IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

APPELLATE JURISDICTION

CIVIL APPEAL NO. ABU0077 OF 2008S

[On an Appeal from the High Court, Suva in Civil Actions No. HBC 60 and HBC 398 of 2007]

BETWEEN : LAISENIA QARASE of Suva, Politician
RATU NAIQAMA LALABALAVU of Suva, Politician
RO TEIMUMU KEPA of Lomanikoro Village, Rewa, Politician
RATU SULIANO MATANITOBUA of Suva, Politician
JOSEVA VOSANIBOLA of Suva, Politician

APPELLANTS
(Original Plaintiffs)

AND : JOSAIA VOREQE BAINIMARAMA Commander of the Republic of Fiji Military Forces of Queen Elizabeth Barracks, Delainabua, Suva.

FIRST RESPONDENT
(Original First Defendant)

AND : THE REPUBLIC OF FIJI MILITARY FORCES

SECOND RESPONDENT
(Original Second Defendant)

AND : THE STATE OF THE REPUBLIC OF THE FIJI ISLANDS

THIRD RESPONDENT
(Original Third Defendant)

AND : THE ATTORNEY - GENERAL of the Interim Regime

FOURTH RESPONDENT
(Original Fourth Respondent)

AND : FIJI HUMAN RIGHTS COMMISSION

FIRST AMICUS CURIAE

AND : CITIZENS' CONSTITUTIONAL FORUM LIMITED

SECOND AMICUS CURIAE

Coram:	**Randall Powell, JA**		
	Ian Lloyd, JA		
	Francis Douglas, JA		
Hearing:	**Monday, 6th April 2009, Suva**		
	Tuesday, 7th April 2009, Suva		
	Wednesday, 8th April 2009, Suva		
Counsel:	**Bret Walker SC**	]	
	Rachel Pepper	]	**for the Appellants**
	Tevita Fa	]	
	Richard Gordon QC	]	
	Gerard McCoy QC	]	
	Christopher Pryde,	]	
	Kerry Cook	]	**for the Respondents**
	Dr Shaista Shameem	]	**for the Fiji Human Rights**
	Wilfred Golman	]	**Commission**
	Sonanatabua Colovanua	]	
	Dr Melissa Perry QC	]	
	Nicola McGarrity	]	**for the Citizens Constitutional**
		]	**Forum Limited**
Date of Judgment:	**Thursday, 9th April 2009, Suva**		

JUDGMENT OF THE COURT

The Parties and these Proceedings

1. On 17 March 2006 Ratu Josefa Iloilovatu Uluivuda ("President Uluivuda") was re-appointed by the Great Council of Chiefs for a further 5 years as President of the Republic of the Fiji Islands ("Fiji").

2. On 5 December 2006 the First Respondent Commodore Josaia Voreqe Bainimarama ("the Commander") being Commander of the Republic of Fiji Military Forces (RFMF) purported to assume the office of President of Fiji and to dismiss the Prime

Minister Mr Laisenia Qarase ("Mr Qarase"). He then appointed an interim prime minister, who advised him to dissolve Parliament, and on 6 December 2006 the Commander purported to do so[1].

3. On 5 January 2007, the Commander purported to stand down as President. President Uluivuda then purported to ratify and confirm the actions of the Commander and the RFMF up until 4 January 2007[2], and he appointed the Commander Prime Minister of an Interim Government, and announced that until elections were held legislation would be made by Promulgation.

4. Mr Qarase brought these proceedings challenging certain acts of President Uluivuda. On 9 October 2008, the High Court made a number of declarations. These included that the decision of President Uluivuda to ratify the dismissal of Prime Minister Qarase, to appoint a caretaker prime minister to advise the dissolution of Parliament, the appointment of other lay persons as Ministers to advise him in what was to be a period of direct Presidential Rule, and the dissolution of Parliament itself, were valid and lawful acts in the exercise of the prerogative powers of the Head of State to act for the public good in a crisis[3].

5. Mr Qarase and the four other politicians appeal that decision to this Court. In order that this decision may be considered in its appropriate context, it is necessary to understand a little concerning the recent constitutional and political history of Fiji. In doing this, we agree with the Respondents' Submissions that the events of January 2007 must be viewed against the backdrop of the nation's history.

Independence & the 1970 Constitution

6. On 10 October 1874 Fiji was ceded by the Chiefs of Fiji to the United Kingdom. Fiji became a separate British Colony by virtue of a Charter passed under the Great Seal of the United Kingdom on 2 January 1875. In November 1879 the Chiefs of Rotuma likewise ceded Rotuma, which thereupon became part of the Colony of Fiji.

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[1] Declaration of a State of Emergency 6 December 2006, Fiji Gazette Vol 1 No.2
[2] Ratification & Validation of the Declaration and Decrees of the Fiji Military Government Decree 2007 16 January 2007, Fiji Government Gazette Vol 7 No. 4
[3] Qarase v Bainimarama [2008] FJHC 241

7. From 1874 until 1970 Fiji remained a colony of the United Kingdom In 1970 Fiji was granted independence by the Fiji Independence Order of 1970 ("the 1970 Constitution") and became a constitutional monarchy with the Queen as Head of State represented in Fiji by the Governor-General[4].

8. At independence approximately half the population were classified by race as ethnic Fijians and half as Fijians of Indian origin ("Indo Fijians"). The ancestors of the vast majority of the Indo Fijians were brought to Fiji in the half century prior to World War 1.

9. Pre-independence legislation protecting ethnic Fijian affairs and land remained in force after independence, but the 1970 Constitution entrenched the provisions of these Acts so that they could not be altered without a majority of three quarters of all members of each House of Parliament. Any alteration of the Constitutional provisions entrenching such Acts required similar majorities.

10. The 1970 Constitution also included the rights of the Bose Levu Vakaturaga ("Great Council of Chiefs") established under the *Fijian Affairs Act* to nominate Senators in addition to those nominated by the Prime Minister and the Leader of the Opposition. Where any such amendment affected ethnic Fijian land, customs or customary rights, the majority in the Senate had to include at least three quarters of the nominees of the Great Council of Chiefs.

The 1987 Military Coup – Fiji becomes a Republic

11. In April 1987 the Labour-National Party Coalition won the General Election and Dr Timoci Bavadra became Prime Minister. Although he was an ethnic Fijian there were a majority of Indo Fijian Cabinet Ministers. This alarmed certain of the ethnic Fijian population and on 14 May 1987 the RFMF overthrew the elected government. The Governor-General resumed government in the name of the Queen on 20 May 1987. However on 25 September 1987 a second military coup was staged.

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[4] *Republic of Fiji Islands v Prasad* [2001] FJCA 2 Part of this chronological explanation of events is taken from the material filed in these proceedings or other publicly available and notorious sources including *Prasad's* case and *Yabaki v President of the Republic of the Fiji Islands* [2003] FJCA 3

12. The coup leader, Lieutenant Colonel Sitiveni Rabuka ("Colonel Rabuka"), became head of a Council of Ministers and, on 7 October 1987, he abrogated the 1970 Constitution, proclaimed Fiji a Republic, and appointed himself as Head of State. The Governor-General resigned eight days later. On 5 December 1987, following three months of military rule, Ratu Sir Penaia Ganilau was appointed Fiji's first President.

13. Fiji's membership of the Commonwealth lapsed, development aid was suspended and the economy's main sources of income, sugar and tourism, were severely affected. Over the next 15 years approximately 50,000 people, mostly skilled workers and professionals, and mostly Indo Fijians, emigrated. In 2009, Indo Fijians may make up only 35% of the population of Fiji.

The 1990 Constitution & the 1992 Election

14. In 1990, a new Constitution ("the 1990 Constitution") was proclaimed by the Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990. It contained provisions designed to further protect ethnic Fijian interests. It strengthened the position of the Great Council of Chiefs by giving it the right to appoint the President, and it reserved the position of the Prime Minister and the Chairman of the Public Service Commission to ethnic Fijians. It provided that the President consult with the Great Council of Chiefs before nominating 25 of the 34 Senators and required that they be ethnic Fijian or Rotuman. It excluded any right to challenge in the courts the decisions of the Native Land Trust Board in relation to custom and ownership of land, and it changed the distribution of seats in Parliament to ensure a bias in favour of ethnic Fijians.

15. Colonel Rabuka as leader of the Soqosoqo ni Vakavulewa ni Taukei Party - Party of Policy Makers for Indigenous Fijians ("SVT") became Prime Minister following the 1992 elections held under the 1990 Constitution.

The 1997 Constitution

16. In 1997 a new Constitution ("the Fiji Constitution"), being the Act to alter the

Constitution of the Sovereign Democratic Republic of Fiji Act [5], was proclaimed. It had been passed unanimously in both Houses of Parliament and endorsed by the Great Council of Chiefs.

17. Section 98 of the Fiji Constitution provides that a member of the House of Representatives who, in the President's opinion can form a government that has the confidence of the House of Representatives is to be appointed the Prime Minister. The Prime Minister, thus appointed, is then required pursuant to s.99(5) to invite all the parties with more than 10% of the seats to come into Cabinet and to be proportionally represented there.

18. Sections 50 to 63 of the Fiji Constitution provide for the election by popular franchise of members of the House of Representatives for five year terms. Section 90 provides for the appointment of a President for five year terms by the Great Council of Chiefs[6] following consultation with the Prime Minister.

19. Prior to 1997 elections had been held under the "first past the post" system. Under s.54 of the Fiji Constitution the electoral system is based on preferential voting and, pursuant to s.56, voting is compulsory. In addition, pursuant to s.51 there has been a change in the arrangement and distribution of the 71 seats in the House of Representatives to provide for 46 communal seats and 25 open seats. Twenty four (24) of the communal seats are for ethnic Fijian and Rotuman voters, 19 for Indo-Fijians and 3 for remaining groups.

The 1999 General Election – Mr Chaudry becomes Prime Minister

20. In May 1999, the first general election was held under the Fiji Constitution. A People's Coalition was successful, being returned with a total of 51 of the 71 seats. Within the Coalition, the multi-ethnic Fijian Labour Party ("FLP") was the largest party and its leader Mahendra Chaudry ("Mr Chaudry") became Prime Minister. Mr Chaudry was the first Prime Minister of Indian descent.

[5] Act No 13 of 1997. It became effective on 28 July 1998 pursuant to Act No 5 of 1998.
[6] See s.116, which provides for the continuance of this body.

21. The FLP victory was so comprehensive that Colonel Rabuka's SVT barely exceeded the 10% of the vote required for eligibility for invitation to Cabinet. In accordance with the Constitution Mr Chaudry offered the SVT positions in the Ministry. The SVT made a counter-offer which was not accepted and consequently, at least on offer and acceptance principles, ended up in Opposition. An offer to the Christian Democratic Party ("VLV") was accepted and the VLV joined the Chaudry Government.

22. The Fiji Constitution maintained privileges for ethnic Fijians. For example s.185 provides that any attempt to alter certain Acts relating to the rights of ethnic Fijians must be passed three times in the House and the Senate, and no vote will be deemed passed on the third reading in the Senate unless it is supported by at least 9 of the 14 Senators appointed on the recommendation of the Great Council of Chiefs.

The 19 May 2000 Civilian Coup – George Speight

23. On 19 May 2000 a civilian George Speight ("Mr Speight") and a group of armed men occupied Parliament and held Prime Minister Chaudry, most cabinet members and other members of the People's Coalition Party hostage. They claimed that the rights of ethnic Fijians were being eroded or threatened by the Chaudry Government.

24. On the same day President Ratu Sir Kamisese Mara ("President Mara") proclaimed a State of Emergency and promulgated Emergency Regulations pursuant to the Public Safety Act (Cap 19).

25. A breakdown of law and order ensued, particularly in Suva.

26. On 27 May 2000 President Mara appointed the Minister of Labour, the Hon. Ratu Tevita Momoedonu, as Acting Prime Minister while the Prime Minister was unable to perform his functions. On the same day, acting on the advice of the Acting Prime Minister and pursuant to s.59(2) of the Fiji Constitution, President Mara prorogued Parliament for six months. The Acting Prime Minister then resigned that office.

27. The situation continued to deteriorate and on 29 May 2000 the Commissioner of Police informed President Mara that he could no longer guarantee security. He

requested the President to invoke the Public Emergency Regulations made pursuant to the *Public Safety Act (Capt 19)* and to ask the RFMF to perform all duties and functions of police officers.

The 29 May 2000 Military Coup – Mr Qarase becomes Prime Minister

28. On 29 May 2000 the Commander informed President Mara that in his opinion the Fiji Constitution did not provide a framework for resolving the crisis and should be abrogated. The Commander then assumed executive authority as "Commander and Head of the Interim Military Government of Fiji."

29. President Mara declined to accept office as President under any new Constitution. Later that day the Commander promulgated a decree purporting to abrogate the Constitution (Decree No. 1). There followed a decree (Decree No. 3) establishing an Interim Military Government and stating that executive authority of the Republic of Fiji was vested in the Commander as head of the Military Government.

30. On 4 July 2000 Decree No 10 was promulgated by the Commander. This Decree established an Interim Civilian Government with the Commander as Head of Government. By clause 10 the executive authority of the State was vested in the Head of Government. Mr Qarase was sworn in as Prime Minister of this Government by the Commander on the same day, 4 July 2000.

31. On 9 July 2000, the Interim Civilian Government promulgated Decree No. 19 (the Interim Civilian Government (Transfer of Executive Authority) Decree) which provided for the appointment of an Interim President and the vesting of executive authority in such Interim President. The Decree took effect on 13 July, and on 14 July the Great Council of Chiefs appointed Ratu Josefa Iloilo, who had been Vice-President appointed under the Constitution, as Interim President. Also on 9 July 2000, there was promulgated Decree No 18 which purported to grant immunity from criminal prosecution and civil liability to George Speight and his supporters, subject to certain conditions, including the release of the hostages.

32. On 14 July 2000, Mr Speight released the hostages. On 26 July 2000 Mr Speight was arrested and charged with treason. He was subsequently convicted and sentenced to death, later commuted to imprisonment for life.

33. On 28 July 2000, Interim Civilian Government Ministers, including Mr Qarase as Interim Prime Minister, were sworn in by the Interim President and took office under the Interim Civilian Government (Transfer of Executive Authority) Decree.

The *Prasad* Case

34. Within days of Mr Speight's rebellion three High Court judges, namely the Chief Justice Sir Timoci Tuivaga and Justices Michael Scott and Daniel Fatiaki ("the Three Judges") gave advice to the President the broad nature of which was that he could dismiss the Prime Minister and the mechanism by which it could be done ("the dismissal advice").

35. Then, in early June 2000, Chief Justice Tuivaga presented the Commander with a draft "*Administration of Justice Decree*" which purported, inter alia, to abolish the Supreme Court and to increase the retirement age of the Chief Justice from 70 to 75. These provisions found their way into the Judicature Decree 2000[7] promulgated on 17 August 2000 with retrospective effect from 13 July 2000.

36. On 9 June 2000, the Fijian Law Society, in a publicly released letter, wrote to Chief Justice Tuivaga expressing the strong view that the involvement of the Judiciary in helping the Military draft the Administration of Justice Decree was inconsistent with the position that the Fiji Constitution had not been abrogated, and that it was not the function of the Judiciary to exercise legislative powers. The Law Society called upon the Judiciary to dissociate itself from the military decrees, including the Administration of Justice Decree, and to make an unequivocal statement that it maintained the continued existence of the Fiji Constitution.

37. On 14 and 21 June 2000 each of the Three Judges responded in writing, attacking the Law Society. They did not defend the Fiji Constitution.

[7] Decree No 22

38. On 4 July 2000 Chandrika Prasad, a farmer, filed a High Court action in the registry of Lautoka, the closest registry to his residence, seeking a declaration that the Fiji Constitution was still in force as the supreme law of Fiji. The senior judge in Lautoka was Justice Anthony Gates ("Justice Gates").

39. In mid July 2000 Chief Justice Tuivaga sent a memo to Justice Gates directing him to transfer the Prasad case to Justice Scott in Suva. Justice Gates did not respond. Chief Justice Tuivaga then brought an application for the case to be transferred to Suva but Justice Gates dismissed the application, heard the case and, on 15 November 2000, delivered judgment.

40. In his judgment Justice Gates held that the attempted coup of 19 May 2000 had not succeeded and that the purported abrogation of the Fiji Constitution was not made in accordance with the doctrine of necessity and as such was of no effect. Justice Gates held that the Parliament was still in being and should be summoned by President Mara as soon as practicable[8].

The *Prasad* Appeal

41. On 17 November 2000, the Interim Civilian Government led by Mr Qarase filed a Notice of Appeal. Justice Gates' orders were stayed pending the hearing of the appeal.

42. The appeal was heard by a five judge bench of the Court of Appeal in late February 2001. Judgment was delivered on 1 March 2001 and the appeal dismissed[9].

43. The doctrine of necessity, the Court of Appeal held, does not authorise permanent changes to a written constitution let alone its complete abrogation. The Court of Appeal further held that a revolutionary regime should not be accorded legitimacy by the courts unless the regime has the people behind it and with it, the burden of proof of which is on the new regime. Mr Qarase gave evidence that there was a widespread perception of defects in the Constitution that *"made inevitable the abrogation of the*

[8] [2000] FJHC 121
[9] [2001] FJCA 2

Constitution." However Court of Appeal held that the Interim Civilian Government had failed to prove real acquiescence on the part of the people. On the contrary, the evidence before the Court of Appeal suggested:

> "that a significant proportion of the people of Fiji believe that the 1997 Constitution embodies and protects the ideals and aspirations of the different ethnic groups in Fiji. The material also indicates a widespread belief that there was no proper justification for its abrogation."

44. Accordingly the Court of Appeal held that the Fiji Constitution had remained in force at all times and that President Mara remained President until 15 December 2000 when, the Court of Appeal found, he resigned, having informed Mr Qarase of his decision to accept a pension and gratuity as retired President.

45. The Court of Appeal made the following declarations:

Firstly, that the Fiji Constitution remained the supreme law of Fiji and had not been abrogated.

Secondly, that Parliament had not been dissolved. It had been prorogued (adjourned) on 27 May 2000 for six months.

Thirdly, that the office of President under the Fiji Constitution became vacant when the resignation of President Mara took effect on 15 December 2000 and, in accordance with s.88 of the Fiji Constitution, the Vice President was able to perform the functions of the President until 15 March 2001 unless a President was appointed sooner under s.90.

The Response to the Court of Appeal decision in *Prasad*

46. On the day the Court of Appeal delivered its decision Prime Minister Chaudry called upon Interim President Ratu Josefa Iloilo (who prior to the coup had been and therefore was Vice-President) as acting-President to summon Parliament. Attached to his letter was a petition signed by 46 members of the House of Representatives. No action was taken on that advice but the Great Council of Chiefs met on 13 March

2001 and appointed Ratu Josefa Iloilo as President of the Republic pursuant to section 90 of the Constitution.

47. President Iloilo, purporting to act under section 109(1) of the Constitution, immediately dismissed Prime Minister Chaudry. On 14 March 2001, purporting to act under section 109(2) of the Constitution, he appointed Ratu Tevita Momoedonu caretaker Prime Minister. Ratu Momoedonu was a member of the House of Representatives.

48. On 15 March 2001, acting on the advice of the caretaker Prime Minister, the President dissolved the House of Representatives in terms of section 59(2) of the Constitution. Ratu Tevita Momoedonu resigned as caretaker Prime Minister the same day. The following day the President appointed Mr Qarase, then a Senator, as caretaker Prime Minister, purportedly pursuant to sections 109(2) and 194(2)(b) of the Constitution.

The Three Judges, Mr Qarase and the *Yabaki* Case

49. As noted above, Mr Qarase was a Senator, but not a member of the House of Representatives. This fact alone was likely to provoke a legal challenge. On 21 March 2001, Chief Justice Tuivaga sent a letter to Justice Gates:

> "I am writing to advise that no court action surrounding the appointment of the President of the Republic of Fiji and the caretaker government may be accepted or entertained in the High Court of Lautoka. Any such court action should be dealt with in the High Court in Suva."

50. The challenge to the Interim Government of Mr Qarase came when the Citizens Constitutional Forum ("CCF") filed proceedings in Suva. Its chief executive officer was Reverend Akuila Yabaki. Chief Justice Tuivaga assigned the matter to Justice Fatiaki.

51. The CCF asked Justice Fatiaki to disqualify himself on the basis that he was one of the Three Judges who had drafted the dismissal advice. Justice Fatiaki demanded that the CCF prove that he was involved in the drafting of the dismissal advice. The CCF responded by filing affidavits sworn by Justices Byrne and Shameem, which affidavits set out a series of meetings between the judges during May 2000, where the

dismissal advice was prepared and discussed by the Three Judges[10].

52. Justices Byrne and Shameem, it can be interpolated at this point, together with Justice Gates, supported strict compliance with the Fiji Constitution, and opposed any involvement of the judiciary in governance arrangements in the aftermath of the 2000 coups. So did other judges including Justice Madraiwiwi, who resigned as a judge on 6 October 2000. He was appointed Vice-President of Fiji on 3 December 2004 and held that position in December 2006.

53. On 23 May 2001 Justice Fatiaki dismissed the application to disqualify himself and in doing so he criticised "*the clumsy attempts by my colleagues to undermine me in this present application.*" However, Justice Fatiaki decided not to hear the proceedings in any event. Chief Justice Tuivaga then allocated the proceedings to Justice Scott[11].

54. On 11 July 2001 Justice Scott in *Yabaki v President of the Republic of Fiji*[12] held that in March 2001 President Iloilu had lawfully dismissed Prime Minister Chaudry and lawfully appointed Prime Minister Qarase. Justice Scott made this findings on the basis of the "*doctrine of necessity*".

The 2001 Election – Mr Qarase becomes elected Prime Minister

55. On 25 August 2001 a General Election was held. Mr Qarase's Fijian People's Party ("SDL") won the largest number of seats, namely 32 of 71, and Mr Qarase was sworn in as Prime Minister.

56. Mr Qarase, claiming that a multiparty cabinet would be unworkable, declined to offer Mr Chaudry or any FLP members a place in his 18 person cabinet. This was contrary to the clear provisions of the Fiji Constitution, and another round of litigation ensued.

57. On 25 July 2002, following the retirement of Chief Justice Tuivaga, Justice Fatiaki was appointed Chief Justice.

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[10] *Citizen's Constitutional Forum v President* [2001] FJHC 28
[11] Ibid
[12] [2001] FJHC 119

58. On 14 February 2003, the Court of Appeal dismissed the appeal in *Yabaki*[13] without agreeing or disagreeing with Justice Scott. The Court of Appeal said that the proceedings had been rendered moot by the 2001 General Election. However, the majority made some important observations concerning the interpretation of those provisions of the Fiji Constitution dealing with the appointment and dismissal of the Prime Minister and the doctrine of necessity to which we shall presently refer.

59. Subsequently Justice Scott was appointed to the Court of Appeal. The judges in the Constitutional camp (including Gates & Shameem JJ) were marginalised. Justice Gates and Justice Shameem were assigned to the Criminal Division. Justice Byrne's commission expired and was not renewed and the High Court at Lautoka was starved of judicial resources. Lautoka is the second city of Fiji and commonly referred to as the commercial capital. It is also the heart-land of the FLP.

60. Section 29(3) of the Fiji Constitution provides that "*Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time*" but as this Court observed in *Woodstock Homes (Fiji Ltd) v Sashi Kant Rajesh*[14], a case where a Notice of Motion to set aside a default judgment filed in March 2001 took over 5 years to be heard:

> "What does emerge from this case and other cases before the Court of Appeal is that for a number of years, until at least 2006, the High Court in Lautoka was not provided with an adequate number of judges, and that such judicial resources as were provided were but a fraction of the resources that the High Court in Suva enjoyed. It is difficult to escape the conclusion that responsibility for this lies at the feet of the relevant chief justices during this period or attorneys-general or the legislatures of the time."

No Fijian law reports were published in the period 2002 to 2007.

May 2006 General Election – Mr Qarase Re-elected

61. Following a General Election in May 2006 Mr Qarase was re-elected to Parliament and re-appointed as Prime Minister of Fiji by the President.

[13] Unreported, Civil Appeal ABU0061 of 2001
[14] [2008] FJC 104

The 2006 Dismissal of the Prime Minister and the Dissolution of Parliament

62. On 5 December 2006 the RFMF took control of the streets of Suva and the Commander purported to assume executive authority of the State. As detailed in the judgment of the High Court and the Respondents' Submissions, for 18 months prior to 5 December 2006 the RFMF and Mr Qarase's Government were descending into a relationship of increasing ill will and conflict[15]

63. The Commander said that he was stepping into the President's shoes, and he purported to dismiss Mr Qarase as Prime Minister and to appoint Dr Jona Baravilala Senilagakali as caretaker Prime Minister to advise the dissolution of Parliament. The Vice President Ratu Joni Madraiwiwi received a message from someone in the RFMF to the effect that he should leave the Vice-Presidential residence.

64. On 6 December 2006 Dr Senilagakali signed an advice to the Commander for dissolution of Parliament. The Commander acknowledged the advice and ordered the dissolution of Parliament[16].

65. On 22 December 2006 the Great Council of Chiefs met and issued a statement advising President Iloilu "*to continue to personally exercise executive authority in accordance with the Constitution*". The Great Council of Chiefs urged Mr Qarase to tender his resignation to President Iloilo and recommended that President Iloilu appoint an interim administration to hold elections within a stipulated time frame[17].

January 2007 – The President Ratifies the Dismissal, the Chief Justice is Suspended, the Vice President Resigns

66. On 4 January 2007 Dr Senilagakali tendered his resignation as Prime Minister to the Commander and later that day the Commander, in a televised address, purported to hand back executive power to the President. The Commander's televised address is set out in full in the judgment below[18]. It included:

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[15] High Court Judgment [34].
[16] High Court Judgment [60]
[17] Ibid, [62]-[67]
[18] Ibid, [68]

> "The RFMF's assumption of executive authority, through its Commander, was predicated and supported in law. The **Akuila Yabaki** case had established through Justice Scott's ruling that the President had certain reserve powers under s.109(1) of the Constitution. In addition to this ruling Justice Scott also held that in some unusual or extreme situations a departure from the normal requirements of the Constitution are justified under the doctrine of necessity. Strictly speaking the decision of Justice Scott has not been overturned and therefore is binding and valid law."

67. Subsequently, President Iloilu addressed the nation and said:

> "I know that the events of the past few weeks have been trying on all of us.
>
> In particular in early December we were at a cross roads at which hard and decisive decisions needed to be made.
>
> I was, as has been noted by the Commander of the Republic of Fiji Military Forces, unable to fully perform my duties as I was prevented from doing so. I do not wish to elaborate further on this point but I can state that they were predominantly cultural.
>
> In any case, given the circumstances I would have done exactly what the Commander of the RFMF, Commodore Josaia Voreqe Bainimarama did since it was necessary to do so at that time.
>
> These actions were also valid in law.
>
> I therefore fully endorse the actions of the Commander of the RFMF and the RFMF in acting in the interest of the nation and more importantly in upholding the Constitution."[19]

68. The President went on to say that he would shortly announce an Interim Government, and he set out a 10 point mandate for that Interim Government which would include taking Fiji "*to democratic elections after an advanced electoral office and systems are in place and the political and economic conditions are conducive to holding of such elections.*" Legislation in the intervening period was to be made by Promulgation.

69. On 5 January 2007 President Iloilo appointed the Commander as Interim Prime Minister and, from 8 January 2007, various Cabinet Ministers and other State Ministers were appointed by the President acting on the advice of the Interim Prime Minister. They were assigned responsibilities by the President, purportedly pursuant to s.103(2) of the Fiji Constitution[20].

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[19] Ibid [69]

[20] Ibid [70], [78]. See also the Ratification and Validation of the Declaration and Decrees of the Fiji Military Government Decree 2007, Fiji Government Gazette 16 January 2007, Vol 7 No. 4

70. On 3 January 2007 Chief Justice Fatiaki received a letter from the Commander which stated in part:

> "We thank you for agreeing to go on leave on full pay, effective immediately until further notice to allow a full and proper and unrestricted inquiry into the Judiciary and the judicial system as a whole. The inquiry has been precipitated by the involvement of certain members of the Judiciary in questionable activities since the events of 2000, the subsequent politicization of the Judiciary, questionable appointments to the Bench in particular the Magistracy and the High Court and numerous complaints we have received on corruption, irregularities and gross inefficiency in the judicial system."

71. On 16 January 2007 Justice Gates was sworn in as Acting Chief Justice. On 18 January 2000, Chief Justice Fatiaki was formally suspended as Chief Justice. He resigned in December 2008 and Acting Chief Justice Gates was then sworn in as Chief Justice.

72. On 18 January 2007, the President promulgated an unconditional grant of immunity to the Commander, officers and members of the RFMF for the period to 5 January 2007[21]. On 26 January 2007 Vice-President Madraiwiwi resigned.

Justiciability

73. The Respondents contended, and the High Court accepted, that the purported exercise by the President of his powers was non-justiciable. The Appellants submit that this contention may be readily disposed of by this Court.

74. It is submitted that it has been clear since the days of Lord Coke that even in jurisdictions without a written constitution, review of the existence and scope of an asserted prerogative power is permitted by the courts (see *Case of the Proclamations 1611*[22]; *Attorney-General v de Keyser's Hotel*[23]; *Burmah Oil Co (Burmah Trading) Ltd v Lord Advocate*[24]; *Laker Airways Ltd v Department of Trade*[25] and *Council of Civil Service Unions v Minister for Civil Service*[26]).

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[21] Ibid [76]
[22] 77 ER 1352 (KB) at 1354
[23] [1920] AC 508 at 545,561, 563 and 565
[24] [1965] AC 75 at 99, 118,137,148,153-154 and 164
[25] [1977] QB 643
[26] [1985] AC 374 at 398, 407,409-410, 417-418 and 423

75. It is further submitted that in jurisdictions governed by written constitutions, executive power typically derives its source from the text of the constitution itself[27].

76. In Fiji, s 85 of the Fiji Constitution is the source of the President's executive power. It provides that:

> "This section establishes the office of the President. The executive authority of the State is vested in the President."

77. Accordingly it is said any issue concerning the *existence* and *scope* of executive power is an issue concerning the proper construction of s 85 of the Fiji Constitution. Put another way, whether a particular executive power exists and, if so, its ambit, can only be determined upon a proper textual interpretation of that document[28].

78. The consequences of a written constitution creating the institution of government with certain defined powers, and courts thereby invested with jurisdiction to adjudicate on whether the legislative and executive have acted within those powers, are:

Firstly, a fundamental change from parliamentary to constitutional sovereignty founded in people's consent;

Secondly, the roles of the common law and constitutional law are reversed; and

Thirdly, all law is governed by the Constitution, and therefore the common law cannot develop inconsistently with the Constitution (see *Theophanous v Herald Weekly Times*[29], *Pharmaceutical Manufacturers Association of South Africa* [30]).

79. The Fiji Constitution must be read in light of the common law (section 3(b)), and the content of section 85 executive power is informed by the common law[31], but it does not necessarily pick up all common law prerogatives. Some prerogatives may only be exercisable by a monarch or a monarch's representative. The right question is what is

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[27] See, for example, Article 1 in the United States of American Constitution and s 61 of the Australian Constitution

[28] The *First Amicus Curiae*, the Fiji Human Rights Commission also sought to give some prominence to s.86 of the Fiji Constitution as a source of prerogative or reserve power. However, we are of the view that any reserve powers of the President are to be found in the grant of executive authority under s.85.

[29] [1994] 182 CLR 104 at 126

[30] [2000] [2] SA 674 paras 37-45

[31] Reeves Report [12.13]

the scope of the section 85 power: see *Ruddock v Vadarlis*[32] & *Pharmaceutical Manufacturers Case*[33].

80. The Appellants have submitted that the existence and scope of a grant of executive power can be – and regularly is – reviewed by courts in this way (see in Australia *Farey v Burvett*[34]; *Shaw Savill and Albion Co Ltd v Commonwealth*[35]; *Victoria v Commonwealth & Connor*[36]; *Ruddock v Vardarlis (Tampa)*[37]: in the United States of America this principle was recognised early in *Marbury v Madison*[38]. More recently see *Youngstown Sheet and Tube v Sawyer*[39]; *Clinton v Jones*[40]; *Hamdi v Rumsfeld*[41]; *US v Nixon*[42]; In Canada see *Conrad v Canada (Prime Minister)*[43]).

81. Section 120(2) of the Fiji Constitution provides that:

> "The High Court also has original jurisdiction in any matter arising under this Constitution or involving its interpretation."

82. In light of this provision it would be surprising if the existence and scope of the executive power or any other asserted power of the President could not be reviewed:

> "Judicial review is the enforcement of the rule of law over executive action. It is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law": *Church of Scientology v Woodward*[44].

83. A consequence of this grant of jurisdiction to the High Court of Fiji in matters arising under or involving the interpretation of the Fiji Constitution is that this Court is given express jurisdiction to interpret and determine whether a purported power exercised by the President exists pursuant to s 85 of the Fiji Constitution or otherwise[45].

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[32] [op cit]
[33] [op cit]
[34] [1916] 21 CLR 433 at 455
[35] (1940) 66 CLR 344 at 351, 354, 360-362, 364-366
[36] (1975) 134 CLR 338 at 354-357 and 363-364
[37] (2001) 110 FCR 491 at [183]-[185] and [193]
[38] 1 Cranch 137 at 177
[39] 343 US 579 (1925) at 584-589
[40] (1977) 520 US 681 at 703-705
[41] (2004) 542 US 507 at 535-536 and 552
[42] 418 US 683 (1974)
[43] (2001) 199 DLR (4th) 228 at [45] and [49]-[50]
[44] [1982] 154 CLR 25 at 70. Cited with approval by Gleeson CJ in *Plaintiff S157/2002 v Commonwealth of Australia* (2004) 211 C.L.R 476 [31]
[45] And see also s.194(10)

84. We have carefully considered the Respondents' Submissions in relation to this issue. The Respondents do not contend, as we understand their submissions, that as a matter of law this Court cannot consider the scope of the executive power under s.85 of the Fiji Constitution, or whether the prerogative power has been abrogated by the Fiji Constitution[46]. They and the Appellants agree that the *exercise* of the discretion contained within a power such as is here contended for is not reviewable, but the Respondents place emphasis upon the fact that the President acted *bona fide*. However, the Appellants' arguments, as we understand them, are directed to the existence of the power, not the manner of its exercise.

85. Therefore, to the extent that it is asserted by the Respondents that the President had the power on 5 January 2007 to appoint the Commander as Interim Prime Minister and on 8, 9 and 15 January 2007 to appoint various persons as Interim Ministers, and to ratify the dismissal of the Prime Minister and the dissolution of Parliament because a state of emergency existed, it does not appear to us to be in contention that the existence of this executive power is able to be reviewed by the Court and is justiciable.[47] What is non-justiciable is the manner of the exercise of that power. Thus, as the Appellants put it, the Court may say whether there was a power to appoint the Commander as Prime Minister. It may not, however, interfere with the President's choice of Prime Minister if that power exists[48].

86. We therefore propose to consider the constitutionality of what was done between 5 January and 15 January 2007. In order to do that it is necessary to refer to some of the relevant provisions of the Fiji Constitution.

Relevant provisions of the Fiji Constitution

87. Significant amongst the provisions of the Fiji Constitution which have some bearing upon the matters which are here in dispute are the following:

> **"Chapter I - The State**
>
> **Section 1 Republic of the Fiji islands**

[46] See, in particular, Respondents' Submissions [113]

[47] Insofar as the Respondents rely upon an unreviewable power of the Head of State arising *dehors* the Constitution, we deal with this contention subsequently.

[48] Even in such a situation, one would have thought that the appointment of the Prime Minister under s.98 would be justiciable if the appointee were not a member of the House of Representatives or could not conceivably have the confidence of that House.

The Republic of the Fiji Islands is a sovereign, democratic state.

Section 2 Supremacy of Constitution

(1) This Constitution is the supreme law of the State.

(2) Any law inconsistent with this Constitution is invalid to the extent of the inconsistency.

Section 3 Interpretation of Constitution

In the interpretation of a provision of this Constitution:

(a) a construction that would promote the purpose or object underlying the provision, taking into account the spirit of this Constitution as a whole, is to be preferred to a construction that would not promote that purpose or object; and

(b) regard must be had to the context in which this Constitution was drafted and to the intention that Constitutional interpretation take into account social and cultural developments, especially:

(i) developments in the understanding of the content of particular human rights; and

(ii) developments in the promotion of particular human rights.

Chapter 6 The Parliament

Part 1 General

Section 45 Legislative power

The power to make laws for the State vests in a Parliament consisting of the President, the House of Representatives and the Senate.

Section 46 Way in which legislative power exercised

(1) Subject to this Constitution, the power of the Parliament to make laws is exercised through the enactment of Bills passed by both Houses of the Parliament and assented to by the President.

(2) The President must not refuse to assent to a Bill duly presented for his or her assent.

(3) A law made by the Parliament does not come into operation before the date on which it is published in the Gazette.

Section 59 Terms of House of Representatives

The House of Representatives, unless sooner dissolved, continues for 5 years from the date of its first meeting after a general election of members of the House.

Section 60 Writs for elections

(1) Writs for the election of members of the House of Representatives are issued by the President on the advice of the Prime Minister.

(2) The writs for a general election issue within 7 days from the expiry of the House of Representatives or from the proclamation of its dissolution.

Chapter 7 Executive Government

Part 1 Executive Authority

Section 85 President

This section establishes the office of the President. The executive authority of the State is vested in the President.

Section 86 Head of State

The President is the Head of State and symbolises the unity of the State.

Section 87 Commander-in-Chief

The President is the Commander-in-Chief of the military forces.

Section 88 Vice-President

(1) This section establishes the office of Vice-President.

(2) The Vice-President performs the functions of President if the President is absent from duty or from Fiji or is, for any other reason, unable to perform the functions of his or her office.

(3) If neither the President nor the Vice-President is available to perform a function of the President, it may be performed by the Speaker of the House of Representatives.

(4) If the office of President becomes vacant, a new President and Vice-President must be appointed in accordance with Part 2, but the incumbent Vice-President has the authority under this section to perform the functions of President for a period of no longer than 3 months, pending the filling of the vacancy.

Part 3 Cabinet Government

Section 96 President acts on advice

(1) Subject to subsection (2), in the exercise of his or her powers and executive authority, the President acts only on the advice of the Cabinet or a Minister or of some other body or authority prescribed by this Constitution for a particular purpose as the body or authority on whose advice the President acts in that case.

(2) This Constitution prescribes the circumstances in which the President may act in his or her own judgment.

Section 97 Responsible government

Governments must have the confidence of the House of Representatives.

Section 98 Appointment of Prime Minister

The President, acting in his or her own judgment, appoints as Prime Minister the member of the House of Representatives who, in the President's opinion, can form a government that has the confidence of the House of Representatives.

Section 102 Responsibility of Ministers and Cabinet

(1) The Cabinet is collectively responsible to the House of Representatives for the governance of the State.

(2) A Minister is individually responsible to the House of Representatives for all things done by or under the authority of the Minister in the execution of his or her office.

Section 103 Functions of Ministers

(1) Ministers (including the Prime Minister) have such titles, portfolios and responsibilities as the Prime Minister determines from time to time.

(2) On the advice of the Prime Minister, the President, by direction in writing, assigns to the Prime Minister and to each other Minister responsibility for the conduct of a specified part of the business of the Government, including responsibility for general direction and control over a branch or branches of the public service or over a disciplined Force, as the case may be.

(3) The Prime Minister has responsibility for any part of the business of the Government that is not specifically assigned under subsection (2).

(4) Nothing in this section limits provisions in this Constitution conferring on specified persons or bodies freedom from direction or control by any person or authority in relation to the performance of specified functions.

Section 104 President to be kept informed

The Prime Minister must keep the President generally informed about issues relating to the governance of Fiji and must supply the President with such information as the President requests concerning matters relating to the governance of Fiji.

Section 105 Vacation of office of Minister

(1) Subject to subsection (2). the appointment of a Minister terminates if;

(a) the Prime Minister resigns in the circumstances set out in s.107;

(b) the Prime Minister is dismissed;

(c) the Minister tenders his or her resignation to the President; or

(d) the Minister ceases to be a member of the Parliament.

(2) If a Minister ceases to be a member of the Parliament because of the expiry or dissolution of the House of Representatives, he or she continues in office as a Minister until the next appointment of a Prime Minister

Section 106 Acting Ministers

(1) The President may appoint a Minister to act in the office of another Minister
(including the Prime Minister) during any period, or during all periods, when the other Minister is absent from duty or from Fiji or is, for any other reason, unable to perform the functions of office.

(2) Notification of the appointment of an Acting Minister must be published in the Gazette.

Section 107 Defeat of Government of polls or on floor of House

If:

(a) the Government is defeated at a general election; or

(b) the Government is defeated on the floor of the House of Representatives in a vote:

(i) after due notice, on whether the Government has the confidence of the House of Representatives;

(ii) that the Government treats as a vote of no confidence; or

(iii) the effect of which is to reject or fail to pass a Bill appropriating revenue or moneys for the ordinary services of the Government;

and the Prime Minister considers that there is another person capable of forming a Government that has the confidence of the House of Representatives, the Prime Minister must immediately advise the President of the person whom the Prime Minister believes can form a Government that has the confidence of the House and must thereupon resign.

Section 108 Advice to dissolve Parliament by Prime Minister defeated on confidence vote

(1) If a Prime Minister who has lost the confidence of the House of Representatives (defeated Prime Minister) advises a dissolution of the House of Representatives, the President may, acting in his or her own judgment, ascertain whether or not there is another person who can get the confidence of the House of Representatives (alternative Prime Minister) and:

(a) if the President ascertains that an alternative Prime Minister exists-ask the defeated Prime Minister to resign, dismiss him or her if he or she does not do so and appoint the alternative Prime Minister; or

(b) if the President cannot ascertain that an alternative Prime minister exists-grant the dissolution advised by the defeated Prime Minister.

(2) If the President appoints the alternative Prime Minister pursuant to paragraph (1)(a) but the alternative Prime Minister fails to get the confidence of the House of Representatives, the President must dismiss him or her, re-appoint his or her predecessor and grant that person the dissolution originally advised.

Section 109 Dismissal of Prime Minister

(1) The President may not dismiss a Prime Minister unless the Government fails to get or loses the confidence of the House of Representatives and the Prime Minister does not resign or get dissolution of the Parliament.

(2) If the President dismisses a Prime Minister, the President may, acting in his or her own judgment, appoint a person as a caretaker Prime Minister to advise dissolution of the Parliament".

The Interpretation of the Fiji Constitution

88. We approach this task by bearing in mind the requirement under s.3 of the Fiji Constitution that a construction that would promote the purpose or object underlying the provisions, taking into account the spirit of the Fiji Constitution as a whole, is to be preferred to a construction that would not promote that purpose or object. We also propose to examine the question in the context in which the Fiji Constitution was drafted[49].

89. The constitutional history of the Fiji Islands is set out in the preamble to the Fiji Constitution in the following terms:

> "WE, THE PEOPLE OF THE FIJI ISLANDS, SEEKING the blessing of God who has always watched over these islands:
>
> RECALLING the events in our history that have made us what we are, especially the settlement of these islands by the ancestors of the indigenous Fijian and Rotuman people; the arrival of forebears of subsequent settlers, including Pacific Islanders, Europeans, Indians and

[49] Courts in Fiji are, in principle, prepared to look at *travaux* for assistance in statutory construction. See *Auditor-General v Reserve Bank of Fiji* [2008] FJHC 194

Chinese; the conversion of the indigenous inhabitants of these islands from heathenism to Christianity through the power of the name of Jesus Christ; the enduring influence of Christianity in these islands and its contribution, along with that of other faiths, to the spiritual life of Fiji:

ACKNOWLEDGING our unique Constitutional history:

(a) first, the Deed of Cession of 10 October 1874 when Ratu Seru Epenisa Cakobau, Tui Viti and Vunivalu, together with the High Chiefs of Fiji, signifying their loyalty and devotion to Her Most Gracious Majesty, Queen Victoria, and their acceptance of the divine guidance of God and the rule of law, ceded Fiji to Great Britain, which cession was followed in November 1879 by the cession to Great Britain of Rotuma by the Chiefs of Rotuma;

(b) secondly, our becoming an independent sovereign state when Her Majesty Queen Elizabeth II promulgated the Fiji Independence Order 1970 under which the Fiji Constitution of 1970 came into being;

(c) thirdly, the abrogation of that Constitution in 1987 by the Constitution Abrogation Decree 1987;

(d) fourthly, after a period of 3 years, the giving to Fiji of the 1990 Constitution by His Excellency the President, Ratu Sir Penaia Kanatabatu Ganilau, Tui Cakau, GCMG, KCVO, KBE, DSO. KStJ, ED, with the blessings and approval of the Great Council of Chiefs;

(e) fifthly, the review of that Constitution undertaken under its provisions; and

(f) sixthly, the conferral by the High Chiefs of Fiji in their abundant wisdom of their blessings and approval on this Constitution:

RECOGNISING that the descendants of all those who chose to make their homes in these islands form our multicultural society:

AFFIRMING the contributions of all communities to the well-being of that society, and the rich variety of their faiths, traditions, languages and cultures:

TAKING PRIDE in our common citizenship and in the development of our economy and political institutions:

COMMITTING ourselves anew to living in harmony and unity, promoting social justice and the economic and social advancement of all communities, respecting their rights and interests and strengthening our institutions of government:

REAFFIRMING our recognition of the human rights and fundamental freedoms of all individuals and groups, safeguarded by adherence to the rule of law, and our respect for human dignity and for the importance of the family, WITH GOD AS OUR WITNESS, GIVE OURSELVES THIS CONSTITUTION"

90. That preamble, in setting out the various stages of the constitutional history of what is now the Republic of Fiji Islands, recites a number of matters of fundamental importance to the questions which we have to consider. Firstly, Fiji was ceded to Great Britain on 10 October 1874, and in the case of Rotuma in November 1879. Secondly, Fiji became an independent sovereign state when Her Majesty Queen Elizabeth II promulgated the Fiji Independence Order 1970 under which the Fiji Constitution of 1970 came into being. Thirdly, the fact that the Fiji Constitution of 1970 was abrogated by the Constitution Abrogation Decree 1987. Fourthly, that the 1990 Constitution was given to Fiji with the blessings and approval of the Great Council of Chiefs, and the High Chiefs of Fiji. Fifthly, that by the Fiji Constitution the people of Fiji committed themselves anew to living in harmony and unity, promoting social justice and the economic and social advancement of all communities, respecting their rights and interests and strengthening the institutions of government. Sixthly, adherence to the rule of law.

91. The Fiji Constitution makes it clear that it is a document that has sanction and support of all levels of society, and all of the diverse communities that live in these islands, with all of their faiths, traditions, languages and cultures.

92. It appears to us that a constitution with those aims and aspirations would wish to ensure that when it came to such a delicate matter as the dismissal of a Prime Minister, that the circumstances in which the Prime Minister could be dismissed would be clearly defined. By the time the Fiji Constitution had been drawn up, as appears from the facts set out above, there had already been the abrogation of one Constitution in 1987, and the establishment of military rule. It is clear that in the circumstances in which the Fiji Constitution was drafted, the people of Fiji wished, if at all possible, to avoid another such occurrence. So much is also obvious from the Reeves Report[50].

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[50] *The Fiji Islands: Towards a United Future, Report of the Fiji Constitution Review Commission 1996*, Reeves, Vakatora & Lal (Parliament of Fiji, Parliamentary Paper No. 34 of 1996). Previous decisions of the Fijian Courts have also taken note of the Reeves Report in interpreting various provisions of the Constitution. See *Bala v Attorney-General* [2005] FJHC 320 & *In re the Constitution, Reference by HE the President* [2002] FJSC 1. See also *Pambula District Hospital v Harriman* [1988] 14 NSWLR 387 at 410 per Samuel JA where the Court held *"[i]t has always been open to the court to have regard to the historical setting of the statute and by that means to ascertain what the object of the legislature was."*

93. Section 109 of the Fiji Constitution deals expressly with the circumstances in which the President may dismiss a Prime Minister. It prescribes that the President may not dismiss the Prime Minister unless the Government fails to get or loses the confidence of the House of Representatives, and the Prime Minister does not resign or get a dissolution of the Parliament. It also goes on to prescribe in s.109(2) that if the President dismisses a Prime Minister, the President may, acting in his or her own judgment, appoint a person as a caretaker Prime Minister to advise a dissolution of the Parliament. In relation to the appointment or dismissal of a Prime Minister, this and s.98 are the only provisions that state that the President can exercise his own judgment. In the case of s.98, that judgment is carefully confined, and in the case of s.109 that judgment is for a very limited purpose.

94. The question really is whether under the Fiji Constitution the President has a discretion to dismiss a Prime Minister in circumstances other than those set out in s.109, and appoint another caretaker Prime Minister to advise a dissolution of Parliament, and appoint an Interim Government, particularly in circumstances where it is said that an emergency situation has arisen. In our view, the answer to this question is to be found in s.96(2) which provides: "*This Constitution prescribes the circumstances in which the President may act in his or her own judgment*". This express provision, in our view, makes it clear that under the Fiji Constitution it is not intended that the President, in the exercise of discretion, dismiss a Prime Minister in circumstances other than those set out in s.109, and in effect establish an Interim Government. In expressing this opinion, we leave to one side, for the time being any discussion of the doctrine of necessity discussed in *Republic of Fiji Islands v Prasad*[51].

95. There is nothing novel in this view. The Court of Appeal in *Yabaki*[52] stated quite clearly:

> "Section 96(2) limits the circumstances where the President may act on his or her own judgment to those circumstances prescribed by the Constitution. He may do so under s.109(2) for example. He may not do so under s.109(1). Nor is some external apprehension by the President, outside of a vote of no

[51] [2001] FJCA 2
[52] Op cit

confidence in the House, that a Prime Minister does not have the confidence of a majority, a substitute for what is required by s.109(1)."[53]

The Existence of a Prerogative or Reserve Power to Dismiss the Prime Minister

96. The judgment of the High Court concludes that the President had a prerogative power, because an emergency had arisen, to rule directly until suitable elections could be conducted, which power included a power on the part of the President to dismiss the Prime Minister, dissolve the Parliament and to appoint Ministers, including the Commander as Prime Minister in the interim[54].

97. There is no doubt that in earlier times the Monarchs of Great Britain exercised a prerogative power of dismissal with respect to the Prime Minister. This power was examined in detail in *Evatt, The King and His Dominion Governors,*[55] written in 1936, not long after the dismissal of the Lang Government by Sir Phillip Game, the Governor of New South Wales. In that work, Evatt examines Dicey's treatment of the Crown's reserve power of dismissal in the passages set out below[56]. We have made extensive reference to Evatt's writings in this judgment because they seem particularly apposite to the situation as it exists in Fiji today. Evatt says:

> "Dicey treats the action of King George III in the dismissing of Fox and North as an appeal 'from the sovereignty of Parliament .... To [the] sovereignty of the people. He adds:
>
> > "Whether this appeal be termed constitutional or revolutionary is now of little moment; it affirmed decisively the fundamental principle of our existing Constitution that not Parliament but the nation is, politically speaking, the supreme power in the State".
>
> He deduces from it, and the precedent of William IV's dismissing Melbourne or compelling him to resign in 1834, the principle that the King may dismiss a Ministry commanding a parliamentary majority, and may subsequently dissolve the Parliament where there is 'fair reason to suppose that the opinion of the House is not the opinion of the electors'. He restates the condition as follows: 'a dissolution is allowable or necessary, whenever the wishes of the legislature are, or may *fairly be presumed to be* different from the wishes of the nation'. Dicey considers that the constitutionality of the dismissal and dissolution of 1834:

[53] In expressing this view the majority distinguished the decision of *Abegbenro v Ankitola* [1963] AC 614 where the Governor had a power to dismiss the Premier where *it appeared* the Premier no longer commands the support of a majority of the Members of the House of Assembly.
[54] Op cit [173]
[55] 1st Ed; F W Cheshire Pty Ltd (1936) 2nd Ed (1967).
[56] For an account of Melbourne's discussions with William IV see *Melbourne* by Lord David Cecil (Bobbs Merrill) (1966) p.266-267

> 'Turns at bottom upon the still disputable question of fact, whether the King and his advisers had *reasonable ground for supposing* that the reformed House of Commons had lost the confidence of the nation'

He regards the two precedents as 'decisive' i.e. as showing that the rules as to the dissolution of Parliament 'are like other conventions of the constitution, intended to secure the ultimate supremacy of the electorate as the true political sovereign of the State'.

Dicey's discussion of William IV's action in 1834 is revealing. From the constitutional point of view he admits that it was a 'mistake'. He adds 'it was justified (if at all) by the King's belief that the House of Commons did not represent the will of the nation'. He argues that if it is right for the King to dismiss Ministers and dissolve Parliament when it is shown to be out of harmony with its constituents, 'there is great difficulty in maintaining that a dissolution is unconstitutional simply because the electors do, when appealed to, support the opinions of their representatives'. He concludes, therefore, that a compulsory dissolution against the will of the Ministry and Commons is constitutional 'whenever there is valid and reasonable ground for supposing that their parliamentary representatives have ceased to represent their wishes'.

It is obvious that Dicey, endeavouring to unify and rationalize the two precedents of 1784 and 1834 under one governing principle, was faced with the great difficulty of reconciling the failure of William IV and Peel to gauge popular opinion with the success of George III and Pitt in 1784. Accordingly he is forced to conclude that ultimate electoral success is not required to justify the exercise by the King of the prerogative of dismissal and dissolution. So long as there is a 'fair presumption', 'valid and reasonable ground for supposing' that the Commons is out of step with its constituents, the King is justified in his action.

The first difficulty which arises from this view of constitutional practice is, who is to decide whether there is fair, valid and reasonable ground for the supposition or presumption? At p.432 Dicey mentions 'the King *and his advisers*' as the authority to decide this difficult question of fact. Such reference to 'advisers' is necessarily to those Opposition leaders who have, *ex hypothesi*, to be summoned to office for the purpose of 'accepting the responsibility' for the King's action in dismissing those who previously held the confidence of the King. What sources of information are to be tapped for the purpose of making a sound electoral forecast? The great resources of a political machine may be available, in which event the reports of Opposition canvassers may find a place in the material upon which a judgment is to be delivered. It is obvious that Dicey's doctrine, if carried out logically, must tend to place the Sovereign in the invidious position of consulting the Opposition leaders upon the question whether the proposed coup and rush election will be successful. It is quite clear that George III, and, to a lesser extent William IV, placed themselves in such a position.

Further, according to Dicey, even if the coup is not successful, and Ministers who have been dismissed from office by the King are returned triumphantly to their former office by the people, the latter have no reasonable cause of complaint so long as the King and the Opposition leaders had 'reason to believe' that a moment had arrived when the Government party was sufficiently unpopular to be rejected by the people.

In his letter to *The Times* in September 1913, Dicey ventured to assert that his exposition of this reserve power of the Monarch has 'assuredly never been

controverted by any writer of authority'. But in this connexion it has to be remembered that very special circumstances existed in 1784, and that no occasion even arose for a close examination of this aspect of the prerogative between 1834 and 1913 – a period of nearly eighty years.

Is the doctrine of Dicey justified when fairly analysed? It certainly assimilates the functions of the Monarch to that of a political prophet, although his serene and remote position necessarily prevents him from being armed with the soundest materials for such a forecast. Failure of the new Ministry at the elections would place the Monarch, to put it at the lowest, in 'a position of some embarrassment'. Under similar circumstances a Colonial governor is 'reasonably supposed' to be liable to recall from office.

If Dicey's test as to the existence of 'reasonable ground for supposing' is taken, it leads to some absurdity. Picture the reassembling of the Commons under the leadership of a dismissed Ministry which is recalled to office after the elections. The Opposition leader will have to justify his action and that of the King by saying: 'We made a mistake – but I put it that William IV also made a mistake. I furnished to His Majesty a summary of reports from expert officials in my party organization. In their opinion we should have won. Moreover, as the people knew perfectly well that the King had intervened upon our side, we expected to rally all doubtful voters to our support. I ask for a finding that I did not act unreasonably in measuring the probability of electoral success.

Such a defence would seem to contain its own refutation. It reduces to a question of mere negligence the correct standard of ministerial 'responsibility'. And what if the Commons considered that Opposition leaders had been negligent, and that there was *no reasonable ground for thinking* that the Government formerly holding office would be turned out by the electors? It is difficult to escape the conclusion that a victorious Commons, the members of which had been put to very considerable trouble and expense for no purpose might be inclined to say: 'These Opposition leaders voluntarily chose to accept "responsibility" for the exercise of these prerogatives. Let them assume some real responsibility, and let us proceed to discuss sanctions'. It is not difficult to imagine how, under the modern conditions of political warfare, the device of impeachment or some analogous proceeding might again be brought into play.

The overwhelming success of Pitt and George III in 1784 has been allowed to convey a false impression as to the situation of the Monarch in relation to the modern democracy. The coalition of North and Fox was regarded by the people as being little short of infamous. In 1782 Fox had suggested that North should be brought to the scaffold. In the circumstances the fusion of the pair shocked the conscience of the country and gave the King a unique opportunity of revenging himself. Moreover, Fox's India Bill, which was one of the immediate issues of the election of 1784, involved a delegation of governing powers over India and an enormous patronage to a commission which might be out of the reach both of the King and a future Cabinet. Further, the Bill was regarded as a general attack upon property rights, the East India Company broadcasting the slogan, 'Our property and charter are invaded, look to your own'. Pitt's superb parliamentary tactics, in refusing to dissolve immediately upon the dismissal of his predecessors in December 1783 played an important part in the election results. Threatening to stop the supplies, the Commons gradually weakened and failed to adopt Fox's suggestion. Having displayed its fear of avoiding an ultimate issue with the Monarch, its prestige gradually vanished. In the circumstances success for North and Fox at the elections would have been miraculous.

"it is dangerous to draw any sweeping general principle from such a modern precedent as that of 1913, or from the precedent of 1834, it is quite impossible to do so from the coup of George III one hundred and fifty years ago, in which, according to one distinguished authority, Pitt became Prime Minister by 'a violent exercise of the prerogative'."[57]

98. Evatt then went on to consider historical precedents up until 1936 and the views of a number of distinguished text writers on the subject and expressed the following views:

"Amongst the text writers on the subject of constitutional conventions those interested will usually be able to find support for (or against) almost any proposition".[58]

99. Evatt also dealt with some practical aspects of the problem of defining the reserve powers in the following passage:

"The difficulties existing in England and the Dominions include the following:

(1) It is not certain to what extent, and under what conditions, the Sovereign or his representative possesses the right to refuse a dissolution of Parliament to Ministers,

(2) The power of dismissal of Ministers possessing the confidence of the majority of the popular Assembly is not precisely ascertained.

(3) The power of the Crown or its representative to insist upon a dissolution against the will of Parliament and Ministers alike, a power connected with (2) is also undefined.

(4) The conditions of the exercise of the prerogative of appointments of Peers in the United Kingdom cannot be precisely stated.

(5) The ultimate right of the Sovereign or his representative to "veto" i.e. refuse assent to legislation, is still asserted to exist.

(6) There is no clear understanding as to the precise constitutional relation between the Prime Minister or Premier on the one hand, and other Ministers on the other.

If the situation is allowed to continue without any alteration, the Sovereign, Governor General and the Governor will have to determine for themselves, on their own personal responsibility, not only what the true constitutional convention or practice is, but also whether certain facts exist, and whether they call for the application of the rule which is alleged to be derived from, and consistent with, all constitutional precedents. Even if, upon the given occasion, no extraordinary exercise of the Crown's prerogative results, the possibility of its exercise has always to be reckoned with, and this inevitably creates uncertainty and distrust."[59]

[57] Pp102-107
[58] 286
[59] 286

100. These problems became topical again in Australia in 1975 as a result of the well known circumstances surrounding the dismissal of Mr Whitlam by the Governor General Sir John Kerr.[60] That debate gave rise to the expression of a number of different views as to the circumstances in which a Prime Minister could be dismissed under s.64 of the Australian Constitution,[61] issues which still continue to have a divisive effect in the Australian Community.

101. Since that time, the Report of the Advisory Committee on Executive Government to the Constitutional Commission in 1987, set out the principle in relation to the Commonwealth level of Government in Australia, in the following passage:

> "The Governor General can dismiss the prime minister for persisting in grossly unlawful or illegal conduct, including a serious breach of the Constitution, when the High Court has declared the matter to be justiciable and the conduct to be unlawful, illegal or a breach of the Constitution, or when the High Court has declared that the matter is not justiciable, and the Governor General believes that there is no other method available to prevent the prime minister or the government engaging in such conduct."[62]

102. What this brief review of the subject shows is that the circumstances in which the Monarch, or the Governor General or Governor of a British Dominion or Colony can exercise the reserve powers of the Crown to dismiss a Prime Minister or Premier were, and still are, a matter of great and ongoing controversy, and in particular, the question whether the Monarch or a representative of the Crown had any power to dismiss a Prime Minister who had the confidence of the lower house and no difficulty in obtaining supply is a controversial one[63].

103. Moreover, at the time that the Fiji Constitution was being drafted Fiji had been beset by a major political upheaval and the abrogation of its existing Constitution. All the

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[60] See e.g. Sir Garfield Barwick, *Sir John did his Duty*, Serendip Publications (1983); *D. P. O'Connell, The Dissolution of the Australian Parliament in (1976) The Parliamentarian* pp1-14; *Cooray, Conventions, The Australian Constitution and the Future* (1979).

[61] Cooray ibid p51.

[62] Advisory Committee to the Constitutional Commission, *Executive Government* (AGPS, Canberra, 1987) p42. Note also the minority view of the Committee that the Governor General may dismiss the Prime Minister in cases in which he believes that there is no other method available to prevent the Prime Minister or his government engaging in substantially unlawful action, including a substantial breach of the Constitution, or other conduct contrary to the principles of democratic government. See also *Twomey, The Constitution of New South Wales* Federation Press (2004) (645-646); Final Report of the Constitutional Commission (1988) Vol 1 2.214-2.224

[63] As to the changing nature of the rights, powers and immunities of the Crown see *Gairy and Anor v Attorney-General for Grenada* [2002] 1 AC 167, 178-9

more reason, in our opinion, that the drafters of the Fiji Constitution, and the Fijian people, in adopting the Fiji Constitution as amended in 1997, would have wanted as much certainty as they could obtain in the provisions dealing, in particular, with the dismissal of a Prime Minister.

104. In that context, it is clear that the drafters of the Fiji Constitution have given very specific attention to the circumstances in which the President can dismiss the Prime Minister. Pursuant to s.98, referred to above, it is the President who appoints the Prime Minister. That person has to be a member of the House of Representatives who, in the President's opinion, can form a government that has the confidence of the House of Representatives. The opinion referred to is one on which, pursuant to s.96(2), the President is entitled to bring to bear his or her own judgment. Normally however, there would not be much controversy about who the appropriate candidate would be. It would necessarily be the leader of the party which had a majority in the House of Representatives, as it would only be that person who could form a government that had the confidence of the House of Representatives.

105. Section 109, also referred to above, deals with the circumstances in which the Prime Minister can be dismissed. Those circumstances are defined as being those where the government fails to get, or loses the confidence of the House of Representatives, and the Prime Minister does not resign nor get a dissolution of the Parliament. In those circumstances, if the President dismisses a Prime Minister, the President may, acting in his or her own judgment, appoint a person a caretaker Prime Minister to advise a dissolution of the Parliament. In that provision, that person is not expressly required to be a member of the House of Representatives.

106. The Fiji Constitution is silent on other circumstances in which the President may dismiss a Prime Minister. This cannot have been unintended, nor could the express reference in s.96(2) to the Fiji Constitution prescribing the circumstances in which the President may act in his or her own judgment have been unintended. Clearly, the Fiji Constitution intended to delineate as precisely as possible the circumstances in which the President could dismiss the Prime Minister. Those circumstances do not, in our opinion, include circumstances other than those set out in s.109 of the Fiji Constitution.

107. The Respondents contend that the main fallacy in the Appellants' written submissions is to suggest that the President is, as a matter of textual constitutional interpretation, *pro tanto*, limited by the terms of the Fiji Constitution. But surely that is the effect of the provisions we have referred to. The Fiji Constitution is supreme [s.2]. The President acts on advice [s.96]. Governments must have the confidence of the House of Representatives [s.97]; and the Fiji Constitution prescribes the circumstances in which the President may act in his or her own judgment [s.96(2)].

108. Since the decision of Justice Scott in *Yabaki* there appears to have been a view, not sufficiently displaced by the Court of Appeal's decision in that case, that notwithstanding the express terms of the Fiji Constitution, including the stipulation that the President acts on advice, the President has some overriding power to dismiss the Prime Minister and form a new government in circumstances of what has been described variously as a crisis or an emergency or where it is perceived that the Prime Minister no longer has the confidence of the nation or the armed forces.

109. While there was a time in English constitutional history when the Monarch had more ample powers to dismiss a Prime Minister than is the case today, and while there is certainly authority which supports the right of the executive to intervene in a crisis in the United Kingdom, the right of the President in Fiji to do anything otherwise than on advice is strictly limited by the Fiji Constitution.

110. Nonetheless, we now proceed to consider the question of whether there is such a prerogative power in Fiji as this was the basis of the decision of the High Court.

The Relevance of the Prerogative

111. Fiji is now a Republic, as distinct from countries such as New Zealand and Australia which still retain the Crown as Head of State. What "reserve" powers therefore does the President have to dismiss the Prime Minister or to appoint persons other than the elected representatives of the people to positions of power in Fiji ?

112. In the case of a Republic it is by no means clear to us that the prerogative powers would continue in existence after the adoption of a detailed written Constitution such as that which has been adopted for the Republic of Fiji. In such a case, it is our opinion that the relevant question would be what is included in the executive authority

of the state vested in the President by s.85 and possibly s.86 of the Fiji Constitution, what other discretions are vested in the President by the Fiji Constitution, and whether the implication of some other power of dismissal would be consistent with the Fiji Constitution.

113. In expressing this view, we have considered the submissions addressed to us by the First *Amicus Curiae*, the Fiji Human Rights Commission, based in part upon United States authority such as *Curtiss-Wright Export Corp*[64] to the effect that all heads of state, whether or not their positions derive from a monarchy, possess prerogative power, apart from other powers they may have been provided with under national laws. However the submissions of the Second *Amicus Curiae*, the CCF, make clear that that decision does not support the proposition for which it is cited, and deals with the powers of the United States federal government on the international stage deriving from international law, and held that presidential power must be exercised in accordance with the Constitution[65].

114. The judgment of the High Court does not take the approach we have outlined above. Having referred to the President's role under the Fiji Constitution[66], it refers to the absence of any specific mention of the prerogative, the fact that the prerogative travelled to the colonies, and to authorities such as the *British Coal Corporation* case[67]which confirm the principle that the prerogative cannot be restricted or qualified save by express words or necessary intendment[68]. The Respondents' Submissions adopt the same approach[69].

115. The absence of any reference to the prerogative is not conclusive, but is a matter to which we shall return. Nor is it in doubt that the prerogative travelled to the Colonies.

116. The judgment of the High Court refers[70] to the continuance of prerogative powers in Fiji. Reference is made to Halsbury's Laws of England to the following effect:

> "The Prerogative is not confined to the British Islands, but extends to all parts of

[64] 299 US 304 (1936), at 316
[65] Ibid, 317-320
[66] [131]-[132]
[67] (1935) AC 500 at 519
[68] See also *Ruddoch v Vadarlis* op.cit [33]-[41]; [176]-[198]
[69] [70]-[106].
[70] [119]-[123]. This reference does not include the footnote to the text which states "ie. *Not to those parts that have a republican constitution*"

> the Commonwealth of which the Queen is monarch as fully in all respects as to England, unless otherwise prescribed by United Kingdom or local enactment." [Halsbury's Laws of England 4th Ed. reissue 1996 para 370; See also *Kielley & Carson* (1842) 4 Moo PC 63 at p.85]

117. Reference is also made in the judgment of the High Court to the decision of the *Attorney General Fiji v DPP*[71] where the Privy Council said:

> "Executive authority is vested in Her Majesty and, save as otherwise provided in the Constitution, it may be exercised on her behalf by the Governor-General, either directly or through officers subordinate to him:"

118. The difficulty with the reference to this decision as being relevant to the current circumstances, is that it was a decision made at a time subsequent to the promulgation of the Fiji Independence Order of 1970, under which the 1970 Constitution came into being, but prior to the abrogation of the Constitution in 1987 by the Constitution Abrogation Decree of 1987. At the time in question Fiji was a Constitutional Monarchy and it fitted the model of Her Majesty's other Dominions and Colonies, in which the Governor General or the Governor exercised certain reserve powers derived from the prerogative. It provides no basis for the suggestion that once Fiji became a Republic, those prerogative powers were vested in the President under the Fiji Constitution, independently of the specific provisions thereunder, or in opposition thereto.

119. The submissions of the Second *Amicus Curiae,* the CCF, are pertinent in this regard. In common with Fiji the Republic of South Africa is a former British colony and in common with the Fiji Constitution the Constitution of South Africa declares that it is the supreme law of the State[72] and vests the executive power of the State in the President as Head of State[73].

120. In *President of the Republic of South Africa v Hugo*[74] the Constitutional Court of South Africa held that while the powers vested in the President under the then interim South African Constitution have their historical antecedents in the prerogative power of the Crown, there were no powers derived from the royal prerogative conferred on the President other than those set out in the Constitution.

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[71] [1983] 2 AC 672
[72] Section 2, South African Constitution
[73] Sections 83 & 85 South African Constitution
[74] 1997 [4] SA 1 at para 8

121. The judgment of the High Court[75] refers to a number of authorities including the *British Coal Corporation* case[76] in which the Privy Council considered whether the prerogative right of appeal from the province of Quebec to the King in Council had been effectively abrogated by the Dominion legislature. It was held that it had. Viscount Sankey LC[77] gave the following advice on behalf of the Panel:

> "No doubt the principle is clearly established that the King's prerogative cannot be restricted or qualified save by express words or by necessary intendment. In connection with Dominion or Colonial matters that principle involves that if the limitation of the prerogative is by a Dominion or Colonial Act, not only must that Act itself deal with the prerogative either by express terms or by necessary intendment, but it must be the Act of a Dominion or Colonial Legislature which has been endowed with the requisite power by an Imperial Act likewise giving the power either by express terms or by necessary intendment."[78]

122. These principles are firmly established but, contrary to what is said in the judgment of the High Court, in our opinion the provisions of the Fiji Constitution have sought to limit clearly the circumstances in which the President can dismiss the Prime Minister, and for that matter, the circumstances in which the other Ministers of the Crown can be dismissed, and the other discretions confided in the President. The words of limitation in s.96(2) are not to be ignored. It is clearly intended by that provision to limit precisely the discretions of the President to the circumstances prescribed in the Fiji Constitution.

123. The Respondents' Submissions contend[79] that notwithstanding that the Fiji Constitution has provided in express terms for the circumstances that regulate the appointment and dismissal of the Prime Minister, the prerogative to act in a national security situation is capable of co-existing with the limited discretion prescribed by the Fiji Constitution for the appointment and dismissal of Prime Ministers and other provisions to which we have referred. But s.187 of the Fiji Constitution confers legislative power upon the Parliament to confer emergency powers on the President. Moreover section 163 of the 1990 Constitution, which it replaced, conferred powers upon the President to issue a "Proclamation of Emergency" if the President was satisfied that a grave emergency existed whereby the security or economic life of Fiji is threatened. This makes it inherently unlikely that the President, personally, acting

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[75] [127]-[136]
[76] [1935] AC 500 at 519
[77] At 519
[78] And see *Northern Territory v Arnhem Land Trust* [2008] HCA 29; 82 ALJR 1099
[79] Para [100]

otherwise than on advice, has those powers without such a conferral under the 1997 Constitution. Such an implication is also at odds with s.2 and s.96 of the Fiji Constitution. Moreover we are unpersuaded by the Respondents' submissions that *travaux* leads to an opposite conclusion. To the contrary, it positively reinforces our views[80].

124. We should perhaps add that the above discussion also deals with the point that there is an absence of any reference to the prerogative. Quite apart from anything else, s.2 of the Fiji Constitution makes clear that any law inconsistent with the Fiji Constitution is invalid to the extent of the inconsistency, and that would include the prerogative if it permitted dismissal of the Prime Minister otherwise than as set out in the Fiji Constitution.

125. Moreover, there is a real question in any event as to the relevance of cases such as the *British Coal Corporation* case[81]. That case concerns the interaction between legislative and executive power, and whether the legislature intended to abrogate the existing prerogative. It is not a case concerning the construction of a constitution. The point was well made by Higgins J in the *Engineers* case:[82]

> "The true position I take to be that the rule as to the Crown's rights not being affected by an Act unless by express words or by necessary implication applies not to a Constitution but to the Acts made by the Parliament under the powers of the Constitution".

126. A further matter referred to in the judgment of the High Court is the absence of reference to reserve powers of the President in matters of the prerogative and in particular, defence of the realm, national security, and of securing the peace, protection, and safety of the people.[83]

127. However, in relation to the specific subject matter of the power of the President to dismiss the Prime Minister, the Fiji Constitution is quite explicit in providing a narrow basis for the exercise of those powers. In relation to the defence of the realm, s.87 provides that the President is the Commander in Chief of the Military Forces. As

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[80] See the Reeves Report Ch. 16, 19 and in particular Recommendations 664, 666

[81] Op cit.

[82] (1920) 28 CLR 129 at 164; see also *Evatt, The Royal Prerogative* (1987) The Law Book Co 46-47. This also deals with submissions in relation to construction based on *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (see Respondents' Submissions, para [99]; see also *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 [85]; *Mahmood and Anor v Royal Pharmaceutical Society of Great Britain* [2002] 1 WLR 879; *Ruddock v Vadarlis*, (op cit)) where the relationship between a statute and the prerogative is discussed

[83] [134]-[136].

to the other points made, in our respectful opinion, this is far too narrow a view. It has a compact [s 6-7]. It deals with questions of citizenship [s.8-s.20]. It contains a Bill of Rights which binds the legislative, executive and judicial branches of government at all levels, and all persons performing the functions of any public office which includes provisions dealing with protection against compulsory acquisition of property [s.40]. The manner in which the legislative power may be exercised is strictly controlled, including absence of any discretion vested in the President to refuse to assent to a Bill duly presented for his or her assent [s.46(2)]. The Senate has a limitation on its powers with respect to money Bills which has the consequence that a power of dismissal arising because supply was blocked by the upper house would not arise [s.49]. There are the provisions in relation to Executive Government previously referred to including limits to the term of office of the President to 5 years plus a further term of 5 years [s.91]. The President and Vice President may be removed from office [s.93]. It is expressly provided that Governments must have the confidence of the House of Representatives [s.97], not, as Dicey would have it, the confidence of the nation. The prerogative of mercy, a well recognised example of the exercise of prerogative power is also dealt with in the Fiji Constitution [s.115] as is the appointment of Ambassadors [s.149].[84] It is clearly provided that the President acts on advice, and that the Fiji Constitution prescribes the circumstances in which the President may act in his or her own judgment [s.96].

128. All of the above is inconsistent in our opinion with the continued existence of the prerogative in the President at least in relation to these subject matters, or with the President retaining reserve powers to dismiss the Prime Minister which are not found expressly in the Fiji Constitution. To the contrary, and as specified in s.2, there is a clear intention expressed to exclude laws inconsistent with the Fiji Constitution. Whilst there may be room for the implication of other powers pursuant to s.85, or possibly s.86, of the Fiji Constitution, that is of no relevance to this inquiry.

[84] And see *Quick & Garran, Annotated Constitution of the Australian Commonwealth* (1901) p322-23, where a list of examples of the prerogative is given virtually all of which are dealt with in the Constitution; see also *Evatt, The Royal Prerogative* op.cit 29-31.

129. We should also say that in considering the nature of the Fiji Constitution we have been considerably assisted by the Reeves Report[85] which in our opinion is entirely consistent with the approach we have adopted.

130. Further, as to the question of national security referred to in the judgment of the High Court, apart from the provisions dealing with the police force and the military, s.187 to which we have previously referred confers legislative power upon the Parliament to make a law conferring power on the President, acting on the advice of the Cabinet, to proclaim a state of emergency in Fiji, or in a part of Fiji in such circumstances as the law prescribes. The section goes on to provide:

> "(2) The law may include provisions conferring on the President the power to make regulations relating to the state of emergency.
>
> (3) A measure authorised by or under the law may derogate from the rights and freedoms set out in sections 23, 24, 30, 31, 32, 33, 34 or 37 (but not from other rights and freedoms set out in the Bill of Rights) if each of the following conditions is satisfied:
>
> (a) the Cabinet has reasonable grounds for believing that, because of the emergency described in the proclamation of the state of emergency, the life of the State is threatened and the exigencies of the situation are such that they cannot be dealt with effectively without derogating from the Bill of Rights;
>
> (b) the proclamation of the state of emergency is laid before the House of Representatives, is confirmed by it within 5 sitting days after the proclamation is made and remains in force at the time the measure is taken;
>
> (c) the proclamation of the state of emergency remains in force for no longer than 3 months or for such further successive periods of up to 6 months as the House of Representatives determines;
>
> (d) regulations relating to the state of emergency are laid before the House of Representatives within 2 sitting days after they are made and remain in force at the time the measure is taken.
>
> (4) A law made under this section that is inconsistent with the obligations of the State under an international convention or covenant is invalid to the extent of the inconsistency.
>
> (5) Regulations made pursuant to subsection (2) remain in force only so long as the proclamation of the state of emergency remains in force."

131. Part of the reasoning of the judgment of the High Court rests upon a number of decisions which are said to demonstrate the nature and extent of two prerogatives,

[85] Op cit

these being the power to preserve the State from civil strife and to act in an emergency to ensure the well being and safety of the people. These include cases such as *Bhagat Singh v The King Emperor*[86]; *King Emperor v Bensari Lal Garma*[87] and *Ningkan v Government of Malaysia*[88]. However these are cases where under an ordinance similar to that which can be made under s.187 of the Fiji Constitution, a question arose whether there was in fact a state of emergency, a matter which was reposed in the discretion of the Governor General or other representative of the Crown. They are good examples of the principle that the exercise, as distinct from the existence of such a power, is not reviewable.

132. In our opinion the existence of s.187 is as clear an indication as there can be that national security matters were not matters which were left to the prerogative. The existence of an implied right in the President arising from the prerogative, acting otherwise than on the advice of the Prime Minister to dismiss the government, to dissolve the Parliament and establish an Interim Government in the face of an emergency, is inconsistent with that provision. And indeed, why does a matter of national security call for the dismissal of a Prime Minister and his Ministers and the dissolution of Parliament? Under the Fiji Constitution it is he and his Cabinet who have the responsibility to lead the country through a crisis, and to advise the President in relation thereto. It is entirely unclear to us why the first thing called for in a time of national emergency is the dismissal of the Prime Minister and his government. This, we consider, exposes the real flaw in the argument for the Respondents. It exposes the fact that what has occurred in this case and previous cases is simply a military coup or an unlawful usurpation of power.

133. Cases such as *Burmah Oil Co Ltd v Lord Advocate*[89]; *Attorney General v De Keyser's Royal Hotel Ltd*[90] and *R v Home Secretary; Ex parte Police Authority*[91] do concern the exercise of the prerogative and contemplate the co-existence of both prerogative and statutory powers. But, as was said by Lord Reid in the first of those cases:

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[86] (1931) LR 58 1A 169
[87] [1945] AC 14
[88] [1970] AC 379, 390
[89] [1965] AC 75
[90] [1920] AC 508
[91] [1989] 1 QB 26 at 53H-54A and 58A.

> "It is not easy to discover and decide the law regarding the royal prerogative and the consequences of its exercise."[92]

134. One thing, however, is clear. Both the *Burmah Oil* case and *De Keyser's* case concerned the appropriation or destruction of property by Her Majesty's Armed Forces in time of war and the liability of the Crown in right of the United Kingdom to pay compensation. In the United Kingdom control of the armed forces had been left to the prerogative, subject to the power of Parliament to withhold supply and to refuse to continue legislation essential for the maintenance of a standing army; and so also the waging of war.[93]

135. What was said by Lord Upjohn in *Burmah Oil* to the effect:

> "It is clear that the Crown alone must be the judge of the precise emergency and exact point of time when it is necessary to exercise the prerogative in order to defend the country against apprehended invasion or, indeed, to take steps to prepare the country for war against a foreign power."[94]

relates to circumstances which existed at a time of war, at a time when control of the armed forces had been left to the prerogative.

136. *R v Home Secretary*[95] is interesting in this context. The Court found that a prerogative of keeping the peace that existed in medieval times had not been surrendered by the Crown nor did the process of giving express or implied assent to the modern system of keeping the peace through the agency of independent police forces amount to a surrender of the prerogative[96]. However, under the Fijian Constitution, the relevant question in our opinion would be whether the executive power under s.85 would include such a power independently of s.187, or any legislation made thereunder, and in any event, even if there were such a power, could it be exercised only on advice by the President, or at his discretion. In *R v Home Secretary*[97] the executive power was exercised by the Crown on the advice of the Secretary of State. The Queen herself would be somewhat surprised if she personally was asked to intervene in such a crisis, as the President has done in this case.

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[92] Ibid 99 D-E.
[93] Ibid 100C-E per Lord Reid
[94] Ibid 166
[95] Ibid
[96] Ibid 58H
[97] Op cit

137. In 1381 it was by no means unusual for the 15 year old Richard II to intervene personally in the English Peasants' Revolt led by Wat Tyler. However in England, and in Fiji, the basis of their modern democratic societies has been laid, in England's case, by the development of Conventions which govern the exercise of the Crown's prerogative, and in the case of Fiji, by the provisions of its written constitution.

138. Reference is also made in the judgment of the High Court to *Crown of Leon v The Admiralty Commissioners*[98]; *Laker Airways v The Department of Trade*[99]; *Gairy v The AG for Grenada*[100]; *AG v De Keyser's Royal Hotel*[101]; *CCSU v Minister for Civil Service*[102]; *Reg v Home Secretary ex parte Northumbria Policy Authority*[103]. We are of the view that these cases and other cases referred to in the Respondents' Submissions do not assist in the resolution to the current problem, for substantially the same reasons we have expressed above.

The Doctrine of Necessity

139. In *Republic of Fiji & Anor v Prasad*[104] the Court of Appeal adopted what was said by Haynes P in *Mitchell v DPP*[105] in the Court of Appeal of Grenada as to the circumstances which would justify an intervention by the President in a crisis. These conditions are set out in the judgment of the High Court [3], and are to the following effect:

> "I would lay down the requisite conditions to be that: (i) an imperative necessity must arise because of the existence of exceptional circumstances not provided for in the Constitution, for immediate action to be taken to protect or preserve some vital function to the State; (ii) there must be no other course of action reasonably available; (iii) any such action must be reasonably necessary in the interest of peace, order, and good government; but it must not do more than is necessary or legislate beyond that; (iv) it must not impair the just rights of citizens under the Constitution; (v) it must not be one the sole effect and intention of which is to consolidate or strengthen the revolution as such."

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[98] [1921] 1 KB 595
[99] [1977] 1 QB 643 at 705
[100] Op cit at p.178
[101] Op cit at p.565
[102] (1985) 1 AC 374 at 409-10
[103] [1989] 1 QB 26
[104] [2001] 2 LRC 743
[105] [1986] LRC (Const) 35 at 88-89

140. In the judgment of the High Court it is recorded that the doctrine of necessity for a coup d'état has not figured as a matter of dispute between the parties, and evidence and argument has not been directed to prove that issue[106]. In those circumstances we are of the view that, in light of the manner in which the case was conducted below, it is not possible for the Respondents to justify what was done on 5 December 2006 and following by reference to the doctrine of necessity as established by *Prasad*.[107] Neither party to this appeal sought to contend that *Prasad* is incorrect. One cannot deny the existence of such a principle, but its application to justify what is in effect a military coup is undoubtedly dubious.

141. We should also say that based on the facts which are in evidence or which are notorious, that we can see no room for the application of the *Prasad* principle in this case, apart from its limited application as outlined below to ensure that writs for fresh elections are issued. To this extent we disagree with the decision of the High Court[108]. Nor, in light of the position of the parties at trial, do we consider that it was appropriate to decide the case on that basis, if for no other reason than that evidence was not directed to that issue.

142. In support of their submission that the President had the lawful power to appoint Ministers in the period 5 to 15 January 2007, the Respondents submitted that the ultimate source of the President's power was that of "State necessity" in the time of an emergency or crisis (also described by the Respondents as "ultimate reserve power", a "prerogative power" or "common law necessity"[109]). The Respondents submitted that this power was different from the doctrine of necessity as described by this Court in *Prasad* and that State necessity empowered the President in times of emergency or crisis to act outside the strict terms of the Constitution. They also asserted in the alternative that such a power was an implied power under the Constitution. In effect the Respondents were asserting the existence of an unreviewable emergency power outside the written terms of the Constitution.

143. In our opinion, whilst such a power may exist elsewhere in the world, the framers of the Fiji Constitution intended, by the inclusion of Chapter 14 (Emergency Powers) in

[106] Para [7]
[107] We should note that in *Yabaki*, op cit, the majority were not prepared to consider whether Scott J was correct or not in applying the doctrine of necessity.
[108] Paras [157] and [161]-[163].
[109] See *Reference by HE the Governor-General of Pakistan* PLD (1953) FC 435

the Constitution, to exclude the existence of any such power of State necessity as the source of the power for the President to act as he did in January 2007. In saying this we accept entirely that the doctrine of necessity as described by this Court in *Prasad* may well empower a President to act outside the terms of the Constitution but ultimately only for the purposes of restoring the Constitution. As we have said, the Respondents cannot rely on the doctrine of necessity as described in *Prasad* given the manner in which this case was litigated by the parties in the High Court.

The Facts and Circumstances of this Case

144. The facts as outlined in the judgment of the High Court and as set out above and in the Respondents' Submissions[110], establish that there were a number of private and public exchanges between the Commander of the RFMF on the one hand, and the Prime Minister on the other hand, which were both hostile and acrimonious leading to a series of requests being made to the Government of Mr Qarase by the RFMF which were not acceded to in late October 2006. Ultimately the circumstances as set out in the judgment of the High Court reveal that the RFMF took control of the streets of Suva on 5 December 2006 and the Commander assumed the executive authority of the State. This conduct was not engaged in at the time with the sanction of the President. The Commander of the RFMF then purported to exercise Presidential powers and appoint Dr Senilagakli as a caretaker Prime Minister to advise the dissolution of Parliament.

145. Thereafter the President purported to ratify the actions of the Commander of the RFMF, and went on to appoint the Commander as Interim Prime Minister, and to appoint other lay persons as Ministers, to advise him in what was to be a period of direct presidential rule. He purported to ratify the call for fresh elections and he indicated that legislation in the intervening period, prior to the formation of a democratic Government, was to be made by promulgation.

146. The President thereafter gave directions for absolving the Commander and his men to facilitate their immunity and, purportedly exercising his own deliberative powers as President, promulgated an unconditional grant of immunity on 18 January 2007. The conduct was remarkably similar to the events of 2000 and 2001.

[110] Paras [14]-[29]

147. None of what was done in the circumstances as thus described was, in our opinion, sanctioned by the Fiji Constitution. And if the President has the reserve or prerogative powers which have been relied on, notwithstanding the express terms of the Fiji Constitution, such powers of the President of Fiji do not extend to doing what was done in this particular case, even assuming the powers to have been exercised by the President of Fiji. In this regard we note the somewhat ambivalent submission by the *First Amicus Curiae* that it may be possible for the President to delegate his authority in much the same way as the Queen delegates her authority to her Governors General. In this case there was no prior delegation. It is a case of subsequent ratification and in any event, as the Appellants point out, you cannot delegate power to do what you cannot do yourself[111].

148. Throughout the period when these events occurred Mr Qarase retained and had not lost the confidence of the House of Representatives, so no power on the part of the President, or the Commander of the RFMF on behalf of the President, existed to dismiss the Prime Minister[112].

149. Another matter that requires mention is the reference to the possibility of military intervention. Evidence was given in relation to this and is set out at length in the Respondents' Submissions[113]. The highest the evidence reached was that on 5 December 2006 foreign military intervention was being sought and that an Australian defence helicopter was operating within Fiji's EEZ. Assuming this to have been the case, and that such intervention was being sought by Prime Minister Qarase prior to the assumption of executive power by the Commander, the Commander and the RFMF could not act contrary to the wishes of the Government of the day, unless what they were required to do, or what was being done, was contrary to the Fiji Constitution or the law of Fiji, in which event they should have sought access to the courts.

Relief to be Granted

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[111] *Firth v Staines*[1897] 2QB, 70 at 75; *Boston Deep Sea Fishing v Farnham* [1957] 3 All ER 204 at 208-9

[112] There may have been a question as to the validity of Mr Qarase's election as Prime Minister, bearing in mind that he effectively manoeuvred himself into that position by his participation in the events of 2000/2001. But that question was resolved in *Yabaki*, op cit, by the majority, when they found, in relation to the 2001 elections, that "The elections were duly held despite any constitutional irregularities which may have preceded them".

[113] Paras [18]-[29]

150. At the commencement of the hearing of the appeal the Court asked the appellants' counsel to defer his submissions on the existence and scope of the prerogative, and on justiciability, until his reply, and in chief to address the Court on relief bearing in mind that Mr Qarase appeared to have resigned, that his fidelity to the Constitution had come late in his political life, and it is now more than two years since the events of December 2006. The Court also observed that whatever the constitutionality of the events the subject of these proceedings, as a matter of practical reality one cannot ignore the fact that there has been an interim government in Fiji for more than two years.

151. During the morning of the first day of the appeal hearing counsel for Mr Qarase proferred to the Court an undertaking (the undertaking) which was modified on the second day and again on the third. The undertaking finally given was as follows:

> "Mr first-named appellant Mr Qarase, by his Counsel, undertakes to the Court that, in the event his position is vindicated in this Court by declarations or other relief to the effect that his purported removal as Prime Minister and the purported dissolution of the House of Representatives by the President on 5 January 2007 were, both of them, contrary to the Constitution, unlawful and of no effect, then he will:
>
> (a) immediately advise the President to dissolve the House of Representatives and to issue writs for the election of members of it under subsecs 59(2) and 60(1) of the Constitution;
>
> (b) at the same time, inform the President that he may, in considering the date to be fixed in the proclamation for the dissolution advised by Mr Qarase, take into account as he sees fit the state of affairs concerning the carrying out by the Constituency Boundaries Commission of review required by subsec 53(1) of Constitution and pursuant to Part 2 of the Electoral Act 1998;
>
> (c) draw to the attention of the President his discretionary power under subsec 106(1) of the Constitution, upon or after Mr Qarase ceasing to be Prime Minister, to appoint as Acting Prime Minister, if and as the President may choose, one of the Ministers (will to be so appointed) who was in office on 5th December 2006 (being one who has not resigned as such or as a Member of the House of Representatives), such acting appointment being for the period ending when the President appoints a new Prime Minister pursuant to sec 98 of the Constitution after the election;

(d) thereafter immediately tender his resignation as Prime Minister to the President under para 105(1)(c) of the Constitution; and

(e) thereafter immediately tender his resignation as a Member of the House of Representatives to the Speaker under para 71(1)(a) of the Constitution."

152. In our opinion there are problems with this proposal. It assumes that notwithstanding all that has occurred, albeit unlawfully, including the dissolution of Parliament, the dismissal of Mr Qarase and his Ministers, the pensioning off of a large number of members of the Parliament and the usurpation of the lawful authority of the Parliament for more than two years, the Court should ignore what has in fact occurred. In our opinion at this time the dismissal of the Qarase Government is simply incapable of being disregarded, reversed or undone.

153. Moreover we do not consider that an undertaking to provide advice to the President giving as an option the appointment of one of the former Ministers of Mr Qarase's Government as caretaker Prime Minister would be appropriate in the circumstances. In the events that have occurred, there is a very real question whether Mr Qarase remains the Prime Minister of Fiji, notwithstanding that he has not formally resigned. He did seek a pension describing himself as former Prime Minister. Although we are of the view that his dismissal and the dissolution of Parliament were unlawful, at this point in time it is difficult to ignore the fact that, however unlawful, those events have occurred.[114]

154. The respondents' position was that the Court had a duty in granting any relief to minimise the risk of adverse public consequences, and to take account of the risk of social upheaval and disruption if Mr Qarase was, in effect, restored to power, even for a limited period. The undertaking, it was said, was a recipe for chaos. Yet in response to a question from the Court senior counsel for the respondents said that he had been unable to obtain instructions from the respondents as to the earliest date an election could be held.

155. We are naturally concerned that no responsive answer was given to this enquiry and are unpersuaded that the undertaking itself would lead to chaos. Our concerns are

[114] See *Victoria v Commonwealth & Connor* (1975) 134 CLR 81, 120 per Barwick CJ; *Yabaki* op cit per Davies JA

more those of dealing with the practical reality facing the Court after a period of unconstitutional government.

156. In our opinion the only appropriate course at the present time is for elections to be held that enable Fiji to get a fresh start. We approach our consideration of questions of relief with this in mind.

157. The relevant provisions of the Fiji Constitution appear to proceed on the basis that a Prime Minister will be duly appointed by the President pursuant to s.98 of the Fiji Constitution, will vacate office only as contemplated by s.105, and will be dismissed only pursuant to s.109. None of that has occurred in this case.

158. In order to issue writs for elections the President requires the advice of the Prime Minister under s.60 of the Fiji Constitution. Although on one view the power of the President to appoint a person as a caretaker Prime Minister to advise a dissolution of the Parliament and the issuance of writs for an election only applies where a Prime Minister has been validly dismissed, we are of the view that giving the section a purposive construction in accordance with s.3 of the Fiji Constitution, it can also cover circumstances such as this where the Prime Minister has been forcibly removed from office and no other Prime Minister has been validly appointed in his place.

159. We are fortified in this view by the acceptance by the Appellants that courts have and will take a pragmatic breach approach to repairing the damage after constitutional breaches[115].

160. These principles would at least enable the President on the advice of an Interim Prime Minister to dissolve Parliament and to issue writs for fresh elections under sections 109 and 60 of the Fiji Constitution in circumstances (a) where the Prime Minister had ceased to hold office in circumstances not contemplated by the Fiji Constitution (b) where he had resigned without a successor being appointed and (c) where no provision was made for that eventuality in the Fiji Constitution. To this limited extent, we believe we can take cognizance of the principle of necessity or the *de facto* doctrine for the purposes of these proceedings.

[115] *Re Manitoba Language Rights* (1985) 19 DLR (4th) 1; 1985 1 SCR 721 at 724-5 and 766-8; see also *Yabaki* op.cit.

161. Further support for the President's powers to issue writs for elections under s.60 of the Fiji Constitution is to be found in s.194 dealing with Interpretation. This enables everything necessary or convenient to be done for, or in connection with the performance of his functions under the Fiji Constitution which would include appointing an Interim Prime Minister to enable this to be done[116].

162. Whilst of course we are not in a position to govern the exercise by the President of his discretion, it would seem to us that it would be advisable for the President to overcome the present situation by appointing a distinguished person independent of the parties to this litigation as caretaker Prime Minister, to advise a dissolution of the Parliament, assuming it is not already dissolved, and to direct the issuance of writs for an election under s.60 of the Fiji Constitution. This would enable Fiji to be restored to democratic rule in accordance with the Fiji Constitution, and quash any arguments about the legitimacy of Mr Qarase's Governments or the Republic as currently constituted. In recommending this course, we are also fortified by the public statements of both the President and the Commander that the mandate of the Interim Government was to uphold the Fiji Constitution and that the Interim Government was anticipated to take the people smoothly to the next elections. We urge the parties to these proceedings to co-operate with that process.

Conclusion

163. We make it clear that we are not dealing, in these proceedings, with the validity of any acts of the Interim Government. Consistently with the decision of *Prasad*, that would seem to us to be better dealt with on some subsequent occasion, if necessary. *Prasad*'s case, and the decision of the Privy Council in *Madzimbamuto v Lardner-Burke*[117] recognise that acts done by those actually in control without lawful authority may be recognised as valid or acted upon by the courts, with certain limitations, namely, so far as they are directed to, and are reasonably required for ordinary orderly running of the State; so far as they do not impair the rights of citizens under the lawful Constitution; and so far as they are not intended to, and do not in fact directly help the usurpation.

[116] See also section 194(2) of the Fiji Constitution
[117] [1969] 1 AC 645, 732.

164. Further, as counsel for the appellants observed, there were good reasons why in the proceedings below, the Court was not asked to rule on the power of the President to legislate by Promulgation, namely that it was in not in anyone's interest for the Court to declare that all legislation proclaimed since January 2007 was invalid. The declarations made by the High Court in paragraph 178(iii) to (v) ought not have been made because the issues they deal with were not ultimately before the Court, however until those matters are considered by a Court it must be assumed that the acts of the Interim Government are lawful and valid.

165. We do however propose to grant a declaration to the effect that the dismissal of Mr Qarase and the other Ministers of his Government and the dissolution of Parliament was unlawful and in breach of the Fiji Constitution and that the appointments of the Commander as Prime Minister and his Ministers were not validly made.

166. We also propose to declare that it would be lawful for the President to appoint a person a caretaker Prime Minister, for the purpose of advising a dissolution of the Parliament and to give advice to the President that writs for the election of members of the House of Representatives be issued.

Concluding comments

167. A number of persons, lawyers and otherwise, in Fiji and elsewhere have voiced the point of view that no-one should accept appointment to the Courts of Fiji. It is argued variously that accepting appointment involves an implicit bargain with the military government, that appointments should not be accepted because there are questions about their legality, and that accepting appointments lends legitimacy to the military government and makes it less likely that it will stand down or call elections.

168. The commentators are entitled to their points of view. However another point of view is that so to refuse appointments denies the people of Fiji access to justice and the rule of law[118] and undermines the Constitution. As the High Court in Australia stated in *Attorney-General of the Commonwealth of Australia v The Queen*[119] *"the absolute*

[118] In recommending the preamble to the Constitution the Reeves Report [5.41]explained that the rule of law "is a constitutional concept which today signifies: a preference for law and order in the community as distinct from anarchy and strife; the conduct of the government in accordance with the law; the need for the law to conform to standards of fairness and justice, both in its substantive content and in the procedures for its application in court

[119] (1957) 95 CLR 529 at 540

independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive.."

169. It is not for this Court to delve into this debate except to observe:

(a) Section 118 of the Fiji Constitution provides that judges of the State are independent of the legislature and the executive. In Fiji judges are appointed by the President on the advice of the Judicial Services Commission[120] and not on the advice of any government, military or otherwise.

(b) Some of the commentators have descended into personal attacks, sustained and virulent, against Chief Justice Gates and several other High Court judges. This has not, to the close observation of members of this Court, deflected the Chief Justice and other High Court judges from their judicial oaths, their duties and their endless work in bringing Fiji a fair and functioning judicial system. It must be remembered that a fair and functioning legal system can substantially alleviate the situation of a people who aspire to democratic rule in times of instability.

170. As judges of this Court, we can only express the hope that the people of Fiji will again have the freedom of choice of their Parliamentary Representatives that is enshrined for them in the Fiji Constitution.

Declarations and Orders

The Court hereby:

(1) Declares that:

(a) the assumption of executive authority and the declaration of a State of Emergency by the First Respondent;

(b) the dismissal of the First Appellant from the office of Prime Minister and the appointment of Dr Jona Baravilala Senilagakali as caretaker Prime Minister;

(c) the advice that Parliament be dissolved by Dr Senilagakali;

[120] The Judicial Services Commission is established by section 131 of the Constitution and consists of the Chief Justice, the chairperson of the Public Service Commission and the President of the Fiji Law Society

(d) the order by the First Respondent that the Parliament be dissolved;

(e) the appointment on 5 January 2007 of the First Respondent as Interim Prime Minister and of other persons as his Ministers by President Uluivuda;

(f) the purported Ratification and Validation of the Declaration and Decrees of the Fiji Military Government Decree of 16 January 2007, subsequently renamed as a Promulgation of the Interim Government of the Republic of Fiji, by which decree President Uluivuda purported to validate and confirm the dismissal of the First Appellant as Prime Minister of Fiji, the appointment of Dr Senilagakali as caretaker Prime Minister and the dissolution of Parliament;

were unlawful acts under the Fiji Constitution.

(2) Declares that in the events that have occurred it would be lawful for the President acting pursuant to section 109(2) of the Fiji Constitution, or as a matter of necessity, to appoint a caretaker Prime Minister to advise a dissolution of the Parliament and the issuance of writs for the election of members of the House of Representatives.

Randall Powell
Justice of Appeal

FIJI COURT OF APPEAL

Ian Lloyd
Justice of Appeal

Francis Douglas
Justice of Appeal