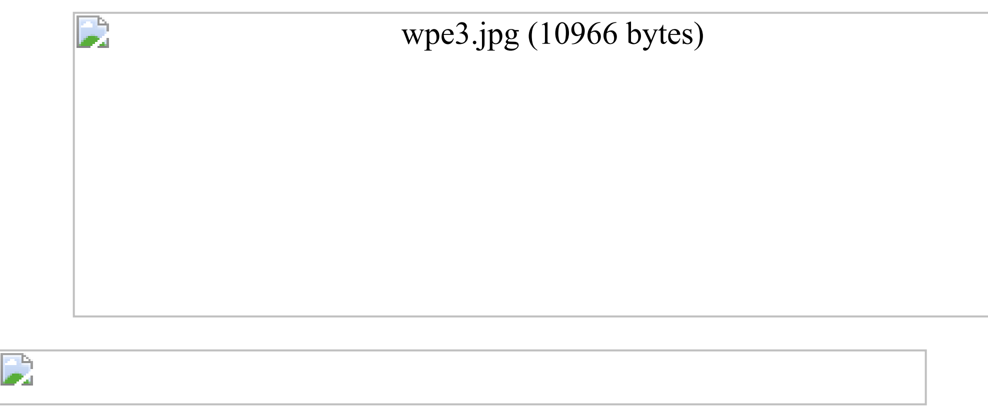
High Court of Fiji

Prasad v Republic of Fiji [2000] FJHC 121; Hbc0217.2000l (15 November 2000)



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Fiji Islands - Prasad v The Republic of Fiji - Pacific Law Materials

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CIVIL JURISDICTION

ACTION NO. HBC0217.00L

BETWEEN:

CHANDRIKA PRASAD
APPLICANT

AND:

THE REPUBLIC OF FIJI
1ST RESPONDENT

ATTORNEY-GENERAL OF FIJI
2ND RESPONDENT

Dr. George Williams with Mr. Anu Patel for the Applicant
Mr. J.J. Udit & Mr. A. Tuilevuka for the Respondents

Date of Hearing: 23rd August 2000
Date of Judgment: 15th November 2000

JUDGMENT

This is a case about the status of the Constitution in Fiji today following an armed invasion of Parliament on 19th May 2000, a hostage crisis, a military takeover, and latterly the installation of an interim administration. The Applicant, an indigent farmer, claims he has been adversely affected as a result. Presently he is a refugee staying at the Girmit Centre in Lautoka.

On 4 July 2000 he filed an originating summons in the High Court, with an affidavit in support, seeking certain declaratory orders. He did so in person. He appears to have received a modicum of assistance along the way. But before this court he was ably represented by Dr. George Williams and Mr. Anu Patel both of counsel whom I permitted to appear for him at the hearing as advocates to argue his case. Subsequently Messrs. S.B. Patel came on the record as his solicitors. At the hearing objection had been taken to such appearance since no Notice of Appointment of solicitors had been filed and served pursuant to the **High Court Rules Order 67 rule 3**. In view of the complexity of the constitutional arguments to be presented to the court, the objection had no merit. This case demanded the assistance of able counsel. There could be no valid basis therefore for refusing representation to the Applicant, on a minor technical ground, the soundness of which objection was questionable. The Applicant deserved any services that the Bar could render him, and the court will invariably be assisted by counsel, as it was here.

The matter was first called before the court on 14th July 2000. I indicated to Dr. Shameem, who first appeared for the Applicant to assist him, and to Mr. Udit for the Respondents that there was a need for the affidavit material to provide evidence of the acceptance or non-acceptance of the military takeover and of the consequent government. Time was allowed for the Applicant and the Respondents, to place such evidence before the court. The Applicant availed himself of this opportunity by filing 2 further affidavits. The Respondents, elected not to do so.

Instead the Respondents filed a summons to strike out the claim, which was returnable on the date fixed for the hearing of the originating summons. I shall revert to that later.

Mr. Udit also objected to my hearing both summons on the same day. I gave a short ruling on this objection and said I would proceed to hear both summons together. The Applicant was represented by overseas counsel who had attended on the day fixed for the hearing ready to present his arguments and there was no good reason to put the matter off to another date. This was a constitutional case requiring expeditious treatment in the national interest. The Attorney�s office seemed to have taken the matter lightly by not compiling necessary factual material in affidavit form as they had been ordered to do for the hearing. I was not prepared to adjourn the hearing and I have already provided the foundation for that decision in my ruling given on that day. The onus of proving that the Constitution had been abrogated lay on the Respondents. They should have come prepared with their material, to prove the major issue in this important and far-reaching summons.

The interlocutory rulings, to allow Dr. Williams and Mr. Anu Patel to appear for the Applicant without the prior filing and serving of notice of the appointment of solicitors on record, and to hear the substantive originating summons together with the striking out application, resulted in an application to this court by the Respondents for leave to appeal to the Court of Appeal and to stay the interlocutory orders. I refused that application for reasons set out in a further ruling delivered a short while ago.

The Material filed by the Parties

The orders sought in the originating summons were perhaps not well phrased. Later I allowed an amendment, this being made in order to deal with changed circumstances which had arisen at the end of the hostage crisis.

The affidavit of the Applicant sworn on 30 June 2000 dealing with the facts of the constitutional crisis was somewhat sparse and did not say how events had affected the Applicant. His second affidavit sworn on 21 July 2000 stated that the poll survey could not be conducted by the research company since it could not guarantee the safety of its field staff at that time. However a good deal of material consisting of press stories, comments, advertisements and letters was exhibited, supportive of the Applicant�s case. The third affidavit was sworn by one Peter Sipeli on 20th July 2000. He stated he represented the Sexual Minorities Group, who he believed would and were suffering as a consequence of the events succeeding 19th May 2000 by acts of violence and discrimination towards that group. The court was left to deduct in what way these events impinged upon such rights.

As I have said the Respondents elected not to file any affidavits. Subsequently when seeking to appeal the interlocutory orders after the hearing they filed the affidavit of Anare Tuilevuka sworn on 19th September 2000. Leaving aside the irregularities of that affidavit, there were two affidavits exhibited to it, which had been filed in a separate but similar constitutional case. These no doubt were exhibited to show the evidence that the Respondents would have adduced in this case. They were the affidavit of

Commodore Josaia Voreqe Bainimarama the Commander of the Fiji Military Forces and for a time the Head of the Interim Military Government. This was sworn on 14 September 2000, and filed on 15 September 2000 [in effect 1� months late for these proceedings]. The other was of Alipate Qetaki, Attorney-General and Minister for Justice in both the Interim Military Government and the interim civilian government thereafter. This too was sworn on 14 September 2000 and filed on 15 September 2000.

The papers filed were much more remiss in the case of ***Uganda v. Commissioner of Prisons Ex parte Matovu [1966] EA 514.*** In that case 2 affidavits were filed with defective intitulment, impermissible prayers, without a Respondent named for the subsequent execution of habeas corpus orders, and without a Notice of Motion or motion paper setting out grounds entitling or relief sought, this last error was said by the court to be �so fundamental a defect as to be almost incurable.� The second affidavit had been filed by the Applicant�s counsel which was wrong on so many counts that the court said it �should have been struck out.�

Sir Udo Udoma CJ commented at 519:

> ***�Indeed but for the fact that the application concerns the liberty of a citizen, the court would have been justified in holding that there was no application properly before it.�***

And the court came to the following opinion as to what to do in the circumstances at 521:

> ***�On reflection, however, bearing in mind the facts that the application as presented in the first instance was not objected to by counsel who had appeared for the state; that the liberty of a citizen of Uganda was involved; and that considerable importance was attached to the questions of law under reference since they involved the interpretation of the Constitution of Uganda; we decided, in the interests of justice, to jettison formalism to the winds and overlook the several deficiencies in the application and thereupon proceeded to the determination of the issues referred to us.�***

In dealing with defective applications, breaches of procedure and insufficiency of material in important constitutional cases the courts have taken an enabling rather than a technical approach. In ***Mokotso and Others v. HM King Moshoeshoe II and Others [1989] LRC (Const.) 24*** Cullinan CJ**,** happily also formerly of the Lautoka High Court, at 148 said:

> ***�In this respect I consider that but a technicality precludes the court from conducting the necessary inquiry and that in all the circumstances of this case it is in the interests of justice that this court should be seen to be a court of justice rather than procedure. On that basis therefore I proceed to consider the matter.�***

In the concluding paragraphs of his judgment which ran to 169 pages in all, his Lordship at 168-169 said:

> ***�These proceedings have been troubled from the start by defective pleadings. Much against my better judgment, I acceded to requests by both parties to over-look such defects. I have consequently been at pains to construe the pleadings liberally. I have done so in the interests of justice; for the want of such construction, the pleadings could in any event have been amended, entirely without prejudice to the respondents.***
>
> ***I have dealt at length with some aspects which, to the legal mind, might appear beyond argument. The first applicant, however, would not seek legal assistance, and I considered myself in fairness obligated therefore to deal with all submissions made. Further, due to the constitutional aspect of the issues raised and the troubled history involved, I thought it best, in the national interest to fully ventilate all grievances, imagined or otherwise.�***

I favour the approach adopted by both of these Chief Justices. I overlook defects in the papers, which are largely minor, in the greater interests of the justice of the matter.

I also propose to consider the two affidavits of the Respondents, though the Applicant�s counsel will be deprived thereby of an opportunity to address the court on them, since they were not made available at the right time to the

Applicant�s counsel or to the court for the hearing. In the wider national interest and in that of justice it is better that I consider them and I have done so.

Notorious Facts

Inevitably the affidavits will not present all of the facts before the court. The wide ranging history of the matter and of its numerous events and the logistical difficulty in presenting opinions and views representative of the people of Fiji and of its various groups, religious and ethnic, mean that I have to take a more generous approach as to what are notorious facts than might be appropriate in an ordinary case, and a more generous approach than that urged by the Applicant�s counsel.

There is also a further reason for looking at the affidavits exhibited by the Respondents. To do so would be in accord with the approach taken in supra constitutional cases where events are numerous, fast flowing and fluid. It is an approach that is necessary in such cases in order to see justice is done both to the litigants and also to the wider public who have a proper interest in their outcome.

However in relation to proof of the popular acceptance of the abrogation of the constitution or to the overthrow of the elected Parliament or the forcing out of office of the President, the court would require full and proper proof.

In ***Mitchell & Others v. Director of Public Prosecutions & Another [1986] LRC (Const.) 35,*** a case dealing with a similar extra-constitutional situation in Grenada, Haynes P in the Court of Appeal at 72f set out the approach of the courts to such issues:

> ***�A revolutionary regime should not be accorded legitimacy by this Court unless it is satisfied that, on the whole, the regime had the people behind it and with it. Legality should be achieved only if and when the people accept and approve for in them lies political sovereignty, and the Court so finds. This approval they may give ab initio or subsequently. Length of time might or might not be sufficient to infer it. It might be expressed or tacit approval.***
>
> ***But it is that which should give legitimacy to a successful and effective revolutionary regime. The support of a real majority is sufficient. This could be shown by its majority vote at a general election or a*** referendum ***or a majority percentage at polls. In court it can be proved by agreed statements of fact (as in Valabhaji) or by affidavits (as in Matovu). And these modes are not exhaustive. If a Constitution was abrogated, a new one should be substituted forthwith as happened in both of those cases.�***

Such an onus cannot be discharged without proper affidavits or an agreed statement of facts. It is insufficient for a court to have to rely solely in deciding such an issue on the taking of judicial notice of notorious facts. Haynes P concluded at 73g:

> ***�I do not think this Court can properly act on a bare statement of fact or opinion of popular support, however credible and knowledgeable the source is and whatever is the basis of it. Proof of the fact by judicial notice may be admissible. But the weight to be given to it is another matter. I would hold that what is needed here is proof of particular facts or circumstances from which the court itself***

can infer popular support. In my view the proof here was insufficient.�

In **Mokotso (supra)** Cullinan CJ was prepared to accept an affidavit from the Acting Attorney-General deposing that the laws promulgated by the government were enforced and obeyed throughout the Kingdom and that the decisions of the courts were enforced by the government. The efficacy of the change was marked by the acceptance of the people, which acceptance was spontaneously popular, unqualified and widespread. The matter was not seriously challenged. However in the present case those issues are seriously challenged, and the deponent Mr. Qetaki, the present Attorney-General, can hardly put himself forward as a neutral witness or independent observer. However I shall consider and evaluate the contents of the affidavits later.

The Summons to Strike Out the Action

On 7th August 2000 the Respondents issued a summons to strike out (the summons), seeking orders that:

a) the Applicant has no locus standi to institute these proceedings

b) the application discloses no reasonable cause of action

c) the application is scandalous, frivolous or vexatious

d) the application is otherwise an abuse of process.

The Applicant�s originating summons had sought the following orders:

a) That the attempted coup of May 19 was unsuccessful.

b) That the declaration of a state of emergency under the doctrine of necessity by the President Ratu Sir Kamisese Mara was unconstitutional.

c) That the revocation of the 1997 Constitution by decree by the Interim Military Government was unconstitutional.

d) That the 1997 Constitution still remains in force.

e) That the elected government is still a legally constituted government in view of the inability of the interim Military government and Speight�s Group to reach an agreement on governing the country.

f) That the elected government (The People�s Coalition) is still the legitimate government.

g) Any relief that the Court considers just and fair.

In ***Bavadra v. Attorney-General*** *[1987] SPLR 95* the plaintiff had sought to challenge certain decisions of the Governor-General. On 14 May 1987 the plaintiff had been Prime Minister of Fiji. On that morning a detachment of the Royal Fiji Military Forces led by Lt. Colonel Rabuka invaded Parliament. They arrested and detained the Prime Minister, members of his Cabinet, and members of the House of Representatives who formed the plaintiff�s majority in the House. The Governor-General declared a State of Emergency and by proclamation dissolved Parliament.

His Excellency also declared the office of Prime Minister and certain offices in the Executive and Legislature to be vacant. By originating summons, the plaintiff came to the High Court and sought 10 declaratory orders. The case arose out of Fiji�s first military coup which had startled the nation and intruded upon its easy-going tranquillity. That coup gave birth to various incidents of legal, factual and constitutional complexity. In his judgment Rooney J. at 98 line 158 et seq. observed:

> ***�This is probably the most significant and important action ever brought before any court in Fiji. To claim that it is frivolous, vexatious or an abuse of the process of the Court is entirely inappropriate. Mr. Newman, who argued the application, made no submission in favour of these propositions and confined his argument to the only pertinent issue, namely, whether the plaintiff has a reasonable cause of action.�***

The present case before me therefore may be the second most significant and important action ever brought before a Fiji court, and Rooney J�s comments are equally apposite. As it turned out, Mr. Udit did not submit in his address that the Applicant�s claim was �scandalous, frivolous or vexatious or that it was otherwise an abuse of process.� The striking out orders sought under paragraph (c) and (d) should not have been included in the summons. They are challenges that can be included in appropriate cases but not otherwise.

Such inclusion, made nonchalantly and unthinkingly, is itself an abuse of process. Summons to strike out should be confined to allegations against pleadings which are relevant and capable of argument.

Dr. Williams suggested the following amendment should be read into prayer (e) of the Applicant�s originating summons:

> **(e) that the elected parliament is still the legally constituted parliament of Fiji**.

Prayer (f) was therefore little different from (e). (a) (c) and (d) amount to saying that the 1997 Constitution still remains in force. Such a question is not a merely hypothetical or academic one in the present circumstances, as was suggested. No argument was directed

at the Applicant�s summons to cover �no reasonable cause of action.� The only argument taken up seriously by the Respondents was that relating to the locus standi or standing of the Applicant before the court to permit him to bring such an action.

Standing of Applicant

The Applicant brings these constitutional issues before the High Court which has original jurisdiction in such matters. Section **120(2)** of the **1997 Constitution** provides:

> ***�120(2) The High Court also has original jurisdiction in any matter arising under this Constitution or involving its interpretation�***

The High Court (Amendment) Act No. 27 of 1998 also repeats that jurisdiction in its Section 18(1):

�18(1) The High Court has the jurisdiction conferred on it by the Constitution Amendment Act 1997 and by any other written law and all other jurisdiction necessary for the administration of justice in the Fiji Islands.�

An appeal path is provided from a final judgment of the High Court to the Court of Appeal in any matter arising under the Constitution or involving its interpretation [Constitution s. 121(2)]. Further appeal lies to the Supreme Court [s.122(1)] and the Supreme Court has advisory jurisdiction if a question is referred to that court by the President acting in the public interest and on the advice of the Cabinet [s.123].

In addition and without prejudice to a litigant�s rights of appeal a power is given to a judge of the High Court to reserve for consideration by the Court of Appeal on a case stated, any question of law which might arise, and to seek the Court of Appeal�s opinion, (see **Section 15** **Court of Appeal Act** **Cap. 12**).

If the Respondents accept that this is not an application in which an argument could be raised that the Applicant was bringing an application that was �scandalous, frivolous or vexatious or otherwise an abuse of process� or that the Applicant was in Lord Denning�s phrase in ***R. v. Greater London Council Ex p. Blackburn [1976] 1 WLR 550 at 555*** �a mere busybody who is interfering in things which do not concern him�, then his standing before the court would be largely established. His claims of course would have to be litigated and arguments heard. This is not simply an issue of special loss occurring to a private citizen as a result of a public law matter. If that had to be established first, the Constitution in seeking to protect all of the inhabitants of Fiji would be but a paper tiger.

The 1997 Constitution brought into being through the Constitution Amendment Act 1997 Act [No. 13 of 1997] received the Presidential assent on 25 July 1997 and commenced as law on 27 July 1998. In Chapter 1, after the preamble, it states:

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

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

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

The loss therefore of democratic rights enshrined in the Supreme law would appear to suggest that any citizen of Fiji would be able to argue:

(a) that he had suffered a grave loss of rights and freedoms

(b) that to approach the courts would be a rightful path to redress such grievances (indeed it may be, as here, the only remedy open to him)

(c) and that to bring such proceedings could not be considered an abuse of process or the work of a mere busybody.

Chapter 4 of the Constitution deals with the Bill of Rights [Sections 21-40]. Section 36 states:

�36. Every person who has a right to vote in an election of a member of the House of Representative has the right to do so in

secret.�

The Chapter extends protection to many matters including those of privacy, equality, religion and belief, freedom of movement, freedom of expression, and the right to form or to join a trade union.

The courts, if they have any role at all to play, must always be involved in the business of upholding justice and the rule of law. On being told the courts had no powers to intervene in a matter Salmon LJ in ***Nagle v. Feilden [1966] 2 QB 633 at 654*** said this:

> ***�This is a familiar argument on behalf of anyone seeking to exercise arbitrary powers free from any control by the courts. It was eg. recently advanced in this court on behalf of the Crown in In re Grosvenor Hotel (London) (No.2) when the question of Crown privilege was under consideration. I must confess that I do not find this argument attractive. One of the principal functions of our courts is, whenever possible, to protect the individual from injustice and oppression. It is important, perhaps today more than ever, that we should not abdicate that function.� (my underlining)***

It has been said that:

> ***�The English courts have converted the standing requirement into a right of access to the courts for those with standing, and a merely prima facie or discretionary barrier to access for those who lack it.�*** **[Aronson and Dyer: Judicial Review of Administrative Action 1996 p.697].**

An Applicant who has no personal connection with a dispute will nevertheless be allowed to sue by being granted standing as a matter of discretion.

Mr. Udit cited ***Gouriet** v. **Union of Post Office Workers*** *[1978] AC 435* but this case on the standing issue has largely been explained and distinguished by subsequent cases. Of greater bearing now on the issue of standing is ***R v. IRC ex parte National Federation of Self-employed and Small Business Ltd. [1982] AC 617 (the Fleet Street Casuals case).*** This was a decision of the House of Lords in which their Lordships adopted a simple test for standing in all public law cases and that is �sufficient interest.� It is interesting also that all of the judges in their speeches to the House said that the issue of standing should usually be left for the main hearing; another argument rendering the necessity for holding a separate hearing on the limited issue in this striking out summons otiose.

In ***R v. Greater London Council: ex parte Blackburn (supra)*** Lord Denning at 559 said:

> ***�I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government or department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty�s subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate.�***

With this concept of �high constitutional principle� Lords Diplock and Scarman [in ***Fleet Street Casuals*** (supra)] were in agreement. Whilst stating that ultimately it was a matter of some discretion, Lords Wilberforce and Roskill foresaw the possibility of a complete stranger with no personal stake in the matter being allowed to litigate. This they said could occur �in a case of sufficient gravity�. No one is suggesting that the issues here before this court, as similarly observed by Rooney J. in ***Bavadra***, are not otherwise than �grave�. Even in cases which do not fit the traditional criteria for standing an applicant will be allowed to sue if the court in its discretion thinks that the case is of sufficient public importance (see ***Fleet Street Casuals*** case supra).

Dr. Williams referred me to further examples of the modern approach to standing and it is worthwhile to set them out shortly. In ***R v. H M Treasury ex parte Smedley*** *[1985] 1 QB 657* a taxpayer was allowed to challenge the Treasury�s proposal to pay a large sum of money to the EEC; in ***Gillick v. West Norfolk Area Health Authority*** *[1986] AC 112* a mother of 5 underage daughters challenged the legality of Government funded contraceptive advice to underage girls; in ***R v. Secretary of State for Foreign and Commonwealth Affairs; ex parte Rees-Mogg*** *[1994] QB 552* ***(DC)*** at 562 a life peer and former editor of The Times of London sought judicial review to challenge the government�s ratification of the Maastricht Treaty, even though �his only stake in the dispute was his sincere concern for constitutional issues�. In ***R v. Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement Ltd.*** *[1995] 1 WLR 386* Rose LJ at 395f said:

> ***�The authorities referred to seem to me to indicate an increasingly liberal approach to standing on the part of the courts during the last 12 years. It is also clear from Ex parte National Federation of Self-Employed and Small Businesses Ltd. that standing should not be treated as a preliminary issue, but must be taken in the legal and factual context of the whole case; see per Lord Wilberforce, at p. 630D, Lord Fraser at p. 645D and Lord Scarman, at p.653F.�***

(see too ***Richard Naidu v. Attorney-General of Fiji (unreported) Court of Appeal Civil Appeal No. ABU0039 of 1998S 27 August 1999***; ***Thorson v. A-G of Canada*** *[1975] 1 SCR 138*; ***Nova Scotia Board of Censors v. McNeill*** *[1976] 2 SCR 265*; ***Minister of Justice of Canada v. Borowski*** *[1981] 2 SCR 575* ***and*** *[1989] 1 SCR 342*; His Lordship cited also Lord Diplock�s speech in the **Fleet Street Casuals** case (at 644):

> ***�It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The Attorney-General, although he occasionally applies for prerogative orders against public authorities that do not form part of central government, in practice never does so against government departments. It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they***

are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.� (my underlining)

Another factor in this case leading to the overwhelming conclusion that standing though going to jurisdiction was best left for the substantive hearing was the importance of the merits of the challenge, what Rose LJ considered (at 395a) ***��an important, if not dominant factor when considering standing.� �The real question�***, wrote Professor Wade in Administrative Law, 7th Edition (1994) p.712 ***�is whether the applicant can show some substantial default or abuse and not whether his personal rights or interests are involved.�***

We are concerned in the present case with the supposed abrogation of the Constitution, a supreme law passed by the people�s democratically elected representatives for the good governance of the nation, and with an usurpation of power.

Lord Diplock in the Fleet Street Casuals case had emphasised the importance of vindicating the rule of law. Such aims were bound to provide the litigation foundation of �sufficient interest�. Indeed by lodging human rights suits in the courts complaining of loss of rights an individual is in reality acting as an agent of public interest for all those who have also been deprived of their rights. (see ***Kokott J: The Burden of Proof in Comparative and International Human Rights Law. Kluwer Law International, The Hague 1998 at 210***).

I find that this is not a frivolous application to the High Court. The Applicant is not a mere busybody. He claims to have lost rights by the purported abrogation and seeks to be re-assured that the Constitution is still in place so as to protect him and to maintain those rights. There is no alternative remedy open to him. The issues raised for decision are sufficiently grave. The issues are also of sufficient public importance. They involve high constitutional principle. I find the Applicant has the necessary standing to seek the court�s intervention.

Procedure for bringing a Constitutional Case

Section 41 of the Constitution provides for enforcement where a person considers that any of the provisions of the Bill of Rights Chapter �has been or is likely to be contravened in relation to him or her�� The section refers to the right to make application to the High Court �and that it is without prejudice to any other action with respect to the matter that the person concerned may have� [Section 41(2)]. The High Court has original jurisdiction to hear and determine applications referred to it, and is empowered to make such orders and give such directions as it considers appropriate [Section 41(3)].

No set procedure for applying is provided in the Constitution. Pursuant to powers granted to him by Section 41(10) of the Constitution, the Chief Justice has made rules namely the **High Court (Constitutional Redress) Rules 1998**. These provide for application for redress to be made by motion and affidavit **[Rule 3 (1)]** giving at least 3 clear days prior notice to the parties affected by it, unless the High Court gives leave to the contrary. The notice of motion should state concisely the nature of the claim and the relief or remedy required **[Rule 4(3)].** The practice and procedure to be exercised is to be in accordance with the normal practice and procedure of the High Court and its Rules **�with any variations the circumstances require.�** I have already stated, as indicated by the cases, I consider that practice and procedure

take second place to considerations of gravity, justice, public interest and the upholding of the rule of law in constitutional cases. Included in the concept of justice here will be that of ease of access for the litigant.

It is somewhat disappointing therefore to observe the Attorney�s officers attempting to deny the Applicant jurisdiction to bring this important case, and to deny him that access to the courts. When the trend of the cases has been all in favour of permitting access, and since this applicant was obviously no frivolous busybody, there was no proper basis for attempting to stifle his litigation. As officers of the court those directing the litigation should have realised these were not objections to be taken at this time in Fiji�s crisis. In the current tragic scale of things, technical objections of this kind could only weigh as buzzing gnats in comparison with events on the grander stage, off from which they must surely be ignominiously swatted.

The Salient Facts

On 19 May 2000 Fiji�s Parliament suffered an armed invasion and takeover. George Speight with some civilian supporters and a band of armed soldiers from the military forces moved in. Parliament was in session at the time. The Members had been elected the previous year under the 1997 Constitution. For the most part the Opposition Members were released and only the Coalition Government and its Members of Parliament were held. Others present, staff and visitors, were released. The Government, including the Prime Minister, Deputy Prime Minister, Members of Cabinet and Government MPs were all held hostage. From TV coverage of which I take judicial notice the rebel group sought through their vociferous if not always translucid leader, to gain abolition of the democratic provisions of the Constitution as presently framed and assertion of indigenous Fijian supremacy. Beyond that it was impossible to discern specific claims.

Fiji Television, as well as international stations relayed on Fiji Television gave daily and frequent coverage of events. The City of Suva was extensively pillaged with shops being chiefly targeted. Some were burned, most were looted. Some estimates assessed the extent of the damage at F$35 million. I take notice of these scenes and accounts, as live events unfolded in the crisis. Speight and his group purported to abrogate the Constitution the next day, the 20 May 2000. Ratu Jope Seniloli was sworn in as the rebels choice of President. Various members of the group were sworn in as Ministers, and decrees under the auspices of the Taukei Civilian Government were published. On 19th May 2000 the lawful President declared a State of Emergency.

On 27 May 2000 the lawful President, acting pursuant to powers under Section 106(1) of the Constitution, appointed Ratu Tevita Momoedonu the Minister for Labour, Industrial Relations, and Immigration to perform the functions of the Prime Minister. Ratu Tevita had not been in Parliament at the time of the invasion, and was not held hostage. The Prime Minister was held largely incommunicado in the Parliamentary complex. On the same day the President purported to prorogue Parliament for 6 months pursuant to section 59(2) of the Constitution. This bringing to an end of the then current session of Parliament was gazetted, and the gazette notice stated that it was done in exercise of powers on the advice of the Acting Prime Minister.

The Applicant states in his first affidavit that �on 27 May the President Ratu Mara sacked the elected Government of Prime Minister Mahendra Chaudhary and

claimed control of the country.� None of the Respondents affidavits refer to such facts, the dismissal of the Prime Minister, his government, or to the assumption of full executive powers by the President. Nor has any Gazette Notice been provided to me of these alleged facts. I have no reliable official evidence that the President did dismiss the Prime Minister or his government, or that he assumed executive control. However, without Parliament, control would have vested in him so that he could act in the national interest. In his affidavit Commodore Bainimarama referred to the deteriorating law and order situation. It was obvious that persons freely came and went into the Parliamentary complex. The authorities allowed a human shield thereby to gather so as to protect the hostage takers. The surrounding area and the complex were not properly sealed off.

Indeed the situation was quite unlike any other hostage crisis in the way it was handled, or perhaps not handled. The rebels roamed around the city of Suva at odd times apparently when they felt like it. The country appeared to be drifting daily into further anarchy. Casualties occurred to the armed forces and an unarmed policeman was shot dead by the rebels. That same night 28 May 2000 the lives of the President and his immediate family were threatened by the rebels. Fiji TV One�s premises were also attacked by a rampaging mob who were allowed to emerge unchecked from the Parliamentary complex. The TV station was seriously vandalised and put out of operation. Weapons were discharged by the rebels indiscriminately and the town was intimidated.

The President and his family were evacuated to a Fiji naval vessel on Monday 29th May 2000. Commodore Bainimarama stated in his affidavit:

> ***The President then stated that he would relinquish his post as President. As a result of the absence of any other viable alternative at that time I assumed Executive Authority from the President as Commander and Head of the Interim Military Government of Fiji,***

That night Commodore Bainimarama promulgated the **Constitution Revocation Decree 2000** and the **Existing Laws Decree 2000**, stating this was done �in an effort to restore normality and to ensure the overall safety of the hostages.� The Commodore promulgated other Decrees subsequently �to ensure smooth continuance of government administration and the related services.�

Meanwhile he directed negotiations with the George Speight group in order to secure the release of the hostages. He appointed an interim military government on 3rd July 2000. On 9th July 2000 an agreement was signed by the Commodore and by George Speight, known as the Muanikau Accord. In consequence Commodore Bainimarama promulgated the **Transfer of Executive Authority Decree 2000** and the **Immunity Decree 2000** which came into force on 13 July 2000. Then followed the convening of the Bose Levu Vakaturaga (Great Council of Chiefs), all the hostages were released after being held for a total of 56 days, and Ratu Josefa Iloilo was recommended by the BLV for appointment and was appointed President. However, this appointment was made without consultation with the Prime Minister as was required by **section 90** of the **Constitution**.

Thereupon the new President appointed an interim civilian administration. Eventually some of the George Speight group were arrested and taken into custody. They have yet to answer a variety of charges, chief of which is treason. Most of their supporters were seen on the television by the rest of the nation inside the

Parliamentary complex during the hostage crisis. Whoever were the group�s sponsors, they have yet to be identified, or if identified already, yet to be fully investigated or charged. Reassuringly some progress is reported to the press by the police authorities in this regard.

Commodore Bainimarama explained his assumption of extra-constitutional powers by stating: �our whole nation was on the brink of total anarchy and the safe release of the hostages was the primary and paramount concern�. In his affidavit he concluded:

> ***�Further, I verily believe that the interim government headed by Prime Minister Qarase has effective control and acceptance by the majority of Fiji�s people and the administration has acquired legitimacy by such widespread acceptance by the people of Fiji.�***

I do not have an affidavit from Ratu Sir Kamisese, to provide the court with events on the takeover of power, as he saw it. His Excellency was widely reported as stating that he had �stepped aside�. I shall return to the Applicant�s second affidavit later. These then are the basic facts.

Procedure for making changes to the Constitution

Man long ago realised that he could not live in a world without laws. In order to defeat tyranny, despotism, untrustworthy and arbitrary princes, robber barons, provincial nabobs and court favourites, he came to see a capacity for good governance in the State was to be had through the assistance of a constitutional document. In some countries such supreme law was unwritten but obeyed as a matter of established convention, and upheld and developed by the courts. Most countries nowadays have a written constitution, as does Fiji.

Fiji�s 1997 Constitution is to be described as *rigid* or inflexible as opposed to *flexible* within the categorisation of Bryce [see **Bryce**: Studies in History or Jurisprudence (1901). See also **A.V. Dicey** �The Law of the Constitutions 10th Edition by Wade.�] It is also a *supreme* constitution as opposed to a *subordinate* one within the Wheare categorization. Fiji�s Constitution states in **section 2(1)** that it is supreme. As with that other rigid constitution, the United States Constitution, Fiji�s Constitution has special procedures for the making of alterations to it. (see Chapter 15).

Section 190 states:

> **This constitution may be altered in the way set out in this chapter and may not be altered in any other way**. (emphasis added)

The purpose of such a provision is to ensure due and careful consideration before the supreme law of the land is changed, including the safeguard of a 2/3 majority of both Houses, 60 day lapses between the 2nd and 3rd readings of bills so as to allow for proper debate, and provided certain veto provisions are not exercised against the Bill.

It is obvious that an usurpation of the power of Parliament, that is the Parliament consisting of the President, the Senate and the House of Representatives by subverting or abrogating the Constitution does not amount to an amendment within

the supreme law. A challenge made in this way is an unlawful act. What laws therefore can come to the rescue of those who would otherwise be guilty of treason by such usurpation? When one considers the amount of incursion and damage caused to the lives of the ordinary people of Fiji as a result of the attempted civilian coup of the George Speight group and the extra-constitutional disengagement now affecting Fiji nationally and internationally it is not difficult to see why such acts should be visited with the most serious charge in the Penal Code, namely treason. The civilian coup of George Speight and his group failed. It never achieved any legitimacy and therefore its legality or lack of it does not fall for further consideration. Prayer (a) of the Applicant�s summons seeking a declaration that the attempted coup of 19 May was unsuccessful is therefore granted.

Declaration of State of Emergency

I have no formal evidence before me of such Declaration apart from the Applicant�s first affidavit. I have been shown no Gazette Notice of such Declaration if it occurred, and as I have already indicated I have no affidavit from H.E. The President stating that he exercised such powers. I was handed a copy of a Legal Notice numbered simply as No. 1 and dated 19th May 2000. I am not certain whether these Public Emergency Regulations were indeed gazetted. If they were not, this is hardly surprising in the disturbing and distracting times in which government had to operate.

They were no doubt done in great haste, and this probably explains why they incorrectly refer to being made under the Public Safety Act instead of the more recent Emergency Powers Act 1998. Assuming for the purposes of the order sought that the President had so proclaimed, under what powers was he acting?

Since 19 May 2000 was the day on which so much rioting, looting and destruction occurred in Suva it is hardly surprising that the President formed the view that a state of civil commotion had arisen, justifying the making of the proclamation.

Chapter 14 of the Constitution deals with **Emergency Powers. Section 187** provides for Parliament to make a law conferring power on the President to proclaim a State of Emergency in such circumstances as that law prescribed. The **Emergency Powers Act 1998** **[Act No. 28 of 1998]** came into force on the same day as the **1997 Constitution** 27 July 1998. Besides empowering the President to make Emergency Regulations (which he did and promulgated on 19th May 2000, the day of the civil commotion) it also empowered the President to proclaim a State of Emergency �acting on the advice of Cabinet.� Four circumstances are set out for which the Cabinet can advise in favour of making such a proclamation [**Section 2(2) (c) to (d)].** It was not possible for the Cabinet, held hostage for the most part in Parliament with only 2 or 3 Ministers free outside, to decide and communicate their advice to the President.

In certain circumstances Parliament may disallow a proclamation of a State of Emergency. It was not practicable for parliament to debate the matter, whilst held hostage. In cases of real emergency the maxim �*salus populi est suprema lex*� applies (that is: the welfare of the people is the paramount law). Oliver Cromwell, who had briefly studied law at Lincoln�s Inn but who had probably gained his directness and common sense from farming in Cambridgeshire allegedly said:

> ***�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.�

I am satisfied that the President acted as lawfully as he could in the circumstances, that he acted under the doctrine of necessity and that he acted in an attempt to buttress the lawful framework of the State.

Under prayer (b) therefore I decline to grant the declaration sought in so far as it relates to the action of the President Ratu Sir Kamisese Mara. I turn now to consider whether the doctrine of necessity has some bearing on the actions of Commodore Bainimarama in legitimizing otherwise unlawful acts.

The Doctrine of Necessity

A useful starting point is Haynes P�s conclusions after an exhaustive review of all the cases on necessity and extra constitutional situations in **Mitchell�s** case (supra) at 88h et seq.:

> ***(3) 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) It is for this court to pronounce on the validity (if so) of any unconstitutional action on the basis of necessity, after determining as questions of fact, whether or not the above conditions exist. But it is for the party requiring the Court to do so to ensure that proof of this is on the record.***
>
> ***(5) Such validation will not be a once-for-all validation, so to speak, it will be a temporary one, being effective only during the existence of the necessity. If and when this ends, the right constitutional steps must be taken forthwith, that is, within a reasonable time.***
>
> ***(6) I am not at all attracted to the principle of �condonation� invented and applied in Jilani v. The Government of the Punjab. I can find no support for it either in the classical maxims or in the cases or in the writings of the jurists ancient and modern. In my view, necessity, when it applies, must legitimise or not legitimise; I find it difficult to conceive of a judicial jurisdiction to pardon an illegality. To pardon should be the***

> ***prerogative of the executive. I would not adopt this principle of �condonation� on the basis of necessity as law in Grenada.�***

On the question of onus of proof of regularity or lawfulness Cullinan CJ in **Mokotso (supra) at 132** he said:

> ***��the burden of proof of legitimacy must always rest upon the new regime. No presumption of irregularity can operate in the regime�s favour; indeed there must be a presumption of irregularity��***

Ackermann JA in **Makenete�s** case **(supra) at 65b** said:

> ***�I likewise agree that the onus of proving that a government is entitled to recognition as lawful notwithstanding its revolutionary origins lies on the government claiming such recognition and in particular when it relies on such recognition as a defence to an individual�s claim that it has acted in breach of the previous constitutional order. I also support the view that a court ought not lightly to uphold such a defence or uphold it on insubstantial grounds or persuade itself to uphold it precipitately on the evidence of rapid military or executive success which might give a misleading impression of �effective� government control in the narrow sense of the word.�***

The courts have recognised the existence of a law of necessity. Such a law permits emergency action to be taken validly in times of extreme crisis, such action being in normal circumstances illegal. But if such action is taken it must be transient and a proportionate response to the crisis [see **de Smith and Brazier: Constitutional and Administrative Law 7th Edit. 1994 at 73-74;** and **Mitchell�s Case (supra) at 88e** wherein Haynes P said:

> ***�(I) Whether we read it into the written Constitution of 1973 as an implied constitutional provision thereof or regard it as a purely extra doctrine, this Court should adopt and adapt necessity as a constitutional source of validation of unconstitutional acts and legislation in fit cases.�***

Whatever is done however should be done in order to uphold the rule of law and the existing constitution. Necessity cannot be resorted to in order to justify or support the abrogation of the existing legal order. The doctrine is valid only to protect not to destroy.

Brookfield in [1988] New Zealand Law Journal 250 summarised the principle in **�The Fiji Revolutions of 1987�** as:

> ***�the power of a Head of State under a written Constitution extends by implication to executive acts, and also to legislative acts taken temporarily (that is, until confirmed, varied or disallowed by the lawful Legislature) to preserve or restore the Constitution, even though the Constitution itself contains no express warrant for them.�*** (emphasis added)

The doctrine does not permit necessity to be used as a means of subverting the existing constitutional structure either by abrogating the existing legal order or by

bypassing the path laid out for lawful amendment. It may in a fit case allow for a short-lived temporary suspension. What can and cannot be done therefore? Lord Pearce in his well-remembered dissenting advice in the Privy Council in ***Madzimbamuto v. Lardner-Burke [1969] 1 AC 645 at 732E*** advised Her Majesty over the unilateral declaration of independence by Rhodesia as follows:

> ***�I accept the existence of the principle that acts done by those actually in control without lawful validity may be recognised as valid or acted upon by the courts, with certain limitations namely (a) so far as they are directed to and reasonably required for ordinary orderly running of the State, and (b) so far as they do not impair the rights of citizens under the lawful (1961) Constitution, and � so far as they are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful Sovereign. This last, ie �, is tantamount to a test of public policy.�***

Fieldsend A.J.A. in the Court below had said:

> ***�The act must not be intended to, or in fact in its operation directly, further or entertain the usurpation�* [1968] 2 SA 284 at 441**:

Following the outbreak of the Civil War in the USA the Supreme Court of the United States held that a limited validity might be accorded to the actions of the southern confederacy. Chase CJ stated for the Court at 733:

> ***�It is not necessary to attempt any exact definitions within which the acts of such a state must be treated as valid or invalid. It may be said perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government, and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void�. (emphasis added)***

It is obvious therefore, that the doctrine of necessity could come to aid Commodore Bainimarama in resolving the hostage crisis, imposing curfews, maintaining roadblocks and ensuring law and order on the streets. Once the hostage crisis was resolved and all other law and order matters contained if not entirely eradicated, the Constitution, previously temporarily on ice or suspended, would re-emerge as the supreme law demanding his support and that of the military to uphold it and to buttress it against any other usurpers. The doctrine could not be used to give sustenance to a new extra-constitutional regime **Mokotso (supra) at 122.** Nor could it provide a valid basis for abrogating the Constitution and replacing it with a Constitutional Review Committee and an Interim Civilian Government. Necessity did not demand any of that.

Commodore Bainimarama makes his intentions in dealing with the emergency situation very clear. They were to preserve law and order, �to save the State from

further destruction and to ensure the safe release of the hostages in Parliament,� �to restore normality�, �our whole nation was on the brink of total anarchy and the safe release of the hostages was the primary and paramount concern.� Subject to an analysis of the effectiveness doctrine below, it can be concluded therefore that there was no foundation, cause or genuine desire to remove the 1997 Constitution. Nor is there evidence that Fiji had been affected by a state of affairs when �there was no real democracy because the country, by and large, was under one man rule� �where the judiciary was ridiculed�, �where an attempt was made to politicise the Army�, �where the representatives of the people are accused of massive corruption�, �disqualification suits abounded for corrupt practices�, and when the economy was highly precarious, bank loans defaults rampant and generally no accountability or transparency of government. Such a situation leading to constitutional deviation could be validated for a transitional period on the ground of State necessity (see **Short order of Judgment of Supreme Court of Pakistan on Petitions challenging the provisional constitutional order and proclamation of emergency** per I.H. Khan CJ in a decision made this year 2000). No such demonstrably desperate situation faced Commodore Bainimarama concerning the state of health of the body politic and social fabric of Fiji. There was thus no need to pass any Decrees purporting to abrogate the 1997 Constitution. Nor at the end of the hostage crisis was there need, in order to shore up the Constitution and preserve the fabric of society, any need to have the Government of the day dismissed. These were unconstitutional and unnecessary acts unprotected by the doctrine of necessity.

Nor was it necessary to seek to dilute rights in the Constitution granted to its inhabitants by the people�s democratically elected representatives. Any decree in which it was sought to do so, would be unlawful at least to that extent, such as for example section 19(7) (g) of the **Interim Military Government Decree No. 7 the Fundamental Rights and Freedoms Decree 2000**, purporting to narrow the meaning of equality in section 38 of the Constitution. Similarly there was no need to prorogue the Parliament of Fiji, even more so since the Emergency Powers Act required Parliament **to be recalled** if a proclamation was to be made [**section 4 Emergency Powers Act 1998; section 188 of the Constitution**].

What is the Duty of the Judiciary upon the occurrence of extra-constitutionality?

Judges are required to uphold lawfulness and to apply justice. Upon being appointed they swear both the oath or affirmation of allegiance to the Republic of Fiji and the oath or affirmation for the execution of judicial office [section 135 Constitution]. The judicial oath as set out in Schedule D at page 112 reads:

> ***�I, A.B. , do swear that I will well and truly serve the Republic of the Fiji Islands, in the office of [ ] . I will in all things uphold the Constitution and I will do right to all manner of people in accordance with the laws and usages of the Republic, without fear or favour, affection or ill will [So help me God!]***

The oath is two pronged. First the judge swears to uphold the Constitution, and second he swears that he will do right (ie. will do justice) to everyone in accordance with the laws and usages of the Republic (that is he will not go against the law or make a perverse decision or one not in accordance with the law). Finally he will so act, with courage, without bias, without favouring anyone, and without malice or spite towards anyone. A judge�s first duty is to uphold the Constitution. Because a

judge may be called upon to pronounce upon the legality of executive action when an instance of supra-constitutionality occurs, it is a wiser counsel for a judge, indeed for the Bench of Judges, to make no public statement on the matter. In ***Makenete*** (supra) Ackermann JA at 56c said:

> ***�A peculiar duty is thereby cast upon the court to remain open to argument when subsequently called upon to adjudicate in a dispute regarding the legitimacy of the new regime.�***

A judge�s strength and value lies in continuing to hold office and to carry out his or her duties with integrity, even-handedness, boldness and courage. If the judiciary is deserving of any respect, it must at least aim for these precepts.

What does even-handedness mean when the judicial oath enjoins the judge to uphold the Constitution? Events will no doubt place the Constitution into one of three categories, namely �abrogated� �still in being� or �wait and see�. One must commence from the presumption however that the Constitution is still in being and not subverted. The onus of impugning the validity of the Constitution lies on those seeking to suggest it is no longer operative. In ***Premier of Kwazulu-Natal & Others v. The President of the Republic of South Africa & Others*** Constitutional Court of South Africa case No. CCT 36195 (unreported) 29 November 1995 Mahomed DP said at 47:

> ***�There is a procedure which is prescribed for amendments to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable.�***

It is unchallenged that the Fiji Constitution has not been amended by the new regime in the way expressly provided for in Chapter 15. The doctrine of necessity is not applicable to validate a change in the Constitution either. That leaves only a consideration by the court as to whether the interim government has established a proper claim to have succeeded the previous regime on the doctrine of effectiveness. Such a doctrine would clearly take some time, perhaps over months if not a year or two, before it could be established with certainty. I shall return to this consideration later.

The courts have pronounced frequently on the presumption in favour of the Constitution. In ***Madzimbamuto*** **(supra)** Lord Pearce said at 732C:

> ***�The judges under the 1961 Constitution therefore cannot acknowledge the validity of an illegal government set up in defiance of it. I do not agree with the view of Macdonald J.A. that their allegiance is owed to the rebel government in power.�***

> ***�Judges could not carry on,�*** his Lordship said at 742 B ***�without acknowledging some formalities and acts that had an illegal origin.�***

In ***Makenete*** **(supra)** Ackermann J.A. quoted extensively from Fieldsend A.J.A. sitting in the Court of Appeal in ***Madzimbamuto*** RAD case (1968(2) SA 284 at 429-430, 1968 RLR 203 at 385) with full approval at 65-66:

> ***�The Courts become the pivot on which the constitutional arrangements of the country turn, for the Bench can and must determine the limits of the authority both of the executive and of the***

> ***Legislature. The consequence follows that the Bench of Judges is the guardian of the constitution�***
>
> ***Judges appointed to office under a written constitution, which provides certain fundamental laws and restricts the manner in which those laws can be altered, must not allow rights under that constitution to be violated. This is a lasting duty for so long as they hold office, whether the violation be by peaceful nor revolutionary means. If, as in South Africa, the Courts were obliged to stand resolutely in the way of what might be termed a legitimate attempt to override the constitution, a fortiori must a court stand in the way of a blatantly illegal attempt to tear up a constitution . If to do this is to be characterized as counter-revolutionary, surely an acquiescence in illegality must equally be revolutionary. Nothing can encourage instability more than for any revolutionary movement to know that, if it succeeds in snatching power, it will be entitled ipso facto to the complete support of the pre-existing judiciary in their judicial capacity. It may be a vain hope that the judgment of a court will deter a usurper, or have the effect of restoring legality, but for a court to be deterred by fear of failure is merely to acquiesce in illegality. It may be that the court�s mere presence exercises some check on a usurper who prefers to avoid a confrontation with it.*** (emphasis added)
>
> ***I am in full agreement with these views and in particular with the warning that a court ought not to shirk its constitutional duty because it fears that its orders may not be executed by the usurper.�***

Clearly the judges at the outset of an extra-constitutional occurrence must uphold the Constitution until evidence and argument are placed before them impugning successfully the operation of that Constitution. That is the approach taken by Shameem J. and Madraiwiwi J. in 3 recent cases. Full argument was not addressed to their Lordships on the validity of the 1997 Constitution. However they stated they awaited the decision of the court which had had the advantage of full argument, namely this court, in the present case. Nevertheless, these judges applied the Constitution and in doing so, in my respectful opinion, correctly applied the lawful presumption of continuing legality applying long established law in consonance with their judicial oaths. But in carrying out their proper judicial function without perversity their lordships were roundly criticised in letters to the press by none other than the Attorney-General, a litigant before this court, the high officer of State who conventionally stands as the protector and apologist for the judges.

Gleaned from the recorded cases and from what had happened in Fiji in the early days of the Military takeover the following observations can be made on the role of the judiciary in such crises:

> 1. Judges should remember their oaths of judicial office to uphold the Constitution. The presumption is that the Constitution remains unimpugned until pronounced otherwise in court.
>
> 2. Extra-constitutional occurrences or subversions if not intended to be temporary will not displace the Constitution for some period of time. Judges should continue to uphold the Constitution meanwhile. Even in cases where

the doctrine of necessity applies, time will need to pass before validity *ab initio* can be granted to acts committed under the doctrine.

3. Unless there has been a �Glorious Revolution� to remove an undoubted tyrant, or to end a regime whose record �was one of turmoil� ***Mokotso* (supra) at 167** followed by �clear acceptance, jubilation, and acclaim� for the revolution, the judges should await the filing of cases and production of evidence and arguments for consideration of validity under all other heads of claim see ***Pakistan Petitions Case* (supra)** generally.

4. It is not the oath taken or the regime under which an appointment is made that colour a judge�s role on legitimacy. A judge is expected to act at all times impartially, fairly, with integrity, and to uphold all the laws of the land, independently of the regime existing at the time of his or her appointment. A judge may be called upon to curb the excesses of a revolutionary regime acting arbitrarily or outside the law.

5. Judges should remember the importance of the constitutional separation of powers and not intrude into political matters. To do so compromises the independence of the judiciary. In particular the President can be advised to seek his own counsel and constitutional adviser. Such persons would have been made available to the President readily and urgently through the auspices of several of the overseas missions of Commonwealth countries represented in Fiji.

It would be inappropriate, as happened here in Fiji, for 3 judges of the High Court, to provide written opinions to His Excellency and oral advice on political paths out of the impasse. It is unwise also to tender advice on the grant of immunity to the rebels for such immunity is bound to feature in future criminal prosecutions or civil litigation [see ***Lennox Phillip and Others v. DPP and Another [1992] 1 AC 545; A-G of Trinidad and Tobago & Another v. Lennox Phillip and Others [1995] 1 AC 396*].** Even more unwise and dangerous a judicial precedent was the tendering of advice on the proroguing of Parliament, the appointment of an Acting Prime Minister and the dismissal of the Government. These were not appropriate judicial functions.

6. Similarly judges should not compromise their neutrality by taking an active part in advising an usurping regime. Nor should they assist in drafting decrees for the usurper. Such may attract the criticism that they were aiding and abetting the abrogation of the Constitution, indeed were acting with indecent haste to see the Constitution gone, such assistance being in obvious conflict with their judicial oaths of office. The cynical will say they hoped for something in the new regime. Such views undermine the public�s confidence in the judiciary.

7. It is well known the same judges assisted in the drafting of the **Administration of Justice Decree 2000 (Interim Military Government Decree No. 5 of 2000).** That Decree was subsequently repealed by the **Judicature Decree 2000 [ICG Decree No. 22].**

In the Decrees of notoriety were the raising of the retirement age of the Chief Justice and that of the puisne judges of the High Court, and the unfathomable abolition of the Supreme Court. None of this conduct provided buttress, in the

opinion of the nation as evidenced in the Press, to the institutions of the courts and the judiciary, and such drafting should never have been entered upon. There was no power to abolish the Supreme Court. No necessity compelled its abolition. It existed under the Constitution and it remains Fiji�s final Appellate Court still.

The Doctrine of Effectiveness

In view of the factual situation in this case, the doctrine of effectiveness does not apply. Commodore Bainimarama is clearly no usurper. Having acted as he thought best in a temporary but dire hostage crisis, he handed over power to a civilian caretaker administration. Necessity would permit him to suspend the Constitution just for so long as to allow him to free the hostages and to restore law and order. That concluded his role. An examination of his regime for effectiveness does not arise (see generally ***Mitchell*** **and** ***Mokotso*** **(supra)).**

However what is the status of what remains, namely the interim administration of Prime Minister Laisenia Qarase**.**

These for the most part, worthy, talented and public spirited persons, were drawn into a government on a misunderstanding of what was possible following on from the emergency of the hostage crisis. But the rule of law means that the suspended state of affairs and the Constitution return to life after the stepping down of a responsible military power and after the conclusion of its work for the restoration of calm for the nation. The nation has much for which to be grateful to the military, and may yet have further need for its assistance to maintain stability. There is no constitutional foundation of legality for the interim government or for the Constitutional Review Committee.

In conclusion the military is invited and recommended by the court to ensure a smooth and amicable handover of Government to that which will soon be chosen by the incoming Prime Minister, following my orders below. The Constitution provides for a multi-party Cabinet, sometimes referred to as a Government of National Unity [GNU]. After the events which we have gone through in the last 6 months, all participants in the political process need to act unselfishly and wisely, and the GNU option may fruitfully be examined. That however is a political question for the parties concerned and not a matter for the court.

I must pay tribute to counsel on both sides for their industry, research and helpful submissions without which the Judiciary�s task would prove so much more difficult.

Orders

In the result I make the following declaratory orders:

1. The attempted coup of May 19th was unsuccessful.

2. The declaration of the State of Emergency by the President Ratu Sir Kamisese Mara in the circumstances then facing the nation, though not strictly proclaimed within the terms of the Constitution, is hereby granted validity *ab initio* under the doctrine of necessity.

3. The revocation of the 1997 Constitution was not made within the doctrine of necessity and such revocation was unconstitutional and of no effect. The 1997 Constitution is the supreme and extant law of Fiji today.

4. The Parliament of Fiji, consisting of the President, the Senate, and the House of Representatives, is still in being. Its incumbents on and prior to 19 May 2000 still hold office, that is Ratu Sir Kamisese Mara, who had stepped aside, and who remains President as originally appointed by the Bose Levu Vakaturaga (Great Council of Chiefs); the Senators are still Members of the Senate; the elected Members of Parliament are still Members of the House of Representatives. The status quo is restored. Parliament should be summoned by the President at his discretion but as soon as practicable.

5. Meanwhile owing to uncertainty over the status of the Government, it will remain for the President to appoint as soon as possible 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 pursuant to **sections 47** and **98** of the Constitution, and **that government** shall be the government of Fiji.

6. I grant liberty to the parties to apply for directions generally and specifically on implementation of these orders.

I shall reserve the question of costs to another date to be fixed. For that purpose this matter is adjourned for mention to 8 December 2000 at 10.30am.

A.H.C.T. Gates
Judge

At Lautoka
15 November 2000

Solicitors for the Applicant: M/s S.B. Patel & Co. Lautoka
Solicitors for the Respondents: Attorney-General of Fiji

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