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BACK TO THE FUTURE: *QARASE v BAINIMARAMA*

Introduction

1. In 2001 Gates J, in the decision of *Prasad v Republic of Fiji* [2000] FJHC 121 concerning the lawfulness of the purported abrogation of the Constitution following the 2000 coup, quoted approvingly (at 22) from *Makenete v Lakehanya* [1993] 3 LRC 13 per Ackermann JA (at 65-66) (who in turn was quoting from Fieldsend AJA in *Madzinbamuto v Lardner-Burke* 1968 (2) SA 284 at 429-430):

> 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 as long as they hold office, whether the violation be by peaceful or revolutionary means. If…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 individual 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 confrontation with it.

2. Later that year in *Korori v Commissioner of Inland Revenue* [2001] FJCH 138 his Honour repeated this theme when he stated that (at 10-11)[1]:

> The Constitution's very indestructibility is part of its strength… The Constitution remains in place until amended by Parliament… The fundamental law represented in a Constitutional document may only be changed in accordance with that Constitution. The Constitution provides for its own mutation. Usurpers may take over…and…rule for many years apparently outside or without the Constitution. Eventually the original order has to be revisited, and the Constitution resurfaces… For the courts cannot pronounce lawfulness based simply on the…tyranny of the mob. That way leads to the guillotine. Such tyranny lacks universal morality and the courts will not assist usurpers simply because they are numerous, powerful, or even popular.

3. In 2008 in *Qarase v Baininmara* [2008] FJHC 241 the same judge - now the Acting Chief Justice of the High Court of Fiji - resiled from these earlier sentiments, observing, in upholding the lawfulness of the President's actions following the 2006 coup when he dismissed the democratically elected Prime Minister and appointed Commodore Bainimarama as Interim Prime Minister instead, that (together with Byrne and Pathik AJJ[2]) (at [158]-[159]):

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

[1] The quote is taken from A Twomey "The Fijian coup cases: The Constitution, reserve powers and the doctrine of necessity" (2009) 83 *ALJ* 319 at 330.
[2] All of whom had been appointed as acting judges by the military regime after the coup.

4. It was at this moment that, distressingly for the citizens of Fiji and even more calamitously for the rule of law in that nation, judicial authority fell prey to political reality. While the former was restored by the Court of Appeal's decision in *Qarase v Bainimara* [2009] FJCA 9 (on 9 April 2009)[3], as subsequent events demonstrated, this was but the briefest of resurrections.

5. On one view, the Court of Appeal decision in *Qarase* gives rise to interesting issues concerning the permissible use under a written Constitution of reserve or prerogative powers by the Executive in times of national emergency and the extent to which an exercise of these powers can ever be justified by recourse to the doctrine of necessity or some other extra-Constitutional norm.

6. On another view, the decision is no more than another piece of legal detritus in the now increasingly bleak political landscape of Fiji. Only the passage of time will be determinative. But in order to understand the present there must be a return to the past, and in particular, to the previous judgments of the Fijian courts in relation to the legal consequences of the successive coups that have occurred in that country.

Background: Or the More Things Change, the More They Stay the Same

7. Fiji was granted its own Constitution and independence by the United Kingdom in 1970 by the *Fiji Independence Act* 1970 (UK) and the *Fiji Independence Order* 1970 (UK), the Schedule to which contained the constitution of Fiji ("the 1970 Constitution").[4] Like Australia, Fiji remained a constitutional monarchy with Queen Elizabeth II as Head of State represented by a Governor General.

[3] Comprising Powell, Lloyd and Douglas JJA.
[4] For more detail on the constitutional and political background prior to the 2006 coup see Twomey, *supra*, at 319-323 and G Williams "The Case That Stopped a Coup? The Rule of Law and Constitutionalism in Fiji" (2001) 1 *OUCLJ* 73 at 74-77.

8. The 1970 Constitution contained a Bill of Rights and established a bicameral Parliament. The Constitution codified the reserve powers of the Governor General and stated that the Governor General could only exercise his or her power to the extent that the Constitution expressly permitted.

The 1987 Coup

9. While the first constitutional crisis occurred in 1977, it was not until a decade later, in 1987, that Fiji experienced its first military coup d'etat led by Colonel Rambuka.

10. The Governor General eventually dissolved Parliament and formed a council of advisors of which Rambuka was a member. The deposed Prime Minister, Mr Timoci Bavadra, commenced legal proceedings seeking a declaration that the dissolution of Parliament was illegal and that he remained the validly elected Prime Minister. Eventually a power sharing agreement was reached by the relevant political parties and the proceedings were discontinued.

11. In September 1987, Rambuka orchestrated a second coup. The result was the abrogation of the 1970 Constitution, the declaration of Fiji as a republic and, in 1990, the declaration of a new Constitution ("the 1990 Constitution").

12. In 1992 elections were held under the 1990 Constitution, with Rambuka being elected Prime Minister.

13. Section 161 of the 1990 Constitution provided for its review within seven years. A constitutional review process, receiving bipartisan support, was established and in 1995 the Constitutional Review Commission was created chaired by Sir Paul Reeves, a former Governor General and Archbishop of New Zealand.

14. In 1997, pursuant to extensive consultation and review by the Commission a new constitution was enacted, namely, the *Constitution*

Amendment Act 1997 ("the 1997 Constitution"). It was this Constitution that was the subject of the *Qarase* litigation.

The 2000 Coup: *Prasad* and *Yabaki*

15. Following the 1999 elections Mr Mahendra Chaudhry was declared Prime Minister.

16. In May 2000 a civilian coup led by Mr George Speight took place. Speight and his followers stormed Parliament and held the Prime Minister and most of the Cabinet hostage. The President appointed one of the free Ministers as Acting Prime Minister and on his advice prorogued Parliament.

17. As head of the armed forces, Commodore Bainimarama advised the President that the Constitution was not adequate to deal with the breakdown of law and order and ought to be abrogated. Bainimarama then assumed executive power himself and issued decrees abrogating the Constitution and establishing an interim military government. In one of the many ironies characterising the fluid political affairs governing Fiji since 1970, in July 2000 Bainimarama issued a decree establishing a government, the head of which was Mr Laisenia Qarase as Prime Minister. Mr Ratu Josefa Iloilo was made interim President.

18. While the interim civilian government continued to operate, a farmer, Mr Chandrika Prasad, challenged the validity of the abrogation of the Constitution. The challenge was upheld by the Fiji High Court in *Prasad v Republic of Fiji* [2000] FJHC 121, where Gates J held that while Bainimarama's initial actions could be justified by the doctrine of necessity, the subsequent abrogation of the Constitution could not, and was therefore unconstitutional. On appeal, the Fiji Court of Appeal (*Republic of Fiji v Prasad* [2001] FJCA 2) agreed.

19. The interim civilian government accepted the Court of Appeal's decision. However, rather than restoring Parliament and returning Chaudhry to the position of Prime Minister, the President dismissed Chaudhry as Prime

Minister and appointed a member of the House of Representatives as caretaker Prime Minister, on whose advice he then proceeded to dissolve Parliament. The caretaker Prime Minister subsequently resigned and the President appointed Senator Qarase as interim Prime Minister pending elections. Elections were held on 25 August 2001 wherein Qarase's party, SDL, was successful and Qarase was appointed Prime Minister.

20. The President's failure to recall Parliament, his dismissal of Chaudhry and the appointment of Qarase were challenged in the decision of *Yabaki v President of the Republic of Fiji* [2001] FJHC 1116. The case was heard shortly prior to election writs being issued. Justice Scott held that the President was required to summons the Parliament when so advised by the Prime Minister and that the President's failure to do so breached the Constitution (at [8]-[9]).

21. However, Scott J further held that the President could dismiss the Prime Minister if he formed the view that the Prime Minister had lost the confidence of the House of Representatives, even if no actual vote to this effect had taken place. Accordingly, Chaudhry's dismissal was valid as was the dissolution of Parliament, because they had taken place on the advice of the caretaker Prime Minister. In addition, Qarase's appointment was valid.

22. Significantly, Scott J accepted that the doctrine of necessity was applicable on the facts before him. He stated that if the Court were to apply the Constitution strictly then all acts of governance after the release of hostages would have to be declared invalid, creating legal and administrative havoc. He also noted that the election date had already been fixed and that it would not be in the best interests of the nation if his decision caused delay in holding elections.

23. The appeal to the Court of Appeal was dismissed because the intervening elections had caused the substance of the proceedings to

become otiose[5]. However, while sounding a cautionary note against the doctrine of necessity being applied with undue haste in times of constitutional difficulty, the Court went on to state that, contrary to the findings of Scott J, the President had no discretion outside the terms of the Constitution in relation to the way in which he could dismiss a Prime Minister, and therefore, he ought not have concluded that the Prime Minister had lost the confidence of the House of Representatives absent a vote on the floor of the House.

The 2006 Coup: *Qarase v Bainimarama*

24. In May 2006 a further election was held and Qarase was reelected as Prime Minister. But relations between the military and the government soon became hostile. The military alleged corruption on the part of the Qarase government as well as a lack of good governance. The military made demands of the government which included the resignation of Qarase. Qarase refused.

25. On 5 December 2006, the military, under Bainimarama, staged a coup, seizing executive authority from the President and declaring a state of emergency. Bainimarama declared that he took this action to "preserve the Constitution". During this period Bainimarama dismissed Qarase and appointed a caretaker Prime Minister who advised the dissolution of Parliament, which promptly occurred.

26. Bainimarama returned executive authority to the President in early January 2007. The President immediately made a public statement declaring Bainimarama's actions to be valid in law, that is to say, he ratified them. In addition, instead of declaring that the period of emergency had passed and reinstating Qarase as Prime Minister and restoring Parliament (as required by *Prasad* and the Court of Appeal in

[5] *Yabaki v President of the Republic of Fiji* [2003] FJCA 3.

Yabaki), on 5 January 2007, the President appointed Bainimarama as Interim Prime Minister.[6]

27. Approximately a week later, the President promulgated by decree a grant of immunity to all persons involved in the December 2006 coup. These promulgations were purportedly made in accordance with "the reserve powers of the Constitution inherent in the President" and the "Constitutional law and common law of Fiji"[7].

Decision of the High Court

28. Qarase subsequently commenced proceedings in the High Court to determine whether the President had validly exercised his power in dismissing him and his Cabinet.

29. The High Court found that the President had acted lawfully in ratifying the dismissal of the Prime Minister, in dissolving Parliament and in granting immunity to those responsible for the December 2006 coup. Remarkably, the Court held that all of this occurred whilst the 1997 Fiji Constitution remained intact.

30. The legal fiction to which the Court had recourse to achieve this outcome was that the 1997 Constitution could accommodate such acts through an exercise of the prerogative powers or reserve powers of the President. The Court, conflating the two concepts[8], held that these powers – nowhere provided for expressly in the Constitution – enabled the President to commit acts in a time of national crisis that would otherwise be unlawful.

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[6] Interestingly, Bainimarama relied on the first instance decision (and not the Court of Appeal) of Scott J in *Yabaki*.
[7] *Qarase v Bainimarama* [2008] FJHC 241 at [76]-[78].
[8] However, there is, as Twomey correctly notes (*supra*, at 327), "a vast difference between a prerogative power [of the Crown under a constitutional monarchy], which must only be exercised on the advice of a responsible ministers, and a reserve power that may be exercised in the President's discretion." Under the 1997 Constitution the President's reserve powers were codified and could not be exercised other than to the extent, and in the manner, expressly set out in the Constitution.

31. The defendants had to rely on the device of a prerogative power because it was tolerably clear that the conditions for the operation of the doctrine of necessity established by the Court of Appeal in *Prasad* could not be met having regard to the circumstances giving rise to the 2006 coup.

32. In *Prasad*, in order to decide the appeal the Court of Appeal was required to determine two issues[9]:

    (a) whether the doctrine of necessity provided a proper legal foundation for the abrogation of the 1997 Constitution; and

    (b) if it did not, whether the interim government had acquired legitimacy through the acquiescence of the people of Fiji (the doctrine of acquiescence or efficacy).

33. The Court of Appeal stated the doctrine as follows (at 17) (emphasis added):

> The doctrine of necessity enables those in de facto control, such as the military, to respond and deal with a sudden and stark crisis in circumstances which had not been provided for in the written Constitution or where the emergency powers machinery in that Constitution was inadequate for the occasion. The extra-constitutional action authorised by that doctrine is essentially of a temporary character *and it ceases to apply once the crisis has passed*.

34. Further, the Court was at pains to state that those seeking to rely on the doctrine as justification for their supra-constitutional acts in times of national crisis could not be the genesis of the emergency.

35. The Court of Appeal held that the doctrine allowed the temporary suspension of the constitutional order to enable Bainimarama to restore law and order and to secure the release of the hostages; the doctrine could not, however, justify his actions in permanently abrogating the Constitution.

[9] See F Wheeler "Fiji's Constitution Restored" (2001) 12 *PLR* 163 at 165..

36. In relation to the doctrine of acquiescence, the Court of Appeal agreed that the test of efficacy could be satisfied on the facts of the case before it. It formulated the key elements of the doctrine as follows[10]:

(a) that the burden of proof lay on the de facto government seeking to establish that it is in control with the agreement of the people;

(b) that the overthrow of the Constitution must be successful in the sense that the de facto government is established administratively and there is no rival government willing to resume power;

(c) that the people must be proved to be behaving in conformity with the dictates of the de facto government;

(d) that the conformity and obedience to the new order must stem from popular acceptance and support and not through fear and intimidation;

(e) that the longer the period of time in which the de facto government has been in control the more likely it is that there has been acceptance by the people of the new regime; and

(f) that elections are powerful evidence of efficacy.

37. The Court of Appeal held that the interim government had not discharged the burden of proving that it governed with the acquiescence of the Fijian people. This was because the evidence was overwhelmingly to the contrary.

38. Before the High Court, the defendants in *Qarase* could not meet the conditions for the operation of the doctrine of necessity because not only had the crisis passed and the status quo prior to the coup had not been

[10] See *Prasad* at 26, as summarised by Wheeler, *supra* at 165.

restored, the crisis giving rise to the extra constitutional acts was, on the evidence before the Court, the military's own creation.

39. Likewise, the defendants could not avail themselves of the doctrine of acquiescence to legitimise the coup. This was because, again, they could not discharge the burden of proof with respect to this defence.

40. The case was therefore argued on the basis that the President, being the exclusive repository of "the executive authority of the State" pursuant to s 85 of the 1997 Constitution, possessed a plenary power to take emergency action in times of national crisis derived from the prerogative. This was not necessarily to say that his power was derived from the broad language of s 85 (or the provisions that immediately followed it), rather the Court held that prerogative powers had always been vested in the Head of State and that they had not been ousted by "the scheme, order or words of the Constitution" (at [136]).

41. These powers, the Court held, survived Fiji's transformation to a republic in 1987, survived the existence of three written Constitutions which had sought to either abrogate or curtail them, and survived the text of s 96 of the 1997 Constitution which unambiguously stated that (emphasis added):

> **Section 96. President acts on advice**
> (1) Subject to sub-section (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 some other body or authority prescribed by this Constitution for a particular purpose as the body or authority on whose advice the Presidents acts in that case*.
>
> (2) This Constitution prescribes the circumstances in which the President may act in his or her own judgement.

42. The Court came to this conclusion notwithstanding that the parameters in which the President was permitted to act upon his own judgement, even in times of crisis, were expressly circumscribed by the Constitution. Sections 187, 188 and 189 relevantly stated (emphasis added):

> **Emergency Power**
> 187(1) The Parliament may make a law conferring power on the President, *acting on the advice of Cabinet*, to proclaim a state of emergency in Fiji, or in a part of Fiji, in such circumstances as the law prescribes.
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> **Summoning the House of Representatives**
> 188(1) Upon the proclamation, of a state of emergency, the President *must summon* the House of Representatives to meet.
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> **Powers of the House of Representatives**
> 189(1) The House of Representatives may, at any time, *disallow* a proclamation of a state of emergency.

43. Likewise, with respect to the President's power to dismiss the Prime Minister, again the Constitution provided the circumstances in which this power could be exercised. Section 109(1) clearly said that (emphasis added):

> 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.

44. Although the High Court recognised that the dismissal of Qarase and his Cabinet had not been carried out in accordance with the Constitution (at [130]), and notwithstanding the clear and unambiguous language of the 1997 Constitution, the Court nevertheless reasoned that because there had been no abrogation by express words or words of necessary implication of these fundamental prerogative powers inherited from imperial England, the conferral of executive power of the President by reason of s 85 of the Constitution was sufficient to incorporate, preserve and enliven these prerogative powers. Thus, it was held that the President was at all times acting in a manner that preserved the fabric of the Constitution, albeit extra-constitutionally.

45. Critically for the defendants, the difference between the exercise by the President of a prerogative power and the application of the doctrine of necessity was that, they contended, whereas the latter was justiciable, the former was not. The case having been made seductively simply for the High Court, it accordingly held that, "provided the President acted in

a *bona fide* manner, the Court would uphold the President's actions" (at [149]).

46. The Court therefore concluded (at [162] and [163]):

> [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 reasonable 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.
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> [163] We also do not find that the President's actions consolidated any revolution. The Constitution remained and remains in tact.

47. One does not have to be an expert in constitutional law to recognise the problems inherent in the judgment at first instance. Not only did the High Court give legal validation to an unlawful usurper, but by providing unfettered (absent *mal fides*[11]) power to the President above and beyond the textual limitations imposed by the 1997 Constitution, it provided a template for future coups not only in Fiji but elsewhere. Given the instability since Fiji's inception as a constitutional entity since 1970 the decision was, from any perspective, extraordinary.

48. To summarise, irrespective of the genesis of the crisis, including a self manufactured crisis by those seeking ultimately to take advantage of it, once the President determined that there was a national emergency (however so conceived by the President) then the President was afforded absolute power to decide what action was appropriate to deal with it unbounded by any constraints imposed by the Constitution.

[11] Which from an evidentiary perspective can easily run foul of executive privilege or public interest immunity.

49. This conception of the existence and operation of prerogative power is, of course, fundamentally inconsistent with the modern constructs of a democratic system of government founded upon a written constitution.

Decision of Court of Appeal

50. The reasoning of, and the result in, the High Court was wholly rejected by the Court of Appeal (*Qarase v Bainimarama* [2009] FJCA 9). The Court found that the 1997 Constitution provided a framework of government for Fiji and that the President possessed no extra-constitutional powers such as prerogative or reserve powers, and because the respondents had conceded that the prerogative was the only source of power for the President's actions, the Court declared them to be unlawful.

51. The Court of Appeal's decision mostly marked a return to constitutional normality. Applying the text of ss 96 and 109(1) of the 1997 Constitution, the Court concluded that these provisions rendered it manifestly obvious that the 1997 Constitution did not intend that the President, in an exercise of his discretion, could dismiss the Prime Minister in circumstances other than those set out in the Constitution or establish an interim government (at [94]).

52. Thus, in construing the 1997 Constitution the Court held that as framed (both when read as a whole and having regard to its specific sections) the Constitution excluded any additional reserve or prerogative powers. The Court noted that the 1997 Constitution was drafted deliberately to address the specific circumstances in which the President could dismiss the Prime Minister.

53. Further, rather than concluding, as the High Court had below, that the absence of any stated circumstances in which dismissal could occur in a time of national crisis was an indication that the prerogative powers were retained within the Constitution, the Court of Appeal held that the framers of the Constitution had sought to exclusively articulate "as precisely as possible" the only circumstances in which the President could exercise

his power of dismissal (at [106]). This left no room for the exercise of the prerogative.

54. The Court of Appeal was comforted in this conclusion by s 2 of the 1997 Constitution which declared the Constitution to be "the supreme law" of Fiji and stated that any law that was inconsistent with it was invalid to the extent of the inconsistency. It held that any reserve or prerogative power (such as the one contended for the respondents) that was inconsistent with the express terms of the Constitution would therefore be caught by this provision and rendered invalid (at [124]).

55. The Court also categorically debunked the respondent's argument that there was a specific power dealing with national security preserved within the framework of the Constitution. Again the Court of Appeal noted that s 187 of the Constitution conferred legislative power on the Parliament to make a law which in turn conferred power on the President to proclaim a state of emergency, provided he did so "acting on the advice of the Cabinet". [12] Thus the Court of Appeal stated that (at [132], emphasis added):

> In our opinion, the existence of s 187 is as clear an indication as there can be that national security matters were not matters which were left to the prerogative… Under the Fiji *Constitution* it is [the Prime Minister] and his Cabinet who have the responsibility to lead the country through a crisis, and to advise the President in relation thereto. It is entirely unclear to us why the first thing called for in a time of national emergency is the dismissal of the Prime Minister and his government. This, we consider, exposes the real flaw in the argument for the Respondents. *It exposes the fact that what has occurred in this case and previous cases is simply a military coup or an unlawful usurpation of power.*

[12] Section 187 had been specifically drafted with the earlier political and constitutional turmoil in Fiji in mind. Equivalent provisions in the 1970 and 1990 Constitutions were regarded by the Constitution Review Commission (the body tasked with drafting the 1997 Constitution) as too wide with the potential to validate action that would otherwise be constitutionally unlawful. It specifically recommended that there be greater parliamentary control of the Executive (see *The Fiji Islands – Towards a United Future, Constitutional Review Commission* (Government Printer, Suva, 1996), paragraph 19.12): Twomey, *supra* at 326 and A Bache "Qarase v Bainimarama: the End of Democratic Rule in Fiji?" (2009) *Hum Rights Rev* (8 August, online) at 11.

56. Finally, the Court of Appeal considered whether or not the doctrine of necessity as formulated by *Prasad* applied. The Court concluded that it did not on the facts of this case, except to the extent that it was necessary to ensure that fresh writs for an election were issued (at [141]).

57. By far the most vexing issue for the Court of Appeal was whether, and if so in what form, any consequential relief should be granted beyond declarations of unlawfulness (at [150]).[13] In particular, the Court grappled with whether it should declare that the Qarase government remained the lawful government of Fiji and therefore order the President to recall it.

58. A precedent for this approach had been set in *Prasad*. In that case the Court declared that Parliament had not been dismissed by the military but had merely been prorogued by the President (see *Prasad* at Order (1)(ii)).

59. Curiously, the Court had several concerns regarding the reinstatement of the Qarase government:

    (a) the Court expressed disquiet surrounding the constitutionality of the Qarase elections in 2002. It was noted that Qarase's "fidelity to the Constitution had come late in his political life" (at [150]);

    (b) there was the suggestion (albeit refuted by the evidence in Qarase's case) that the Prime Minister and other members of Parliament had resigned and were collecting pensions (at [150] and [153]); and

[13] Indeed it wanted to hear from the appellants first on this issue.

(c) in particular, the political reality was that Bainimarama had now been in power for almost two and a half years (at [150] and [152]).

60. The Court therefore made the following declarations and orders (at [170]):

> **Declarations and Orders**
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> The Court hereby:
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> (1) Declares that:
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> (a) the assumption of executive authority and the declaration of a State of Emergency by the First Respondent;
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> (b) the dismissal of the First Appellant from the office of Prime Minister and the appointment of Dr Jona Baravilala Senilagakali as caretaker Prime Minister;
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> (c) the advice that Parliament be dissolved by DrSenilagakali;
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> (d) the order by the First Respondent that the Parliament be dissolved;
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> (e) the appointment on 5 January 2007 of the First Respondent as Interim Prime Minister and of other persons as his Ministers by President Uluivuda;
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> (f) the purported Ratification and Validation of the Declaration and Decrees of the Fiji Military Government Decree of 16 January 2007, subsequently renamed as a Promulgation of the Interim Government of the Republic of Fiji, by which decree President Uluivuda purported to validate and confirm the dismissal of the First Appellant as Prime Minister of Fiji, the appointment of Dr Senilagakali as caretaker Prime Minister and the dissolution of Parliament;
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> were unlawful acts under the Fiji Constitution.
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> (2) Declares that in the events that have occurred it would be lawful for the President acting pursuant to section 109(2) of the Fiji Constitution, or as a matter of necessity, to appoint a caretaker Prime Minister to advise a dissolution of the

> Parliament and the issuance of writs for the election of members of the House of Representatives.

61. In making these declarations the Court gave not so much a purposive but a pragmatic construction to s 109 of the Constitution,[14] to find that it could be used by a President to appoint a caretaker Prime Minister notwithstanding that the previous Prime Minister had not been validly dismissed (at [158]).

62. The correctness of this approach is, in my respectful opinion, questionable. Moreover, as Anne Twomey has recently observed, it is risky insofar as "in the future a President may be encouraged to act unlawfully in dismissing a Prime Minister in the knowledge that the President can then validly appoint whomsoever he or she wishes as a caretaker Prime Minister."[15]

63. A declaration that the Qarase government was the lawful government of Fiji and was therefore still in power ought to have been the logical outcome of the Court of Appeal's declaration that the actions of the President were unlawful. To the extent that their Honours were understandably concerned with the political reality of the social upheaval that could potentially result from finding that the Qarase government remained the lawful government of Fiji (thereby creating administrative and legal chaos in respect of the decisions and decrees made by the interim military regime), courts generally have recognised and applied the principle that laws or acts of an invalid government that is in actual control at the relevant time may be valid insofar as they concern the ordinary orderly functioning of the state.[16]

64. The Court of Appeal concluded that the only appropriate course was for elections to be held to enable Fiji "to get a fresh start" (at [156]). Curiously, however, instead of accepting the undertaking proferred by

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[14] This distinction has been noted by Twomey, *supra*, at 329.
[15] *Supra*, at 329.
[16] See *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, *Victoria v Commonwealth* (1975) 134 CLR 81, *Re Manitoba Language Rights* [1985] 1 SCR 721, *Madzimbamuto*, *Yabaki* and *Prasad*.

counsel on behalf of Qarase that upon his reinstatement as Prime Minister he would immediately advise the President to dissolve the House of Representatives, to call an election and to appoint an interim Prime Minister from among the members of the deposed House of Representatives and that Qarase would thereafter tender his resignation as Prime Minister (at [151]), the Court merely noted that "the dismissal of the Qarase Government is simply incapable of being disregarded, reversed or undone" (at [152]). The evidentiary basis upon which this conclusion was reached remains, in my opinion, opaque.

Consequences of the Decision

65. The consequence of the Court of Appeal's decision as at 9 April 2009 there was no lawful government in Fiji.

66. Thus the Court made a further declaration that the President would be justified under the doctrine of necessity in appointing a caretaker Prime Minister to take Fiji to a national election (see Declaration 2 above). Whilst acknowledging that it was not in a position to influence the exercise by the President of his discretion in this regard, the Court of Appeal nevertheless recommended that a distinguished person, independent from the parties in the litigation, be appointed as caretaker Prime Minister (at [162]). This, it was reasoned, would enable Fiji to be restored to democratic rule in accordance with the Constitution.

67. On 10 April 2009, the President publicly addressed the nation and instead of appointing a caretaker Prime Minister as suggested by their Honours, he abrogated the Constitution. The President then immediately appointed himself as Head of State and issued the following decrees:

    (a) that all existing Fijian laws would continue;

    (b) that the Fijian courts were dissolved and the appointment of all judicial officers was revoked; and

(c) that a new interim government would be appointed which would be required to hold democratic and parliamentary elections by September 2014 at the latest.

68. On 12 April 2009, the President reappointed Bainimarama as Prime Minister of Fiji.

69. Since then Bainimarama has quashed political dissent by censoring the Fijian media, deported journalists and political commentators, detained and questioned lawyers, raided the offices of the Fijian Law Society and stripped it of its power to issue practising certificates (which now resides in the Chief Registrar of the High Court, a regime appointed employee).[17]

Conclusion: the Significance of the Decision

70. In my opinion, with the exception of the Court of Appeal's somewhat strained construction of s 109 of the 1997 Constitution and its refusal to grant any consequential relief, little turns, from a constitutional perspective, on the Court of Appeal's decision in *Qarase*. The Court's ultimate finding that the President's only (and binding) source of executive power is that contained in the text of the Constitution is unremarkable and entirely orthodox.

71. Rather, I agree with the views expressed by Nicola McGarrity who has opined that the real significance of the Court of Appeal's decision is[18]:

(a) first, that unlike the decision of the High Court, it refused to legitimise the actions of Bainimarama and the military and correctly labelled the events of December 2006 and January 2007 for exactly what they were: a military usurpation of democratic power through the barrel of a gun. Or put another way, a coup d'etat that cannot be dressed

[17] N McGarrity "Calling a Coup a Coup: Judicial Authority Versus Political Reality in the Fiji Islands" (2009) 20 *PLR* 178 at 185. See also Rev Akuila Yabaki "Breaking the Cycle of Coups", University of Queensland special lecture, 20 July 2009 at 4-5.
[18] McGarrity, *supra*, at 187.

up as something else by recourse to sham constitutional clothing; and

(b) second, that in categorically rejecting the perilous notion of an undefined, unreviewable and unfettered discretionary power residing in a Head of State in times of national crisis, it reinforced the role of the courts as the final arbiters of the lawfulness of all government action. That is to say, it "demonstrated that great strength of the judiciary – its independence and impartiality".[19]

72. As Gates J himself once presciently observed at first instance in *Prasad* (at 23):

> It is not the oath taken or the regime under which an appointment is made that colour a judge's role or 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.

27 November 2009 **R A Pepper**

[19] McGarrity, *supra*, at 187.