly:
>
> (a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or
>
> (b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing a detriment to the corporation.

The passing of the Corporations Act did not prevent the collapse of Ansett, or the directors of CTC Resources from deriving personal benefits at shareholder expense, or the defrauding of Farmer Furniture by the directors, who continued to allow the company to trade even though reasonable grounds existed to suspect that the business was insolvent. However the difference was that these directors were investigated prosecuted and some were found guilty by the courts for breaches of the Act. They were held accountable. Corporate law has teeth in Australia.

And that ultimately is the lesson in pursuing law reform. Dishonest people will continue to be dishonest if there are no laws to hold them accountable. They may continue to be dishonest even when such laws are passed. But it is the passing of good laws, and the implementation of those laws which will lead directly to the development of a society which holds the unlawful conduct of the powerful to account for dishonesty, fraud and corruption.

Law reform which has such a direct relationship with the rule of law, then, has a direct relationship with the development of a modern democratic nation. It is the passing of accountability laws, and the implementation of them through strong institutions of the State, that develops a nation's integrity, and its right to sovereignty and respect.

The only comprehensive reform of our corruption laws is contained in the FICAC promulgations and in the Crimes Decree. The former came into effect in 2007. FICAC was created and investigations and prosecutions were launched almost immediately. Accord-

ing to the FICAC annual report 2009, a total of 4365 complaints was received in 2009, an increase of 1,998 from the previous year, and prosecutions ranged from abuse of office, to larceny by servant, to official corruption. Institutions from which prosecutions emerged include the Ministry of Education, the Native Land Trust Board, the Commissioner's Central's Office, the Water Rates Office and the Vanua Development Corporation, the latter being the investment arm of the NLTB. 8 cases led to convictions in 2009 and of course in 2010, there have been convictions of the Commissioner Central, the Town Clerk of the Nasinu Town Council and two businessmen from China who attempted to bribe the Permanent Secretary for Finance.

In late 2009 the Crimes Decree was passed. It came into effect in February 2010. The bribery provisions in the Decree are very similar to those in the FICAC promulgations in that a bribe is a benefit which is offered, given, received by, promised to a public official (and the definition of public official is much broader than the old definition of a person employed in the public service), in return for an official favour, or in the expectation of a favour. When a public official accepts a benefit (or the promise of one) and such act sustains a belief that there will be an official favour done in return, that is sufficient for an act of bribery. There is now zero tolerance for gift-giving or accepting, custom is no longer an excuse, and the burden of proving that a benefit was given or received with a reasonable excuse or on lawful authority, is on the accused. Finally, a 'benefit' includes political advantage.

These laws are quite different from the old laws on corruption. They are much easier to prosecute, and the penalties have increased to 10 years imprisonment. Also interesting are the fraud provisions. Not only are there new theft provisions (taken from the English Theft Act 1968) which create new offences of fraud and deception, but there are also general offences of conspiracy to cause a loss or a gain, and acts done to influence a public official. Some offences will catch directors of companies who act dishonestly, far more readily that the Australian Corporations Act. For instance section 323 of the Crimes Decree provides that: 'A person commits a summary offence if he or she does anything with the intention of dishonestly obtaining a gain from another person'.

Section 324(1) provides: 'A person commits a summary offence if he or she does anything with the intention of dishonestly causing a loss to another person'.

Potentially therefore, any recurrence of a scenario such as the National Bank, can this time, feasibly lead to prosecutions and convictions. The reform however is probably too late for FNPF, Mawi Bay, and Natadola. Any investigations into those events, all of which apparently occurred before 2010 and before the passing of the FICAC promulgations, will have only the old Penal Code as the benchmark for corporate fraud and corruption.

However, even if we have the best laws in the world, they will have no effect if our law enforcement institutions are unable to implement them. We await a new Companies Act which is in the drafting stage. Will it have a securities body to investigate and prosecute company misbehavior? To monitor the conduct of erring directors? It is too early to tell. If it does then government must also give it the resources to function well. In the United States, after the collapse of Enron, an observation frequently made by commentators, was that central government had left too much to investment bankers and investors to exercise their own judgment, and had given too little for the corporate monitoring body to ensure external accountability.

In Fiji, certainly since independence, and demonstrably since 1987, very little work had been done on the strengthening of State institutions. Protecting their independence and integrity, ensuring appointment on merit and merit alone, promoting the competent, training the inexperienced and ensuring that each institution had the necessary laws and resources to empower them, have been low priority. The Office of the DPP, the judiciary, the Office of the Auditor-General, the police force and the Public Service Commission, have all suffered from under-resourcing, political interference and lack of training and capacity building. Fiji needs strong institutions to enforce good laws. Our institutions were created to ensure the accountability of the powerful and the protection of the vulnerable. Too often they have become tools in the hands of the corrupt and dishonest in order to further prey upon the rights of the weak.

If law reform is to be the cornerstone of national development, then so must institutional strengthening. It is at this time, when we have no Parliament, that there is a greater need to strengthen our institutions, not just for the next 5 years, but for the next 50. We need a strong and independent judiciary, an efficient and accountable police force, a competent and fair DPP's Office and in FICAC, a professional and scrupulous body committed to prosecuting corruption.

Fundamental to ensuring that any law reform by government is guided by rules of good governance and equality, is the role of Civil

Society Organizations, or non-governmental organizations. Some such groups specifically seek reform in the area of corruption, such as Transparency International. Others, like Fem Link, do not specifically target corruption, but facilitate discussion and dialogue amongst vulnerable groups on social problems generally. Yet all CSO's or NGO's strive for reform. A challenge for CSO's is of course, independence, both political and financial. It is too easy for a CSO to follow a path determined not by its ideology, but by the politics of its bankers. However, assuming that CSO's have overcome their own vulnerabilities, then they could have an important role in creating social awareness, building trust among citizens, teaching organizational skills and providing visible examples of honest and accountable leadership. Assuming therefore that NGO's and CSO's are themselves honest, transparent, independent and non-corrupt; they could provide an avenue for greater social and legal reform. (Perspectives on Corruption and Human Development, UNDP, Colombo 2009).

When Henry VIII separated England from the Church, he inadvertently set in train a form of government which allowed greater accountability for those who govern. The Magna Carta, so reluctantly signed by an irritated and despotic King John was to have no real effect on the governance of England until the intellectual revolution demanded from rulers a form of equality, liberty and respect. Equality has been a long time coming to us as a right. Many would argue that it is still an aim to be achieved. Yet it remains the only national and social position worthy of our aspirations. Equality is the only moral aim of good governance. From equality emerge the principles of accountability, deference to the law, and fairness in the justice system.

To that end, law reform is an inherent component of good governance, as long as reform is driven by that moral position of equality, justice and accountability. Sovereignty now rests with the ordinary person. Laws which respect that sovereignty and which ensure that those who abuse their authority and power to benefit themselves, are held to account for those acts, by independent and strong institutions of the State, are indivisible from the modern role of nation building.

Author:

Nazhat Shameem, is a former Judge of the High Court of Fiji.