

Qarase and Others v Bainimarama and Others

Fiji High Court, Suva
5th-20th March 2008, 9th October 2008

Civil Actions
HBC60.07S
HBC398.07S

Gates A/CJ, Byrne and Pathik JJ

JUDGMENT OF THE COURT

Mr N. Perram SC,)	
Ms R.A. Pepper	)	For the Plaintiffs
Mr Tevita Fa)	
Mr G.O’L Reynolds QC	)	For the 3 rd Defendant
Dr B.R. Kremer	)	[The State]
Dr Gerard McCoy QC)	
Mr Christopher Pryde (Solicitor-General)	)	For the 1 st Defendant
Mr Steven Kwan	)	[Commodore Bainimarama]
	)	2 nd Defendant [The Republic of Fiji
	)	Military Forces]
	)	and 4 th Defendant [The Attorney-
	)	General]
Dr Shaista Shameem)	
[Fiji Human Rights Commission]	)	Amici curiae
Ms S. Colavanua)	

Introduction

[1] This case is about the lawfulness or otherwise of certain acts carried out by the President following military intervention in the government of the State. The defendants maintain that the President retained prerogative powers which enabled him to act in an emergency for the public good. They say those powers enabled him to ratify the acts of the military in the takeover, and ultimately in consequence absolving the participants of unlawfulness. But did such powers allow him to act without specific authority of the Constitution? Were his powers as the plaintiffs argue circumscribed within the confines of the Constitution with regard to the dismissal of the Prime Minister and his Cabinet and the dissolution of Parliament? Were those powers further

confined by the common law by the requisite conditions set out in the case of *Prasad: Republic of Fiji & Ano.v Prasad* [2001] 2 LRC 743.

[2] In the course of the present case, the parties had pleaded and ventilated the issue of executive privilege or public interest immunity. Interest in this issue faded however and played a less significant part in closing submissions. In its stead the pivotal question posed to the court for answer was how far the courts could subject the President's conduct to judicial review. Though there was variance in the submissions as to the extent or scope of the President's powers, it was generally accepted that the President did possess some reserve powers to act in a crisis. The plaintiffs argued that the 5 requirements of *Prasad* went to the existence of those powers as well as to the extent of their exercise. In effect the powers could only arise in a *Prasad*-like state of affairs. The plaintiffs went further and argued that there was no necessity and there should have been an immediate return to the pre 5th December 2006 situation as if the coup had not occurred at all.

[3] In *Prasad* [pp.760, 761], the Court of Appeal had adopted the formulation of the necessity doctrine from the judgment of Haynes P in *Mitchell v DPP* [1986] LRC (Const) 35 at p.88-89 in the Court of Appeal of Grenada:

“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.”

[4] The defendants argued that the President exercised plenary powers well and long recognised by the common law. These reserve powers were not products of *Prasad*-like necessity. They would only be available to a Head of State, a sovereign, or a monarch. They could not be exercised and excused if carried out by a private citizen: *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 at 136-137 per Lord Hodson. The President's prerogative powers, or

ultimate reserve powers, derived from Presidential succession to those of former imperial sovereignty.

[5] When this case came to trial application was made to the court for the proceedings to be covered by television for re-broadcast on a daily basis. The court, unusually, allowed the coverage. The compelling reason for doing so was to enable the public to understand what this case was about and so as to avoid misinformation and misunderstanding on the nature of the dispute laid before the court.

[6] Courts do not make pronouncements on matters of current national interest as the moment takes them. The courts must await the filing of cases in which litigants in pleadings set out the areas in dispute, where specific declarations are sought or issues litigated, and where live questions are posed for answer. In this case as shall be seen later, the nature of the respective cases and the relevant issues appeared to shift. This much would have been apparent to the ardent observer of the trial proceedings.

[7] It is important to mark at the outset that the court has not been asked to canvass the validity of any possible reasons which might excuse the military takeover. In his opening remarks Mr McCoy QC conceded the court was not concerned with whether there was moral, military or philosophical imperative for such action. Nor has the doctrine of necessity for a *coup d'état* figured as a matter of dispute between the parties. Evidence and argument has not been directed to prove that issue. The court has not been asked to approve the acts of the military in taking over the executive, in removing the Prime Minister and the Cabinet, or in ordering the dissolution of Parliament. These were not the matters litigated in this case. Instead the parties wished to have an answer to the question as to whether the President could act in the crisis of December 2006 and January 2007 in the way that he did. An examination of the surrounding and preceding factual circumstances which confronted the President is therefore relevant to a formulation of this answer.

[8] Fiji does not have a separate constitutional court for matters of this kind. Original jurisdiction is granted instead by the Constitution to the High Court “in matters arising under the Constitution or involving its interpretation” [Const. section 120(2)]. The gravity of this issue has compelled this court to constitute itself as a bench of 3 judges as was done in an earlier

constitutional matter which went on to the Privy Council: *AG of Fiji v DPP* [1983] 2 AC 672. However, as can be seen from the opinions of the Board, their lordships throughout in that case were concerned with far less grave issues than those placed before this court.

History of the Proceedings

[9] On 20th February 2007 the plaintiffs filed an originating summons seeking from the court 12 declarations, chief of which was that the removal of the Prime Minister, Cabinet and Ministers by force of arms was unconstitutional and unlawful. Another declaration sought was that the usurpation of executive authority was similarly unconstitutional and unlawful.

[10] The matter was called in court first on 2nd March 2007. Mr Fa asked for a speedy trial, and sought a minor amendment to the summons. The case was adjourned to 30th March 2007 to allow for the affidavit of Mr Qarase to be properly sworn, and for a supplementary affidavit to be prepared.

[11] On 30th March 2007 upon application the media were allowed to make their own tape recording of the proceedings at the interlocutory stage. Further time was allowed to Mr Fa to file what were to be two supplementary affidavits. Mr Fa mentioned difficulties with his client attending court.

[12] On the next mention 11th April 2007 Mr Pryde the Solicitor-General, appearing for the 1st, 2nd and 4th defendants sought time to consider his clients' position on the affidavit of Mr Qarase. He foreshadowed an application to strike out the action. Mr Fa said he was also preparing certain papers. The court asked that preparation of affidavits by the defence continue whilst the plaintiffs' papers were still being finalised.

[13] On 24th April 2007 the court was informed an interlocutory motion had been filed by the defendants though not yet served on the plaintiffs. The motion sought that the proceedings should be continued by writ not originating summons on the ground that the facts were substantially in dispute. It also sought the striking out of material in the affidavits of the plaintiffs as either irrelevant or inadmissible. It claimed that the reliefs claimed were too broad.

The court ordered affidavits in reply and set the hearing of the interlocutory motion to 11th June 2007.

[14] There remained difficulty in achieving the attendance of Mr Qarase at court. Mr Pryde said the Emergency Regulations had been lifted and no order was necessary. The court expressed concern at delay being caused by any impediment, and decided upon an order against all defendants from which the State and the Attorney-General were subsequently absolved. In making the order the court said:

“[2] Unfortunately in Fiji it seems to happen too often that when a restraint is lifted, the application of the restraint is continued by officers who have not been informed of the lifting or for other reasons of caution or zealouslyness.

[3]

[4] I also express the hope that access to justice, and the right of the litigant to attend his case will be accorded to Mr Qarase without the need for any further court intervention. Such an order will also assist in the disposal of this case.”

[15] On 22nd June 2007 the court decided the motion by permitting the continuance of proceedings by originating summons, and allowed the plaintiffs to amend their summons in order to narrow the scope of the court’s focus. The court concluded [Ruling No. 2 para [12]]:

“The tension for the court lies on the one hand, in allowing relevant and fair ventilation of the issues and facts necessary for the decision, and on the other, in keeping the case within timely and manageable proportions for the litigants and for the justice system.”

[16] The court ordered that the parties were to decide which witnesses who had made affidavits were to be made available for cross-examination. No orders were made to exclude parts of the affidavits filed which contained clearly irrelevant and inadmissible material. The court took the same approach to such material as it had at first instance in *Prasad : Prasad v Republic of Fiji and Anor.* [2001] 1 LRC 665 (at pp.672-4), which was to “overlook defects in the papers, which are largely minor, in the greater interests of the justice of the matter.”

[17] After Ruling No. 2 was delivered, counsel and the court in chambers arrived at a timetable for the case thereafter. In that timetable a pre-trial conference was fixed for 11th September 2007 at which it was necessary for overseas counsel who were to conduct the trial to be present. The trial was fixed for 2nd October 2007. Other interlocutory matters were to be fitted in beforehand.

[18] On the day fixed for pre-trial conference, save Senior Counsel for the plaintiffs, all counsel attended. Time was extended for the plaintiffs to file affidavits in reply to those of the defendants. This was partially because of further time having to be allowed to the defendants to file their affidavits which were eventually contained in 11 lever arch files.

[19] The plaintiffs wished to postpone the pre-trial conference till later in the month. The court declined this request [Ruling No. 3 para [5]]. Instead counsel were urged to be in communication with each other to narrow down the contentious issues. The court stated “In a case of this dimension, it is essential that counsel seek to present to the court for determination only those matters which are the true core of their respective cases.”

[20] The plaintiffs sought to postpone the trial also. This was declined on the ground no good reason was given for the postponement. Orders were given for counsel to notify their opponents by certain dates as to which witnesses were required for cross-examination.

[21] Upon application, the court allowed the Attorney-General’s later originating summons Action No. HBC398.07S to be consolidated with the plaintiffs’ summons HBC60.07S [Order 4 Rule 2]. Most of the declarations sought were inter-related with the main issues in the original proceedings. The court was anxious that the parties bring forward the contentious and central issues of the 5th December intervention so that the court could deal with them all at one time.

[22] In the same Ruling [Ruling No. 3, 12th September 2007] the court declined to allow the Proceedings Commissioner of the Fiji Human Rights Commission to intervene pursuant to section 37(2) of the Human Rights Commission Act [No. 18 of 1999]. Instead the court invited the Proceedings Commissioner Dr Shaista Shameem to make submissions and to assist the court as *amicus curiae*. Earlier, at the time when the invitation had been extended to the Fiji Human

Rights Commission, a similar invitation had been extended to the Fiji Law Society. The Society did not take up the court's invitation.

[23] There were 3 summonses to strike out. Mr McCoy and Mr Fa both conceded that proceeding by way of interlocutory summons was not a realistic way in which to have the extent of residual Presidential powers considered and decided. Accordingly first Mr McCoy and then Mr Fa withdrew their respective summonses.

[24] On 1st October 2007 the plaintiffs sought to postpone the trial fixed for 2nd October 2007. Overseas counsel for the other parties were already present in Fiji. The reason given by the plaintiffs was a last minute change of counsel. The date of trial had been settled with counsel and a date of commencement fixed as far back as 22nd June 2007, some 3 months earlier. It appeared that eminent Senior Counsel had not been properly and definitely engaged. The engagement of Senior Counsel had been handled by another law firm, Q.B. Bale and Associates. The court concluded counsel had neither been engaged nor briefed for the trial.

[25] The court was placed in an unnecessary difficulty, but considered it could not simply put off the trial. The trial was postponed by 2 days however to allow the plaintiffs some indulgence [Ruling No. 4, 2nd October 2007].

[26] Mr Perram SC then appeared for the plaintiffs. He opened his case. The court allowed further indulgence to the parties and time for Senior Counsel to narrow down the issues and to agree facts. By consent a statement of claim was directed to be filed and served. The document produced, which was not filed, revealed a remarkably different case than that shown by the original papers. Counsel for the defendants protested. They said it contained material allegations of fact not referred to in Mr Perram's opening.

[27] It appeared that the legal basis of the plaintiffs' claim had not been worked out. This was not Mr Perram's fault, but rather those who in reality had carriage of the plaintiffs' case. The court observed [Ruling No. 5 11th October 2007]:

“[9] It is not appropriate at this late stage when the trial has already commenced and the case opened, for the plaintiffs to seek to alter the allegations made against the other side in a major way.

The courts must insist on fairness, a concept naturally related to orderliness. Knowing in a timely way what is the nature and extent of the complaint made against you, is a cornerstone of our system of justice. The enormity and gravity of the issues demand also that the judges of the court be given more orderly and measured assistance than results from this manner of proceeding.”

[28] Reluctantly the trial had to be postponed again and a fresh timetable arranged. The trial was re-fixed for 4th March 2008. Meanwhile the defendants moved for a separate trial on the justiciability issue. The court accepted this raised a threshold point *Mbasogo v Logo Ltd* [2007] 2 WLR 1062 but declined to order a separate trial.

[29] When the court convened on 4th March 2008 for the commencement of the trial there was difficulty in Mr McCoy QC for the 1st, 2nd and 4th defendants being present because of a Hong Kong Court of Appeal matter unexpectedly brought on. The court declined the application for postponement. However the court insisted on a list of agreed issues for determination pursuant to Order 34 r.2(4) and a list of witnesses to be tendered [Ruling No. 7 4th March 2008].

[30] The trial then proceeded between 5th-20th March 2008.

Background facts

[31] The court was not presented with a set of agreed facts. The facts were to be gathered from a bundle of documents jointly tendered by the defendants without objection and from those factual circumstances not in dispute which can be considered notorious or from documents which are matters of public record. Many of these were mentioned in the plaintiffs’ amended statement of claim and not disputed in the statements of defence. Two witnesses for the plaintiffs gave evidence or at least were tendered for cross-examination and some exhibits and affidavits were tendered through them. The voluminous sets of affidavits of other witnesses filed were not tendered and did not form part of the evidence for consideration.

[32] On 17th March 2006 the incumbent President, Ratu Josefa Iloilovatu Uluivuda, was re-appointed for a further term of 5 years as President of Fiji. His Excellency’s appointment was made in conformity with section 90 of the Constitution. Throughout the circumstances of this case the President remained constitutionally in office.

[33] Following a General Election in May 2006 the plaintiff Mr Qarase was re-elected to Parliament and was re-appointed as Prime Minister. He led a government comprising 36 members of his own party, the SDL, and two independent members, thereby commanding the confidence of the House of Representatives, with a majority of 38 members in a 71 seat House.

[34] For the previous 18 months or so onwards prior to 5th December 2006 the military and the Government of the day were descending into a relationship of increasing ill will and conflict. Matters grew worse following the formation of the new Government in May 2006. Public and private exchanges between the Commander of the RFMF on the one hand and the Prime Minister on the other were both hostile and acrimonious.

[35] In late October 2006 the RFMF issued a confidential paper with a series of requests to the Government of Mr Qarase.

[36] In the paper the RFMF requested a “public declaration by the Government that the events of 2000 was illegal.” There had been a civilian coup in Fiji in 2000. The military wanted the Ministry of Reconciliation to undertake an education programme to inform the public of this fact, and the removal from public office of all those who were involved and implicated. It wanted this education so that the people would respect the rule of law and understand the standard of leadership required of future leaders.

[37] The army wanted the withdrawal of 3 bills, the Reconciliation Tolerance and Unity Bill, the Qoliqoli Bill and the Land Tribunal Bill. It stated the bills were unconstitutional, controversial and extremist in nature, and would “not bring forth peace and stability that we seek as a young nation.” It was said the bill had the potential to create conflicts in the indigenous race. The bills were “deviously constructed to capture the minds of the Fijians that it is ideal for them. In reality, it is a quest to buy votes for political expediency and supremacy.”

[38] It wanted the investigation against the Commander completely withdrawn. The investigations by the Commissioner of Police were viewed as an attempt to weaken the institution, and continuation of the May 19th 2000 plot by rebels in turn continued by the SDL Government.

[39] It sought the termination of the contract of the Commissioner of Police, Mr Andrew Hughes. It claimed Mr Hughes had compromised his position under political pressure. Foreign influences had been at work. “His office is no longer neutral and impartial in handling state affairs. Hughes unfortunately played a part” it said “in the strategic plan to remove the Commander RFMF in his absence.”

[40] It alleged that Hughes was “the front of the Australian Government in its ground strategy of neo-colonialism, weakening the RFMF and (had) the potential to cause instability in Fiji.” The RFMF sought his immediate removal, so as to restore trust and co-operation between the RFMF and the Police.

[41] It sought reconsideration of the arming of the Police Tactical Response Unit. This was considered an unhealthy development where Rules of Engagement would not be clear. It was stated this was another instance of foreign influence, along with Australian police uniforms, all said to be part of the Australian strategy of total domination over the country.

[42] The Army said there was to be no foreign military or police intervention, and pointed out that it was a clear violation of independence and sovereignty. The RFMF was intact and strong. The Foreign Minister’s statement adopting the Biketawa Declaration was an option neither advised nor acceptable. It was rather a catalyst to instability.

[43] The RFMF sought the removal of the commercial arm of the Native Land Trust Board. The NLTB must focus on its core functions and secure the medium and long term stability of land leases.

[44] There were long standing issues the RFMF had with the Ministry of Home Affairs which were neither responded to nor addressed. These concerned force structure, non-payment of allowances [JE8], Ration allowances, promotions, and the development of operational relationships with other forces.

[45] Finally the RFMF stated the greatest threat to Fiji’s national and economic security was “lack of good governance under the present cloak of democracy.” It was quite wrong to blame long standing economic woes on the military’s stand off with Government. “Under that cloak,

corruption and abuse of office, economic downturn and uncontrolled debts, foreign influence and discriminatory policies are becoming the order of the day. These have slowly destroyed the nation and enslaved the people and the country to a poor state.”

[46] On Friday 27th October 2006 the Prime Minister indicated the Government would not resign. On 3rd November 2006 the Commissioner of Police announced that the Commander would be investigated for sedition.

[47] Efforts were made through the Great Council of Chiefs to try to resolve the impasse. A meeting was also organized to take place in Wellington, New Zealand on 29th November 2006 between the Prime Minister and the Commander. They met as arranged. On Saturday 2nd December 2006 a meeting took place in Suva between the President, the Vice-President, the Commander, and later between the Vice-President and the Prime Minister. Meanwhile on the same day Foreign Ministers of the Pacific Islands Forum met in Sydney.

[48] In the early evening of Monday 4th December 2006 the Prime Minister came by car to attend the President. Eventually he came away from the front gates of Government House without seeing him. On the Prime Minister’s view he was treated discourteously by the soldiers on duty.

[49] By the morning of Tuesday 5th December 2006 the RFMF had taken control of the streets of Suva. The Commander assumed executive authority of the State. Later that evening an Extraordinary Fiji Gazette notice was issued in which the Commander stated that:

“At approximately 1800 hours tonight Tuesday 5th December 2006 I have with much reluctance assumed executive authority of the country and henceforth declared a State of Emergency.”

[50] The Gazette notice stated “The primary objective of the Interim Military Government is to take the country towards good governance, rid us of corruption and bad practices and at the same time provide the well being of Fiji and its people at the earliest possible opportunity.” The normal day to day affairs of the country were to continue as usual.

[51] On the same evening the Commander gave an address to the nation concerning the Public Declaration of Military Takeover. This was put in evidence by the plaintiff [Exhibit P2]. In it he referred to the deteriorating state of Fiji and that the Government was “unable to make decisions to (save) our people from destruction.”

[52] He explained about the security situation, the checkpoints, patrols, and that police and army would work together to ensure everybody’s security. He went on to refer to the Government Ministers and said:

“All the Ministers from the last government have been given as from tomorrow one month to vacate their government quarters and return all government property in their possession. They will be paid a severance pay of one months pay. There is no intention on the Military to arrest these Ministers. We only ask that they live their daily lives and not interfere in the process that is now taking place.”

[53] He said:

“RFMF over the years have been raising security concerns with the Government, in particular the introduction of controversial bills, and policies that have divided the nation now and will have very serious consequences to our future generations.”

[54] He continued:

“These concerns have been conveyed to the Prime Minister in all fairness and sincerity with the country’s interest at heart.

Apparently, all RFMF concerns were never accepted with true spirit. All my efforts to the government were to no avail. Instead, they turned their attention on the RFMF itself. Despite my advice, they tried to remove me and create dissension within the ranks of the RFMF; the institution that stood up and redirected the Nation from the path of doom that the Nation was being led to in 2000. Qarase has already conducted a ‘silent coup’ through bribery, corruption and introduction of controversial Bill.”

[55] He said it was clear to him that the “Government has no intention of solving this crisis.” On his visits to the President over the preceding days His Excellency had expressed concern over the crisis point reached. The Commander referred to Presidential powers to dismiss a Prime Minister under section 109(1) of the Constitution in the President’s own judgment, should exceptional circumstances exist. He then said he was stepping into the President’s shoes since His Excellency appeared to have been blocked from exercising his constitutional powers by those surrounding him or who were putting undue pressure on him.

[56] He explained:

“This is indeed an unusual and exceptional situation, which was not envisaged by the framers of the Constitution and which requires special steps to preserve the Constitution and maintain the integrity of the Nation-State of Fiji.”

[57] He stated he would now dismiss the Prime Minister and appoint Dr Jona Baravilala Senilagakali as the Caretaker Prime Minister to advise the dissolution of Parliament, “Following the dissolution of Parliament”, he said “an announcement will be made regarding the formation of a caretaker or interim Government to steer Fiji. After a proper census and electoral system is in place the caretaker Government will facilitate democratic national elections as provided for under our Constitution.”

[58] He said the takeover would not be permanent. “When the country is stable and the Electoral Rolls and other machineries of Elections have been properly reviewed and amended, elections will be held. We trust that the new government will lead us into peace and prosperity and mend the ever widening racial divide that currently besets our multicultural nation.”

[59] Before concluding he gave an assurance that the rights of all citizens of Fiji were protected and that they would respect the international conventions on Human Rights and humanitarian law. He added:

“I plead to the international community to first learn and understand the situation here in Fiji before you take action.”

[60] Mr Senilagakali duly signed an advice to the President for dissolution of Parliament on the 6th December 2006. The self-proclaimed President, Commodore Bainimarama acknowledged the advice and gave the order for dissolution.

[61] In his pleadings Mr Qarase stated “The next morning the Prime Minister escaped from Suva...” The defendants claim he left Suva that day, 6th December 2006, only to return to Suva on 4th October 2007. In his evidence Mr Qarase said he returned on 1st September 2007.

[62] On 22nd December 2006 the Bose Levu Vakaturaga, or Great Council of Chiefs, met in Suva and issued a statement. The Great Council has no parliamentary functions. But in addition to its Fijian Affairs Act functions the Great Council, under section 90 of the Constitution following consultation with the Prime Minister, is the appointing body for the office of President, Fiji’s Head of State.

[63] In its statement it advised the President “to continue to personally exercise executive authority in accordance with the Constitution of the Republic of the Fiji Islands in his official capacity.”

[64] The Great Council recognised that in view of the action of the military the Government of Mr Qarase had been rendered ineffective and incapable of discharging its constitutional responsibilities. It said:

“In the circumstances, there being no other viable alternative, the GCC regretfully advises the Prime Minister, Laisenia Qarase to tender his resignation to the President, Ratu Josefa Iloilo Uluivuda.”

[65] The Great Council recommended the President “being the repository of executive authority” to appoint an interim administration and to return Fiji to early elections within a stipulated time frame. It wanted the key stakeholders to enter urgent discussions in good faith to work constructively towards finding a legal solution to restore democracy. It urged negotiations with a view to an Accord to facilitate the resignation of the legal government and for a road map to take Fiji forward.

[66] The crucial premise, it referred to, was “the need to protect and preserve the public interest.” It made recommendations for the appointment of an Interim Government of National Unity, and a Privy Council, and foreshadowed the passing of necessary decrees.

[67] The Great Council urged the Government to prepare an appropriate and fair formula for compensating all MPs who were members of both Houses of Parliament. It suggested a Commission of Inquiry to investigate credible allegations of corruption and a working party “to review the elements that contributed to the current political crisis.”

[68] On 4th January 2007 Mr Senilagakali tendered his resignation as Caretaker Prime Minister to the Commander. In the afternoon of the same day the Commander purported to hand back executive power to the President and made the following address to the nation:

“Fellow citizens

Following the Republic of Fiji Military Forces intervention in our country’s Government, Executive and public institutions and my stepping into the shoes of the President Tui Vuda Ratu Josefa Iloilo I now return all executive authority to His Excellency.

As I stated on 5 December 2006 the actions of the RFMF were precipitated by the impasse between the SDL Government and the RFMF. The RFMF through out this impasse had wanted to resolve the matter constitutionally, legally and expeditiously.

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 section 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 is permitted. This departure or extra constitutional steps 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.

Given the circumstances prevailing at that time I had exercised those extra constitutional steps. Notwithstanding the legal ability to carry out what I as Commander and the RFMF did, this course of action was undertaken with great reluctance but it was necessary to steer our beloved nation into peace, stability, a just solution and to above all preserve our Constitution.

It was also essential to maintain the sovereignty and territorial integrity of the nation-state of Fiji.

I would like to now set out some of the key reasons and issues that created and led to the impasse:

1. The persistent and deliberate involvement of persons supporting the unlawful takeover of Government in 2000 in the Qarase led SDL Government. This includes the Governments after the 2001 and 2006 Elections;
2. The double speak of the SDL Government. On the one hand saying that they supported the law but on the other freeing or facilitating the freeing of coup convicts on extra-mural and/or compulsory supervision orders with unsubstantial reasoning. These actions made a mockery of our justice system and fundamentally undermined the integrity of our judiciary and the rule of law;
3. The continued appointment of those tainted by the events of 2000 to diplomatic and senior government positions;
4. The failure of the Police Force to investigate all the 'shadowy figures' behind the 2000 coup including Qarase who had requested me to remove the President. Despite this request the Police Force were determined to instead investigate me, my officers and the RFMF as a whole;
5. The politicization of the Prison services;
6. The regular visits by Government officials to Korovou to Prison to meet prisoners who supported the illegal take over in 2000 and the mutiny. Some of these prisoners are accorded special treatment in prison and referred to as 'cultural advisors' to the prisoners.
7. The racist and inciteful speeches made by SDL parliamentarians which were never checked by Qarase. These speeches caused fear and tension in minority communities and our society as a whole. We also noted with concern the increased incidents of sacrilege aimed at minorities;
8. The repeated acts and incidents of Government and civil service corruption including SDL politicians. Those involved continued to be members of the cabinet, those holding senior Government positions and civil servants;
9. The growing cycle of corruption, clientalism and cronyism also involved the extremely unhealthy influence and involvement of certain businessmen and women in the governmental decision making processes;
10. The failure of the Qarase Government to pass any anti-corruption legislation in the past 5 years despite the growing and repeated acts of corruption which has undermined the very foundations of our civil service and institutions and the economy;
11. The determination by the Qarase led Government to pass acts of Parliament which would have inevitably increased indigenous

Fijian nationalism, led to dispute between provinces – indigenous Fijians themselves, created ethnic tension, undermined the rule of law and the independence of our constitutional offices including the Judiciary and compromised the right to fair hearing and representation. I refer in particular to the Reconciliation, Qoliqoli and Land Claims Tribunal Bills;

12. The exclusion of the RFMF from the National Security Council but repeated inclusion of the Police Force which indicated a refusal to hear the Military point of view on security and governance issues;

13. The manipulation of the criminal justice system for political reasons. The investigations against me and the RFMF arose from a National Security Council decision and not from the independent decision of the Commissioner of Police himself;

14. The threat of and references to the use of regional forces and intervention by the Qarase Government to try and influence the resolution of our own internal problems;

15. The threat of an Australian invasion as shown by the inciteful and hostile remarks made by Alexander Downer, the unexplained presence of an Australian Defense Force Helicopter within Fiji's EEZ and the frequent references to the Biketawa declaration made this threat a real one. Recent revelations confirm this position;

16. The consideration of foreign intervention was viewed to be a serious threat to Fiji's sovereignty and independence. It will always be resisted. Under section 104 of the Constitution the Prime Minister is to keep the President informed generally about issues relating to the governance of Fiji. He was never informed of this foreign presence;

17. On the Biketawa declaration itself, the declaration states that the Government:

- Needs to be committed to good governance exercising authority in a manner that is open, transparent, accountable, participatory, consultative and decisive but fair and equitable;

- Ensure equal rights for all citizens regardless of gender, race, colour, creed or political belief; and,

- Must uphold the democratic processes and institutions which reflect national and local circumstances, including the rule of law and the independence of the judiciary, just and honest government.

The Qarase Government had failed to adhere to many of these agreed principles of governance;

18. The repeated and persistent attempts to change the command structure at the RFMF since 2000 and the rewarding of those who had made those attempts;

19. Most seriously, the large Government deficit, the failure of the SDL Government to cut spending, the failure to revive the sugar industry, the failure to solve the land problem, the racist and selective education policies, the rapidly deteriorating public health services, the escalating poverty, the hike in interest rates, the lack

of employment opportunities given the growing number of school leavers, the almost inevitable devaluation of the Fiji dollar, the neglect to increase our exports vis a vis our growing reliance on imports creating a critical balance of payments situation and the overall serious economic situation created by bad governance, mismanagement, corruption, disrespect for the rule of law and the undermining of democratic values since 2000;

20. The manner in which the 2006 elections were conducted was characterized with discrepancies. The fact that no census was conducted before the elections meant that serious breaches of the Constitution occurred, the fact that there were so many additional ballot papers printed for no good reason and the fact that unexplained procedures were adopted;

21. The fleeing from Suva of the Prime Minister and his Cabinet and although it was only for a couple of days instilled a lack of confidence in the Government and negated claims that the Government was in fact in charge;

22. The untimely absence of leave of the Commissioner of Police at a crucial juncture in our country and his seemingly political bias was of grave concern;

23. Qarase and certain members of his Cabinet sought to incite certain members of our community to rebel against the RFMF and thereby did not have regard for the welfare and security of all our citizens and compromised national security;

24. On the morning of 5 December the President asked Qarase to come and see him and he refused to do so simply because he was fearful that the President would have asked him to resign or dismissed him. Clearly Qarase as Prime Minister abdicated his responsibilities by refusing to listen to the President who is the Head of the State;

25. The President was prevented by some including the Vice President from exercising his constitutional powers. We were as a nation in a state of limbo.

These events and circumstances ladies and gentlemen demonstrate that the actions and inactions of the SDL Government and the circumstances that they had created undermined the core values and the very spirit of democracy, constitutionalism, the rule of law, a fair, equitable, just and non-corrupt government and society.

The RFMF as stated previously believes in the rule of law and has and shall adhere to the Constitution.

Indeed it not only adheres to the rule of law and the Constitution but more importantly believes in the adherence to the spirit of the law and the Constitution.

I would like to thank my officers and all members of the RFMF who have shown true leadership, fortitude and determination.

They have sacrificed much to safeguard our nation and our constitution. They have been a source of strength and resolve.

I would also like to thank all citizens of this beloved country of ours who have remained calm and dealt with the circumstances with fortitude. They have indeed shown us tremendous support and provided much strength.

I thank Dr. Jona Senilagakali who was appointed as Caretaker Prime minister at a time when it was probably not popular to do so. He has this morning tendered in his resignation.

I would like to thank the Tui Vuda who has been tremendously supportive of our actions and continues to support us. We trust his wisdom and believe that he will exercise his Executive Power with resolve.

Given the legal, constitutional and indeed defensible basis of our necessary actions I appeal to all our citizens including the now former Prime Minister Qarase, our neighbors and the international community, to support and work together for the betterment of our beloved nation and its people.

I now hand over executive authority to the President.

God bless Fiji.”

[69] The President subsequently addressed the nation and said:

“Good Citizens of our beloved Fiji Islands.

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 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.

Therefore, I fully endorse the actions of the Commander of the RFMF and the RFMF in acting in the interest of the nation and most importantly in upholding the Constitution.

I thank him and his men and women for having the courage to step in.

I also thank him and the RFMF for handing back all the executive powers.

I thank the civil service, the Police, the Judiciary and other governmental institutions in remaining faithfully at their posts.

I thank the good citizens of this beloved country of ours who have gone about their ordinary business.

It is now necessary to move on, look ahead and to take steps to enforce a genuine democracy.

I look forward to working with the overseas governments, international organizations and our regional neighbours and appeal to them all to recognize our need to find a Fiji based solution while upholding the Constitution.

I will therefore, shortly after consultation with capable people, announce an Interim Government to take us smoothly to the next elections.

The mandate of the Interim Government will be as follows:-

- To continue to uphold the Constitution;
- Where necessary facilitate all legal protection and immunity, both criminal and civil, to the Commander, Officers and all members of the RFMF;
- Give effect to the actions of the RFMF including the respective suspensions, dismissals and temporary removal from office of civil servants, Chief Executive Officer's, those appointed by the Judicial Services and Constitutional Services Commissions, the Judiciary and Government appointed Board members;
- Steady our economy through sustained economic growth and correct the economic mismanagement of the past six years;
- Lift up the living standards of the growing poor and underprivileged of our country;

- Restructure the Native Land Trust Board to ensure more benefits flow to the ordinary indigenous Fijians;
- Eradicate systemic corruption by including the setting up of an Anti-Corruption Unit through the Attorney-General's Office and set new standards of Governmental and institutional transparency;
- Improve our relations with our neighbours and the international community;
- Take our country to democratic elections after an advanced electoral office and systems are in place and the political and economic conditions are conducive to the holding of such elections;
- Immediately as practicable introduce a Code of Conduct and Freedom of Information provisions; and
- Give paramountcy to national security and territorial integrity of Fiji.

I thank each and every one of you for your patience and forbearing. I urge all to strive for a better Fiji.

God bless Fiji.”

[70] On 5th January 2007 the President appointed the Commander as Interim Prime Minister. From 8th January 2007 onwards 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 pursuant to section 103(2) of the Constitution.

The questions posed

[71] In closing submissions the plaintiffs' counsel said the remaining questions for the court were:

- “(a) whether the existence and/or exercise by the President of a power to appoint Ministers in the period 5 January to 15 January 2007 is amenable to judicial review, and, if so, are the events which occurred in December 2006 relevant to the determination of that issue?

- (b) should the Court decline, as a matter of discretion, to grant any or all of the relief sought by the Plaintiffs?
- (c) if the issues in question (a) are amenable to judicial review, what is the Court's determination?"

[72] These did not exactly dovetail in with the declarations sought in the plaintiffs' amended originating summons of 26th June 2007.

The acts of the President

[73] The President who remained in office throughout ratified the acts of the Commander in dismissing the Prime Minister. He also ratified the dismissal of the Cabinet and the Ministers of State, and he ratified the appointment of a Caretaker Prime Minister, and the dissolution of Parliament.

[74] He went on to appoint the Commander the Interim Prime Minister and to appoint other lay persons Ministers to advise him in what was to be a period of direct presidential rule. He ratified the call for fresh elections. Legislation in the intervening period prior to the formation of a democratic government was to be made by Promulgation.

[75] The President gave directions for the absolving of the Commander and his men and to facilitate their immunity. He said he wanted to see enforced a genuine democracy and to take the country to elections with an advanced electoral system at the right time. He intended to have set up an Anti-corruption Unit. But first paramountcy was to be given to national security. All of this was contained in his address to the nation on 4th January 2007.

[76] Exercising his own deliberative powers the President promulgated an unconditional grant of immunity on 18th January 2007. It was to extend to the Commander, the Caretaker Prime Minister Dr Senilagakali, all officers and members of the RFMF and the other branches of the disciplined services. It referred to the reluctant intervention, the Declaration of an Emergency, the holding of office as Acting President, and other acts. The President stated "the aforesaid actions and events have my full and complete concurrence and approval."

[77] His Excellency continued:

“It is my sincere and firm deliberative belief that the best and wisest course, in the interest of restoring law and order, peace, harmony and good government so that our beloved Nation will become stable and grow prosperous, is by the reserve powers of the Constitution inherent in the President and by the constitutional law and common law of Fiji and by all other laws so appertaining to grant FULL AND UNCONDITIONAL IMMUNITY from all criminal or civil or legal or military disciplinary or professional proceedings or consequences, instituted or to be instituted whatsoever, against or in relation to any person or persons who by his or her or their agreement, acts or omissions, caused or facilitated or confederated in or incited or conspired or aided or abetted or counseled or procured or in any way (whether before 5th December 2006 or on it and up until 5th January 2007) to intervene in, oust and remove from office the then legislative and executive organs of Government of the Fiji Islands, Its Prime Minister, Ministers, Officials and also of other persons whose office or employment were not conducive to the public interest of the beloved people of Fiji.”

[78] The President then granted, irrevocably, full and unconditional immunity from prosecution, civil liability and other proceedings. The State was empowered to make ex gratia payments by way of compensation to any person proved to have suffered any unlawful injury. The Promulgation was stated to be “an entrenched provision in the law of Fiji, incapable of repeal or abrogation.”

Nature of Prerogative Powers

[79] In ancient times the Kings of England reigned as absolute monarchs. Over the centuries that power underwent democratic change. Magna Carta and the Bill of Rights set parameters to royal power as indeed did other statutes passed by Parliament with the royal assent. Power ebbed towards Parliament and the King’s ministers.

[80] With the evolution of a constitutional monarchy there remained nonetheless certain powers which had long reposed with the sovereign. These prerogative powers were said by Dicey to be “the residue of discretionary or arbitrary authority which at any given time is left in the hands of the Crown” [Law of the Constitution 10th Edit p.424].

[81] Some of the powers were exercised in the sovereign's name and some by the sovereign alone. They included the power to wage foreign wars, to make treaties, to defend the realm, to grant honours, to preserve the State from civil strife, and to act in an emergency to ensure the well-being and safety of the people.

[82] The court has been referred to a number of authorities which demonstrate the nature and extent of these last two prerogatives. In *Bhagat Singh v The King-Emperor* (1931) LR 58 1A 169 following civil opposition in Lahore, the Governor-General of India exercised powers conferred upon him by s.72 of the Government of India Act 1915 to make and promulgate an ordinance. The purpose of the ordinance was to transfer one of the cases arising from the disturbances to a special tribunal consisting of 3 High Court judges, which was accorded special powers. The petitioners argued that there was no emergency, that the promulgation was not one for peace and good governance, and that it exceeded legislative powers under the Act.

[83] Giving the opinion of the Privy Council, Viscount Dunedin said [at pp.171-2]:

“ The petitioners ask this Board to find that a state of emergency did not exist. That raises directly the question who is to be the judge of whether a state of emergency exists. A state of emergency is something that does not permit of any exact definition : It connotes a state of matters calling for drastic action, which is to be judged as such by some one. It is more than obvious that that some one must be the Governor-General, and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action, and that action is prescribed to be taken by the Governor-General. It is he alone who can promulgate the Ordinance.”

[84] He went on [p.172]:

“ It was next said that the Ordinance did not conduce to the peace and good government of British India. The same remark applies. The Governor-General is also the judge of that. The power given by s.72 is an absolute power, without any limits prescribed, except only that it cannot do what the Indian Legislature would be unable to do, although it is made clear that it is only to be used in extreme cases of necessity where the good government of India demands it.”

[85] With regard to the reasons for the action chosen by His Excellency, Viscount Dunedin said [at p.173]:

“ Their Lordships must add that, although the Governor-General thought fit to expound the reasons which induced him to promulgate this ordinance, this was not in their Lordships’ opinion in any way incumbent on him as a matter of law.”

[86] *Bhagat Singh* was followed in *King-Emperor v Benoari Lal Sarma* [1945] AC 14, where the court said:

“whether an emergency existed at the time when an ordinance is made and promulgated is a matter of which the Governor-General is the sole judge”

[see too *Public Prosecutor v Ooi Kee Saik* (1971) 2 MLJ 108].

[87] The court allowed to the Governor-General the possibility of making provisions “which could be instantly applied if the danger increased”. His Excellency was not to be denied the exercise of any foresight in the protection of the State : *Shreekant Pandurang v Emperor* I.L.R. [1943] B. 331, 351 per Beaumont CJ; *Burmah Oil* (per Lord Reid at p.100).

[88] In *Benoari Lal Sarma*, following the bombing of Rangoon and the movement of Japanese Forces into Burma, the Governor-General of India considered it a sufficient emergency to provide for the setting up of special criminal courts with restrictions on appeals. The ordinance promulgated was found by the Board to be intra vires the Governor-General’s powers.

[89] If it is suggested, as here, that there was no or no sufficient emergency that fact must be proved by the party making such allegation : *Ningkan v Government of Malaysia* [1970] AC 379 at p.390. In that case the plaintiff as Chief Minister of the State of Sarawak had not been defeated on the floor of the Council Negri in either a Bill or a motion of no confidence. Instead the Governor had acted on a signed letter, and asked the Chief Minister to tender his resignation. When the Chief Minister refused to do so, the Governor published his decision that the plaintiff and other members of the Supreme Council had ceased to hold office. He also announced the appointment of a successor.

[90] The deposed Chief Minister contested the matter in court and was at first successful in being reinstated. But he was not thereafter prepared to submit himself to a non confidence vote. The Head of the Malaysian Federation, the Yang di-Pertuan Agong or King, then proclaimed a state of emergency throughout the State of Sarawak. The Board of the Privy Council, comprising Lords Macdermot, Hodson, Upjohn, Donovan and Pearson, said (at p.388): “There can be no doubt that this proclamation was directed to the constitutional impasse which had come about in Sarawak.”

[91] Emergency legislation was then passed by the Federal Parliament directed at the situation in Sarawak. The statutes had a limited life span of 6 months beyond the termination of the emergency. The Board noted (p.388):

“But it was not disputed that they involved a modification, albeit temporary, of the 1963 Constitution of Sarawak and would have been beyond the powers of the Federal Parliament before the declaration of emergency.”

[92] “Emergency” within that constitutional article was held by the Board (at p.390) to be one:

“not only grave but such as to threaten the security or economic life of the Federation or any part of it, the natural meaning of the word itself is capable of covering a very wide range of situations and occurrences, including such diverse events as wars, famines, earthquakes, floods, epidemics and the collapse of civil government.”

Viscount Radcliffe considered the emergency prerogative might also be invoked in the circumstances of “Riot, Pestilence and Conflagration” (*Burmah Oil* at p.115).

[93] Of the decisions of the Head of State and those of his ministers, the Board observed (at p.391):

“It is not for their Lordships to criticise or comment upon the wisdom or expediency of the steps taken by the Government of Malaysia in dealing with the constitutional situation which had occurred in Sarawak, or to inquire whether that situation could itself have been avoided by a different approach.”

[94] The Board found that it would have been within the contemplation of the parties to the Malaysia Agreement that powers might be needed to meet such a situation including a power to modify at any rate temporarily the Constitution of that part of the Federation which was principally affected (p.393). Legislative change therefore, even constitutional amendment, might be necessary in addressing a governmental impasse. That would be a further means at the disposal of a Head of State, in addition to the power to override a provision of the constitution in a grave situation.

[95] In *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 the claimant company sought compensation for the wartime demolition of its installations near Rangoon. The General Officer commanding in Burma ordered the destruction of oil wells, pipelines, stock, and equipment to deny to the invading Japanese the use of such valuable supplies for its military.

[96] The demolitions were found to have been carried out lawfully though without statutory authority. They were acts done in exercise of the royal prerogative. Nonetheless the damage to the property did not occur in the course of actually fighting the enemy. If it had, it would not have given rise to a claim for compensation. But since those anticipatory destructions took place prior to the clash of battle and whilst the enemy was still approaching, the oil company retained a right to claim compensation.

[97] The Crown must be free to take whatever pro-active action it considers necessary for the protection of the State. That was its prerogative right (per Lord Upjohn at p.166). Its power to act is not to be confined to cases of imminent danger and necessity. In line with earlier authority Lord Upjohn said (p.166):

“ 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.”

[98] In *Crown of Leon (Owners) v Admiralty Commissioners* [1921] 1 KB 595 a Proclamation was issued by the King prior to the declaration of war. The proclamation authorised the requisitioning of a British ship to carry a cargo of iron ore to Philadelphia to be made into munitions in readiness for war. It was contended that the prerogative had been stretched and

exercised illegally. The court found otherwise and declared the action taken both necessary and proper. It was an example of the exercise of the royal prerogative in England being used to legislate in an emergency without resort to the usual constitutional mechanism of proceeding through Parliament.

[99] In *Burmah Oil* (pp.117-8) Viscount Radcliffe cited passages from John Locke's treatise "The End of Civil Government [Chapter 14 "Of Prerogative" 1964 edit.]:

"For the legislators not being able to foresee and provide by laws for all that may be useful to the community, the executor of the laws, having the power in his hands, has by the common law of Nature a right to make use of it for the good of the society, in many cases where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it; nay, many things there are which the law can by no means provide for, and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require;"

[100] And at p.118:

"This power to act according to discretion for the public good, without the prescription of the law and sometimes even against it, is that which is called prerogative. . ."

The essence of a prerogative power, if one follows out Locke's thought, is not merely to administer the existing law—there is no need for any prerogative to execute the law—but to act for the public good, where there is no law, or even to dispense with or override the law where the ultimate preservation of society is in question."

[101] Locke's work was described by Viscount Radcliffe as "profoundly influential, not only with the Whigs who dominated so much of English politics for 150 years after 1688 but also with the founders of the American Constitution." It was also relied on by Blackstone in his *Commentaries*, Vol. 1, 8th Ed. (1778) p.252. Lord Denning in *Laker Airways v Dept. of Trade* [1977] 1 QB 643 at p.705 similarly made respectful reference to Locke, and stated that the prerogative was a discretionary power to be exercised by the executive government for the public good in cases where the law had made no provision.

[102] In *CCSU v Minister for Civil Service* [1985] 1 AC 374 (the *GCHQ* case) at pp.409-10, Lord Diplock commented on the prerogative powers:

“there have unquestionably survived into the present day a residue of miscellaneous fields of law in which the executive government retains decision making powers that are not dependent upon my statutory authority..”

They extended to “matters so vital to the survival and welfare of the nation” (p.410).

[103] Prerogative powers are not immutable, and coercive orders for instance, can now be made against the State for breaches of an individual’s Constitutional rights : *Gairy v AG of Grenada* [2002] 1 AC 167 at p. 178. In *A-G v De Keyser’s Royal Hotel* [1920] AC 508 at p.565 Lord Sumner noted that “the scope both of emergencies and of acts to be justified by emergency extends, and the prerogative adjusts itself to new discoveries..” As counsel put it “The prerogative, being residual and inherent, consists of rubric or category powers that are capable of adjusting to new situations.”

[104] Yesterday’s emergencies may not repeat themselves today, and today’s emergencies may be beyond the foresight of the most imaginative parliamentary draftsmen. One cannot expect statute law to cover every eventuality of government. We will return to the question of constitutional acknowledgment of the prerogative powers further on. However Lord Parmoor in *De Keyser* at p. 567 observed:

“The Royal Prerogative connotes a discretionary authority or privilege, exercisable by the Crown, or the Executive, which is not derived from Parliament, and is not subject to statutory control. This authority or privilege is in itself a part of the common law, not to be exercised arbitrarily,”

[105] A further extent of the Royal Prerogative was recognised in *Reg v Home Secretary Ex parte Northumbria Police Authority* [1989] 1 QB 26. The Home Secretary had overridden the wishes of a regional Police authority to ensure the supply to all police forces of modern equipment to deal with incidents of serious public disorder. Nourse LJ recognised the existence of a duty or prerogative of protection. He said at p.58A:

“The wider prerogative must have extended as much to unlawful acts within the realm as to the menaces of a foreign power. There is no historical or other basis for denying to the war prerogative a sister prerogative of keeping the peace within the realm.

I have already expressed the view that the scarcity of references in the books to the prerogative of keeping the peace within the realm does not disprove that it exists. Rather it may point to an unspoken assumption that it does.”

[106] Lord Dunedin in *De Keyser* (at p.524) said “the King, as *suprema potestas* (was) endowed with the right and duty of protecting the Realm.” It was the paramount duty of a sovereign to his people. In *R (Marchioni) v Environment Agency* [2002] 127 1 LR 574 the English Court of Appeal held that the Law of England would not contemplate a merits review of any honest decision of government upon matters of national defence policy. The court was unequipped to judge such merits or demerits.” Laws LJ (at p.642) said “The defence of the realm, which is the Crown’s first duty, is the paradigm of so grave a matter.”

[107] Mr McCoy QC urged on us that the scope of the prerogative exercisable in a national crisis upon which the President drew, was necessarily expansive, malleable and unchecked. He said the safety of the nation must be within the unfettered control of the executive, and therefore the prerogative reserves to the executive a virtually unreviewable discretion as to what the national security requires. Mr Perram SC countered that the President must find his solution within the Constitution.

[108] The exercise of the prerogative for the nation’s safety may result in private inconvenience. In *Hole v Barlow* (1858) 4 CB (NS) 334 at p. 335 Willes J gave the example of the Queen taking land for the purpose of setting up defences thereof for the good of the nation when invasion was apprehended. In such cases “private convenience must yield to public necessity.” Statute may be overridden in the process if necessary, although statutes providing for compensation are to be upheld.

[109] In his renowned text “Constitutional and Administrative Law in New Zealand” 3rd Ed. Professor Philip Joseph commented on the prerogative with regard to keeping the peace:

“Although Chitty’s *Treatise on the Law of the Prerogative of the Crown*³⁶⁵ omitted any reference to keeping the peace, the

authorities have held that the emergency power is so intimately linked to the original purposes of government and civil society that it implicitly falls within the Crown's prerogatives. A 19th century court observed: "A leading duty, if not the leading duty, of a Government is to preserve the public peace, and every one has to sacrifice part of his individual rights and liberties for that object."³⁶⁶ For Hood Phillips, the preservation of the peace was a primary function of the State, vested, he said, in the Crown.³⁶⁷

[110] In *Reference by His Excellency the Governor-General* [1955] PLD 1955 FC 435 the Queen's Representative had not been asked to assent to certain constitutional Acts of the Constituent Assembly. In 7 years the Constituent Assembly of Pakistan had failed to pass into law a new post independence Constitution and had deliberately avoided seeking assent meanwhile to legislation from the Queen's representative so as not to acknowledge the imperial connection. The Governor-General therefore dissolved the Assembly, made and promulgated legislation, and gave retrospective assent so as to validate all of the earlier incomplete legislation. Muhammed Munir CJ said (at p.485):

"If the law as stated by Chitty that the Crown is the only branch of Legislature that is capable of performing any act at a time when Parliament is not in being is correct, legislative powers of the Crown in an emergency are a necessary corollary from that statement, and the same result flows from Dicey's statement that the free exercise of a discretionary or prerogative power at a critical juncture is essential to the executive Government of every civilised country, the indispensable condition being that the exercise of that power is always subject to the legislative authority of parliament, to be exercised *ex post facto*."

[111] His lordship held that the manner in which such power is exercised was essentially a question of method and detail. The court held that the Governor-General had acted in order to avert an impending disaster and to prevent the State and society from dissolution (p.486). The Governor-General's acts otherwise unlawful were validated.

[112] In *Re Manitoba Language Rights* [1985] 1 SCR 721 the Supreme Court of Canada had referred to it a matter that combined "legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity." The Acts of the legislature were by the Manitoba Act 1870 to be printed and published in both the main languages, English

and French. It appeared this constitutional requirement had fallen into disuse. But it was a mandatory requirement. If the courts declared the long standing legislation invalid “a legal vacuum will be created with consequent legal chaos in the Province of Manitoba.”

[113] The court cited Wade and Phillips Constitutional and Administrative Law (9th Ed. 1977) at p.89 where the learned Editors had said:

“the rule of law expresses a preference for law and order within a community rather than anarchy, warfare and constant strife. In this sense, the rule of law is a philosophical view of society which in Western tradition is linked with basic democratic notions.”

[114] The court (at p.751) saw its role as one where it could not “take a narrow and literal approach to constitutional interpretation. The jurisprudence of the court evidenced a willingness to supplement textual analysis with historical, contextual and purposive interpretation in order to ascertain the intent of the makers of our Constitution”.

[115] The court decided that the invalid current Acts of the Legislature would be deemed temporarily valid giving such minimum time as was necessary for their translation, re-enactment, printing and publication.

[116] In *A-G of the Republic v Mustafa Ibrahim* [1964] Cyprus Law Reports 195 the Cypriot Court of Appeal approved a temporary law passed by the Parliament abolishing the constitutional requirement for mixed race courts. Turkish insurgents had gained control of parts of the island preventing Turkish Cypriots from participating in public life, Government, the Parliament and the courts. Since the members of the Supreme Constitutional court had resigned, Parliament had to invest its jurisdiction in the Court of Appeal. The court went on to uphold various measures taken in the emergency including the pressing imperative for the judiciary to take steps to maintain its ability to function.

[117] At p.212, Vassiliades J had commented:

“ I do not need to stress here the importance of a properly functioning judicial system, for the life of the State, for the existence of the community, and for the daily life of every person living within the territorial boundaries of the Republic.”

These comments were also approved by Haynes P in the leading judgment in *Mitchell* (supra at p.89).

[118] Haynes P along with the other members of the Court held that the Governor-General could lawfully assume executive power following the *coup d'état* in Grenada. He could rule directly and legislate by Proclamation pending his attempts to effect the restoration of law and parliamentary government.

The continuance of Prerogative Powers in Fiji

[119] In his constitutional text (supra at p.676) Professor Joseph referred to the residual legislative prerogative of the Crown. He said:

“In conquered or ceded colonies, the Crown retained plenary powers to legislate by proclamation, order in Council, or letters Patent..”

[120] The Royal Prerogative can be traced back 1000 years to the Norman Conquest. It remains unless “superceded by statute, eroded by judicial decision or atrophied by neglect or disuse” (Joseph at p.617). Not unnaturally, it followed the Crown’s servants and adventurers as they traversed the globe and forged the empire. Joseph recognised two principles at work. First the settlers took with them all of the Laws of England as applicable to their new situation. Second, under the imperial unity of the Crown the prerogative automatically took root in the distant colonies.

“The Prerogative is not confined to the British Islands, but extends to all parts of 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].

[121] That the prerogatives travelled to the colonies was confirmed in *Kielley v Carson* (1842) 4 Moo PC 63 at p.85, a Newfoundland case, in *Phillips v Eyre* (1870) LR 6 QB 1 at pp.19-20, a Jamaican case, and in *Solicitor-General v Corp. of City of Dunedin* (1875) 1 NZ Jur. (NS) 1 at p.14-15 a New Zealand case.

[122] In *A-G of Fiji v DPP* (supra at p.678E) 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 :”

[123] Whether the Fiji Constitution has expressly or by necessary implication abrogated the application of any of the prerogatives formerly open to the Governor-General is a matter which we will discuss further on.

How far is the President’s action reviewable?

[124] The courts may determine whether a prerogative power to act exists. This would include being able to inquire as to whether any enactment or constitutional provision has removed the President’s power to act, either wholly or in part, and whether truncated or removed completely. However in the absence of bad faith on the President’s part as here, a state of affairs which the plaintiffs have properly accepted, the court’s inquiry cannot extend to whether one course of action rather than another might have been more suitable as a remedy, whether more efficacious, wiser or better founded. These are of the nature of political inquiries and assessments which the court has neither the jurisdiction nor competence to enter upon: *GCHQ* case at p.411 E, F per Lord Diplock.

[125] In the same case Lord Scarman (supra at p.407) discussed the reviewability of the exercise of the royal prerogative. He considered the controlling factor in determining whether the exercise of prerogative power was subject to judicial review was not its source but its subject matter. Lord Roskill at p.420H held that some matters, of which national security was one, were not amenable to the judicial process. The rationale for non-justiciability is sometimes founded in the fact that the President’s decision under the prerogative required “delicate political judgment”: *Adegbenro v Akintola* [1963] 1 AC 614 at p.632 per Viscount Radcliffe. Again the court cannot second guess such decisions.

[126] The existence of a national security situation or Government’s need for land by way of compulsory acquisition, save compensation, are both non justiciable : *Wijeysekera v Festing*

[1919] AC 646 at p.649. Dr Shameem referred us to section 194(10) of the Constitution as the justiciability clause for persons or authorities charged with constitutional duties and protections. We consider this section does not seek to change the common law approach as we have discussed.

Have the prerogative powers been excluded by the Constitution?

[127] The plaintiffs maintain there was no need for the President to act outside of the Constitution. What he was to do instead in the face of the crisis, crisis being an assessment of the situation accepted by Mr Qarase in his evidence, was not clearly put forward. If Mr Qarase was re-instated by the President, or recalled to allow him to resume office, any further action taken, Mr Perram said, was to be within the confines of the Constitution.

[128] That would mean that the President would need to comply with sections 107, 108, and 109. They provide:

- “ *Defeat of Government at polls or on floor of House*
- 107.** 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.

Advice to dissolve Parliament by Prime Minister defeated on confidence vote

108.—(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.

Dismissal of Prime Minister

109.—(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 a 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 a dissolution of the Parliament.”

[129] Three other sections of the Constitution are also relevant.

“

President acts on advice

96.—(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.

Responsible government

97. Governments must have the confidence of the House of Representatives.

Appointment of Prime Minister

98. 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."

[130] The dismissal of Mr Qarase as Prime Minister, the dismissal of the Cabinet, the appointment of a Caretaker Prime Minister to advise on the dissolution, and the dissolution itself, were not carried out in compliance with the above sections.

[131] The President's role is summarised in the Constitution in Chapter 7 sections 85-87 under the heading "Executive Authority". They provide:

"

President

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

Head of State

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

Commander-in-Chief

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

[132] No specific mention is made of the prerogative as such, nor can repeal of the powers that travelled with empire be read into such silence. The National Security prerogative could only be abrogated by express words or by words of necessary implication: *Re Petition of Right* [1915] 3 KB 649 at p.660 per Lord Cozens-Hardy MR. The prerogative as part of the common law of Fiji sits happily with statute law. Even in the times of the Stuart Kings the royal prerogative had not been used to take land without paying for it. When the taking of land by way of compulsory acquisition is encapsulated in legislation, which also provides for the payment of compensation, the Crown is subject to the empowerments granted by the Act or Acts, and the prerogative remains in abeyance (*in De Keyser* at p.539-540 per Lord Atkinson). But Lord Moulton (at

p.554) considered conceptually that the prerogative had not been abrogated in those circumstances. Rather, the legislature had given to the Crown statutory powers which rendered the exercise of that prerogative unnecessary.

[133] In *British Coal Corporation v R* [1935] AC 500 at 519, the House of Lords was considering whether the prerogative right of appeal for the Province of Quebec to the King in Council had been effectively abrogated by the Dominion Legislature. The House held that it had. Viscount Sankey LC for the House said (at p.519):

“ 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.”

This principle was marked and followed by the New Zealand Court of Appeal in *Simpson v A-G* [1955] NZLR 271 at p.280.

[134] Sections 85-87 of the Constitution cannot be regarded as a code. The sections do not in detail set out the reserve powers of the President in matters of the prerogatives, those of defence of the realm, of national security, and of securing the peace, protection, and safety of the people. Nor can any necessary intendment unequivocally be drawn from it. The sections contain merely a summary by headings indicating areas of the President’s role in the State. That is all. The constitution has never been intended as a complete code. The plaintiffs urge a textual analysis of the Constitution. Even settler colony documents were given a wide and expansive treatment. Nowadays the approach is to give a generous and purposive approach to the interpretation of all written constitutions : *Matthew v Trinidad* [2005] 1 AC 433.

[135] In *De Keyser’s*, Lord Dunedin said at p. 526 that “if the whole ground of something which could be done by the prerogative is covered by the statute it is the statute that rules.” In *R (Mahmood) v Royal Pharmaceutical Society* [2002] 1 WLR 879 at para 27 Kennedy LJ held that

the whole ground was not covered by the statute. As a result, bye-law making powers deriving from the original charter of the Society had not been extinguished.

[136] We find that the relevant prerogatives have not been abrogated by the Constitution. We are dealing with the most fundamental of the reserve powers of the Head of State. The greater the power the clearer must be the form and language of ouster. We do not find the scheme, order or words of the Constitution to have replaced such powers.

The evidence of the plaintiffs' witnesses

[137] Mr Laisenia Qarase and Mr Joseph Vosanibola, Prime Minister and Minister of Home Affairs and Immigration respectively both gave evidence for the plaintiffs. Each was a 1st named plaintiff. Each tendered affidavits. We have already commented in an earlier ruling that some of the material in Mr Qarase's affidavit was at times argumentative, hearsay or otherwise inadmissible.

[138] In his cross-examination Mr Vosanibola agreed he had written to the Secretary to the Cabinet in March 2007 applying for a parliamentary pension. He agreed that such a pension was being paid to him by the Interim Government. More correctly that should have been 'said to have been paid to him by the State'. In the letter he had written "as you are aware I ceased to be a Cabinet Minister and a Member of Parliament following the events of 5th December 2006. I hereby apply for payment of my parliamentary pension as may be calculated in accordance with the applicable laws. With regards to the method of payment, I request that the payments when due be made by cheque, post or delivered to the above postal address."

[139] Mr Qarase said he was Prime Minister in 2006 when he was removed from office. He then went away from Suva to the island of Vanuabalavu, returning only on 1st September 2007. He was asked about the communication links with the island. He accepted that there was an airport, wharves and a jetty and that he had telephone and fax facilities at his home there. He was in touch with the national director of his party, the SDL, and his former Attorney-General. He had many journalists to deal with on the telephone and for radio interviews.

[140] He denied trying to mobilize supporters to take up any form of resistance, nor did he try to regain control of Government or even wish for an uprising. He admitted contacting the Australian Prime Minister by telephone on or about 5th December 2006, as also the New Zealand Prime Minister. He denied inviting either Prime Minister to provide military intervention. He said the calls were to brief the two Prime Ministers and to raise questions on the provisions of the Biketawa Declaration.

[141] In cross-examination Mr Qarase agreed a foreign invasion would have been disastrous and a matter of grave national security. He denied knowledge of a Ministry of Home Affairs proposal for military intervention in Fiji, contained in a document dated 28th November 2006 prepared for the National Security Council of Fiji of which he was Chairman. Mr Qarase said there was a developing crisis in November 2006 and that national security was the most important thing to him at the time.

[142] A Fiji briefing document from the Foreign Ministers Meeting of the Pacific Islands Forum entitled "Security Situation in Fiji" was put to Mr Qarase, and its contents was accepted by him. It referred to the tangible perception that the Government would seek foreign military intervention in case of escalation. Mr Qarase denied inviting military intervention by foreign powers. A clip of a BBC radio interview with Mr Qarase was played to him in which he had said:

"Well, I have been enquiring, particularly from my neighbours here, Australia and New Zealand, but they have been saying "no" flatly. So that option is not there."

[143] Mr Qarase denied having invited intervention. He said he had made an inquiry on the extent and type of assistance. He had in mind something like the New Zealand peace keeping in Tonga or the Australian Forces in the Solomons. Mr McCoy then played another clip in which Mr John Howard the then Australian Prime Minister on 5th December 2006 said Mr Qarase had rung him asking for military intervention. Mr Qarase again denied asking for military intervention.

[144] Mr Qarase was also asked about his application for a pension. He said all his parliamentary colleagues had received such save himself. He said if he was entitled to one, he

should receive it. He had also written to the Secretary to Cabinet following up a prior telephone conversation. The letter said he confirmed that he wished to take option 2, reduced pension and gratuity. He gave details of the bank account where he would like the pension paid, said he would be grateful for early action, signed himself, and wrote below “former Prime Minister.” In evidence he said this letter was “more by way of inquiry.”

[145] No doubt this line of questioning went to the issue of acquiescence and waiver about which we were addressed by all counsel in closing addresses.

Is the Presidential prerogative the same as the Prasad necessity?

[146] The cases discussed so far deal with the exercise of the royal prerogative either by the Head of State, King, or Governor-General or by senior officers or Ministers of State on the sovereign’s behalf. In *Prasad* the court had to consider the actions of Commodore Bainimarama when it appeared the Head of State had “stepped aside.” No claim was made that the Commodore’s actions, although found to be well intended towards the State and its people, were a manifestation of prerogative powers on behalf of the President. Nor were arguments addressed on the two sources of the powers in use in *Prasad*, one for the individual actor, Commodore Bainimarama, and one for the President over his use of the Head of State’s emergency powers.

[147] As the cases that we have traversed indicate, on grounds of extremity, gravity, and ensuing expediency, extraordinary powers are allowed to a Head of State to find a way out of crisis. This unwelcome and anxious task is only granted to one person. It is a duty which was often referred to by President Truman and earthily summarised in a famous desk sign kept at the oval office inscribed with the words “the buck stops here”. The prerogative or ultimate reserve power resides with one person only. Whereas the *Prasad* doctrine of necessity on the other hand is available, in the correct circumstances, to every citizen of the Republic. If the ship’s cargo must be cast overboard in order that the ship might make it through the storm to safety and all lives be spared, so be it. Those who throw away the cargo can say they acted in extremis, and be excused from blame for the loss.

[148] The President is authoritatively supported in the ultimate reserve power. It is indicated as a continuing common law power in sections 85-87 of the Constitution, a document which

nowhere excludes such power. It is a prerogative power long afforded to Governors and Heads of State by the common law. It flows naturally from the Ciceronian maxim *salus populi est suprema lex*, “the welfare of the people is the paramount law” [De Legebus 111 iii 8]. It also derives from an implied mandate: *Madzimbamuto v Lardner-Burke* [1968] 1 AC 645 at 741E. Although the executive authority of the State is vested by the Constitution in the President, in stating that he or she “symbolises the unity of the State” the Constitution binds the President to act with impartiality and to achieve concord.

[149] Those who wish to avail themselves of the approval powers under *Prasad* must keep themselves within the conditions as set out therein and which were republished earlier in this judgment [at para 3]. However it is beyond doubt that the Head of State is in an entirely different, special, and singular category. If he acts in a crisis without mala fides and addresses the grave problems in a way that he believes honestly addresses those problems whether in peace time or war, the courts will uphold his action: *Juan Ponce Enrile and Others v Ramos, Chief, Philippine Constabulary* G.R. No. L35538 September 17, 1974 [1974] PHSC 353.

Did the President intend to exercise the prerogative?

[150] It is said the wrong section was quoted for action taken by the President, and that the use of the prerogative was a fall back position to justify action taken. It was also said the President did not intend to exercise his prerogative powers.

[151] In the *Wool Tops* case (1922) 31 CLR 421, pp.442-3 certain agreements were made and executive action taken by the Commonwealth Government of Australia. At the time when the agreements were made and the executive action taken the Commonwealth Government did not address itself to, or concern itself with, its prerogative powers. It did not consider the emergency that had arisen or whether an emergency had in fact arisen justifying the exercise by it of prerogative power. Later when the case came on for hearing it was argued the action could also be justified by virtue of the King’s prerogative. Isaacs J said it must be shown “that the Executive considered the step necessary for the national security and in fact acted on that basis.” The Commonwealth’s argument was rejected.

[152] In *Joseph v Colonial Treasurer* (1918) 25 CLR 32 at p.43 the action taken by the State Government was found not to have been an intention to exercise the national defence prerogative but a political manoeuvre to benefit the State's farmers and thereby to strengthen the position of the State government. The principles were discussed in H.V. Evatt's book on "The Royal Prerogative" 1987 Ed. At pp.254-256: see too *Re Price* (1920) 54 DLR 286 at p.291.

[153] We turn first to His Excellency's address to the nation on 4th January 2007. From this it is clear that the President accepted there was a grave crisis which he considered necessitated "hard and decisive decisions." He referred to his indorsement of the Commander's actions "acting in the interest of the nation and most importantly in upholding the Constitution." He said he would shortly announce an Interim Government. This would mean direct Presidential rule, clearly a step outside the norm of the Constitution, and a manifestation of an intention to exercise prerogative power.

[154] The next day His Excellency extended the State of Emergency, and later promulgated Public Emergency Regulations which in turn were extended over several months. On 16th January 2007 the President ratified and validated decrees.

[155] We do not feel it necessary to traverse all of the matters which we feel would have fuelled an intention on the part of the President to act using reserve powers. The history of the nation with its four coups, the ultimatums and the disputes between the Qarase government and the military, the constant state of strife, the presence of Australian warships in Fiji waters, and the occurrence of the military takeover a month previous, all would have forced the President's hand to use such powers.

Conclusion

[156] In life it is easier to improve someone else's draft than to initiate one's own creation. There are always many commentators ready to occupy the larger space of the auditorium but fewer to volunteer to act upon the stage. In the President's case in dealing with the growing crisis in November and December 2006, the events of 5th December 2006, and then those of the restoration of 4th January 2007, the decisions to be made were for the President alone. None of

them could have been easy. Shakespeare provides us with the apposite line for such an anxious responsibility “uneasy lies the head that wears the crown” [Henry IV Part 2 III i 30].

[157] No-one has suggested His Excellency failed to act honestly, impartially, neutrally and in what he gauged was in the best interests of the nation, that is, of all of the inhabitants of Fiji. It is not for this court to inquire into the details of his acts or to comment on whether one action would have been better done another way. But it is certainly open to conclude his intentions were to unify the people of Fiji.

[158] The President assessed that Fiji was at a crossroads and had reached a grave crisis. A military intervention had already occurred at the end of a long tunnel of civil strife. If he returned the nation to the status quo ante what might have been the result? We do not have the various intelligence and political assessments before us which might have been available to His Excellency. When he had the freedom to act again as President on 4th January 2007 he had to act swiftly and decisively.

[159] Cromwell, though a usurper himself, percipiently observed of the urgency of such a moment:

“If nothing should be done but what is according to law, the throat of the nation might be cut while we send for someone to make a law.”

[160] The President’s decision in short was to exercise prerogative powers to rule directly until suitable elections could be conducted. He decided to rule meanwhile with the advice of a Prime Minister and Cabinet. That decision if it were to succeed necessarily involved ratifying the acts already carried out by Commodore Bainimarama. They were the dismissal of the Prime Minister Mr Qarase, the dismissal of his Ministers, the device of the appointment of Dr Senilagakali as Caretaker Prime Minister who in turn advised the dissolution of Parliament, and the dissolution itself. Thereafter he appointed to advise him a new Prime Minister and Ministers. In further shorthand the President decided “direct rule, fresh elections with conditions.” The details of how all of this was to be achieved did not affect or deflect from the President’s clear intention to act to save the country from its strife, or affect the legality of his acts within the scope of the ultimate reserve powers.

[161] In his speech the President referred to taking the country to elections with an advanced system at the right time. He also gave directions for the absolving of the Commander and his men. Direct rule meant that legislation would have to be made by Promulgation. Though we find that the President exercises a different power from that permitted to Commodore Bainimarama in 2000 in *Prasad*, it may be concluded that the President's actions did comply with the conditions imposed by *Prasad*. The approach to such an appraisal would be, as already indicated, on the basis of allowing for the President a very wide "margin of appreciation" as noted in *Ningkan* (at p.390A).

[162] We find that exceptional circumstances existed, not provided for by the Constitution, and that the stability of the State was endangered. We also find that no other course of action was reasonably available, and that such action as taken by the President was reasonably necessary in the interests of peace, order and good government. Rather than impairing the just rights of citizens we conclude that the President's actions were designed to protect a wide variety of competing rights from displacement by avoiding conflagration.

[163] We also do not find that the President's actions consolidated any revolution. The Constitution remained and remains in tact. The government exists in the interim by way of direct Presidential rule with His Excellency being advised by a Prime Minister and Cabinet of Ministers. There have been criticisms of the inclusion of Commodore Bainimarama as Prime Minister. We are not aware of specific difficulties the President may have incurred in obtaining the services of competent and valiant citizens to advise him at this time. Ideally his advisers should be drawn from across party lines and from a wide political spectrum of civil society. It is clear from media reports many politicians have been reluctant to assist. These persons might otherwise have advised the President on the wise way to achieve a smooth return to democratic rule through universally approved elections. In addition, neighbouring states have imposed travel bans on persons wishing to assist the President on the ground that their actions would bolster an illegal regime. Such action would not have assisted the President in obtaining a broad cross-section of persons from Fiji public life so as to forge a way out of the crisis. Non-participation, whilst a free and democratic choice, does not always assist the democratic aim: *A-G v Malawi Congress Party* [1997] MWSC 1, 31st January 1997.

[164] It is necessary to say something about the President's power to promulgate legislation prior to the return of Parliament. Parliament is the constitutional forum for the consideration of new legislation. It would be constitutionally appropriate for the incoming Parliament to consider all decrees or Promulgations made in the intervening period which have not received the scrutiny of the full Parliamentary process. Promulgations with far reaching effect on the lives of citizens such as the FICAC promulgation require such scrutiny and representative assent. Meanwhile such legislation is of lawful effect. Subsequently it will be for Parliament to decide whether to continue with such legislation or whether some amendment is necessary.

[165] In *Jokapeci Koroï and Others v Asesela Ravuvu & Others* HBC007.01L, 15th June 2001 in a brief ruling on an injunction application Gates J said:

“The doctrine of necessity is a narrow doctrine and does not cover matters outside of the routine and the necessary.”

In *Koroï v Commissioner of Inland Revenue* [2003] NZAR 18 at p.36 Gates J in a more considered judgment said “but no act will have authority if it goes beyond the routine.”

[166] We feel this may have been an unnecessarily narrow interpretation. Gates J was not referred to citations that show a more generous approach to legislative powers during a period of extra-constitutionality. First a period of legitimate direct Presidential rule, not rule by a usurper, permits of wide ranging powers; see Professor R. Q. Quentin Baxter: *The Governor-General's Constitutional Discretions: an essay towards a re-definition* (1980) 10 V.U.W.L.R. Second, the *Prasad* conditions which formed the basis for the narrow interpretation of law making capability in the interregnum that is, of action (and legislation) necessary in the interest of peace, order and good government, had already attracted authoritative interpretation in the Privy Council decision in the Ceylon case of *Ibralebbe v The Queen* [1964] AC 900 at p. 923. The Board said:

“The words peace, order, and good government connote, in ‘British’ constitutional language, the widest law-making powers appropriate to a sovereign.”

[See too Philip Joseph in 1998 *Anglo-American Law Review* 18, 91, 100].

[167] Other than to realise he must rule without the re-assurance of popular mandate during the interregnum, the President has yet for his purposes a full sufficiency of powers to legislate for the public good meanwhile: *Bhagat Singh* (at p.172).

[168] We approve also the good sense of the draftsman of the Constitution in not seeking to define ‘emergency’ or ‘gravity of situation’ when indicating where the President might act for the people. It would be impossible to cover the range of dilemmas that might arise. Of course dilemmas would not count as crises if they were merely political inconveniences. There has been no suggestion here that the Head of State was confronted with a situation of mere awkwardness or inconvenience. The crisis was real. In *Mitchell* (at p.94) Haynes P observed:

“We, in the jurisdictions with written constitutions of the Westminster model realise that the Constitution does not and cannot provide for every political situation that might arise. It does not provide for extra-constitutional situations like this one at all. We, in the Caribbean judiciary must do so. We cannot find the solution in English cases. We ought not to look to English judges to decide it for us.”

[169] We note the completion of a census as a necessary preliminary to the holding of accurate and fair elections. We take notice of the significant demographic changes brought to light from that survey which are likely to effect a permanent and growing dominance of the Parliament by the indigenous. As was the case in *Bhutto v Chief of Army Staff* PLD 1977 SC 657 we do not find it appropriate to issue directions as to a definite timetable for the holding of elections. No doubt the President will have uppermost in his mind the twin imperatives of the sanctity of fair elections on the one hand and the need for urgent return to democratic rule on the other. In *Mitchell* (at p.94) Haynes P said the court assumed that the Government would act with reasonable despatch.

[170] We also note the close similarities in the path chosen by the President with the advice tendered to him by the Great Council of Chiefs.

[171] To answer the questions posed therefore:

- (a) In the absence of mala fides or arbitrariness the existence only and not the exercise of the President's powers to appoint ministers was capable of judicial review. The events of December 2006 are relevant to that determination.
- (b) The court declines to grant the reliefs sought.
- (c) The President's actions at the relevant time were valid and are held to be lawful.

[172] The court dismisses the plaintiffs' claim, and will consider costs subsequently on a motion with affidavit setting out a brief summary of heads of expenditure.

[173] The declaratory orders of the court are:

- (i) The plaintiffs' originating summons is dismissed.
- (ii) The decision of the President to ratify the dismissal of the Prime Minister and his ministers, to appoint Dr Senilagakali as Caretaker Prime Minister to advise the dissolution of Parliament, and the dissolution of Parliament itself, are held to have been valid and lawful acts in exercise of the prerogative powers of the Head of State to act for the public good in a crisis.
- (iii) For the same reasons the further decision of the President to rule directly pending the holding of fresh, fair and accurate elections is upheld as valid and lawful.
- (iv) For the same reasons, the President's decision to make and promulgate legislation in the interest of peace, order and good government in the intervening period prior to a new Parliament is upheld as valid and lawful.
- (v) The grant of immunity by Promulgation was similarly within the powers of the President in the emergency, and such grant is upheld as valid and lawful.
- (vi) The matter of costs will come back before the court in an application by motion and affidavit with brief schedule of costs.

Orders accordingly.

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A.H.C.T. Gates
Acting Chief Justice

.....
J.E. Byrne
Judge

.....
D. Pathik
Judge

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Solicitors for the 1st, 2nd, and : Office of the Attorney-General, Suva
4th Defendants
Amici curiae : Fiji Human Rights Commission