

IN THE COURT OF APPEAL FIJI
AT SUVA
CIVIL JURISDICTION

Civil Appeal No. ABU0077 of 2008

Between:

**LAISENIA QARASE & RATU NAIQAMA
LALABALAVU & RO TEIMUMU KEPA, RATU
SULIANO MATANITOBUA & ADI SIVIA QORO &
JOSEFA VOSANIBOLA**

Appellants

And:

JOSAIA VOREQE BAINIMARAMA Commander of
the RFMF

First Respondent

And:

THE REPUBLIC OF FIJI MILITARY FORCES

Second Respondent

And:

**THE STATE OF THE REPUBLIC OF THE FIJI
ISLANDS**

Third Respondent

And:

THE ATTORNEY GENERAL of the Interim Regime

Fourth Respondent

FIJI HUMAN RIGHTS COMMISSION

CITIZENS' CONSTITUTIONAL FORUM LIMITED (a
company registered under the *Companies Act*, Cap.
247, and having its registered office at 25 Berry
Road, Suva)

Amicus Curiae

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PART I: INTRODUCTION AND SUMMARY OF SUBMISSIONS

1. These submissions are filed pursuant to orders made by this Honourable Court on 31 March 2009, granting leave to CCF to appear as amicus curiae. Following service by the respondents of their submissions on 31 March, these submissions now include a response to those submissions.¹ In addition, they include an appendix containing a brief overview of Fiji's constitutional history. This history, including the 1996 Report of the Fiji Constitution Review Commission ("**the Reeves Report**"),² comprises part of the context against which the Fijian Constitution falls to be construed in accordance with s 3(b) of the Constitution.³
2. At the heart of the issues raised on the appeal lies the questions of whether, absent the valid invocation of the doctrine of necessity affirmed in *Prasad*,⁴ the President may:
 - 2.1. dismiss a Prime Minister otherwise than in accordance with s 109 of the Constitution; and
 - 2.2. appoint a Prime Minister otherwise than in accordance with s 98 of the Constitution (albeit that, if there was no valid dismissal, logically there could be no valid appointment of another Prime Minister⁵).
3. CCF submits that the answer to these questions must be "no" for the following reasons.

¹ For this reason, these submissions are now a little longer than those attached to the submissions in support of CCF's application for leave to appear as amicus curiae.

² *The Fiji Islands: Towards a United Future, Report of the Fiji Constitution Review Commission 1996*, Reeves, Vakatora and Lal (Parliament of Fiji, Parliamentary Paper No. 34 of 1996). Previous decisions of Fijian courts have also taken account of the Reeves Report in interpreting various provisions of the Constitution. In *Bala v Attorney General* [2005] FJHC 282, the High Court referred to the report in interpreting the phrase "[a] person who holds public office" in s 67(1) of the Fijian Constitution. The Court cited *Pambula District Hospital v Harriman* (1988) 14 NSWLR 387 at 410 per Samuel JA in support of the proposition that "[i]t has always been open to the court to have regard to the historical setting of the statute and by that means to ascertain what the object of the legislature was". See also *In re the Constitution, Chaudhry v Qarase* [2002] FJCA 1; *Ali v Tikoca; Kalou v Tikoca; Padarath v Tikoca* [2002] FJHC 320; and *In re the Constitution, Reference by HE the President* [2002] FJSC 1.

³ The primary documents referred to in that history will be provided to the Court at the hearing.

⁴ *Prasad v Republic of Fiji* [2001] 1 LRC 665 at pages 25 -28 inclusive.

⁵ Appellants' submissions filed 16 February 2009 ("**Appellants' submissions**") at para 28.

- 3.1. The Constitution establishes Fiji as a democratic republic and creates the institutions and offices of government including the offices of the President and the Prime Minister. Those institutions, having no legitimacy outside the Constitution, derive their power solely from the Constitution or from laws made in accordance with the Constitution.
 - 3.1.1. It follows that all executive power ultimately derives from s 85 of the Constitution. There are no prerogative powers outside and above the Constitution.
 - 3.1.2. As a matter of logic, there can be no common law royal prerogatives in a republic. A republic, by its nature, is a break with a system of government that has the Crown as its head of State.
- 3.2. The scope of executive power conferred by s 85 must (relevantly) be read with Part 3 of Chapter 7 of the Constitution. This Part establishes the system whereby the democratically elected House of Representatives and, therefore, ultimately the people, hold the executive government to account. Sections 98, 99 and 109 are central pillars of that system of representative and responsible government as they ensure that a government has the confidence of the House of Representatives in accordance with s 97, and only continues in power between elections for so long as it continues to have that confidence. As such, those provisions cannot be overridden by the unelected President.
- 3.3. To hold otherwise would be inconsistent with the form of democratic republic established by the Constitution and the people's compact that ultimately underpins the Constitution, and would undermine the rule of law.

PART II: INTERPRETATION OF THE CONSTITUTION

(1) The Constitution as the starting point

4. The Constitution creates the Republic of the Fiji Islands as “*a sovereign, democratic state*” (s 1), provides that the Constitution “*is the supreme law of the State*” (s 2), establishes the office of the President and vests the executive power of Fiji in that office (s 85). As such, on any view, the starting point for considering

what, if any, powers are possessed by the President must be the Constitution itself.

(2) The democratic republic created by the Constitution

5. The 1997 Constitution is in substance a new Constitution, notwithstanding that it was effected by amendments to the 1990 Constitution. It established a new democratic republic which is founded in the sovereignty of all of the people of Fiji and rests upon their consent. As the preamble to the 1997 Constitution states, “*We, the People of the Fiji Islands...give ourselves this Constitution*”. The consent of the people of Fiji, in turn, “*is the justification for government by the people’s elected representatives.*”⁶ It also reflects the process by which the new Constitution was born, namely, the unanimous approval by the Parliament of the terms of reference to the Reeves’ Commission,⁷ the extensive consultations held by the Commission with the people of Fiji in accordance with its terms of reference,⁸ and the fact that the Commission’s report and the resulting Constitution were unanimously passed by both Houses of Parliament and endorsed by the Great Council of Chiefs.⁹
6. Section 6 of the Constitution gives expression to the Fijian people’s compact, recognising the principles on which the conduct of government under the Constitution is based. Section 7(2) requires these principles to be considered in interpreting the Constitution. Relevantly, these principles include that the conduct of government is founded on:

“(f)...free and fair elections of members to the House of Representatives held by secret ballot and ultimately on the basis of equal suffrage;

(g) the formation of a government that has the support of a majority in the House of Representatives depends on the electoral support received by the various political parties or pre-election coalitions...”
7. The first of these principles is implemented as follows.

⁶ Reeves Report at p. 24 [3.4]

⁷ Reeves Report at p. 4 [2.2].

⁸ As observed in *Republic of Fiji v Prasad* [2001] 2 LRC 743 at 755-756.

⁹ *Republic of Fiji v Prasad* [2001] 2 LRC 743 at 756.

- 7.1. By virtue of s 50 of the Constitution, the House of Representatives is comprised of members elected by registered voters.¹⁰ Section 55 makes it compulsory for all Fijian citizens over 21 who are resident in Fiji and who are not exempt to apply for registration. Section 56 makes voting compulsory for all registered voters.
- 7.2. The efficacy of the democratic process is protected by s 36 which gives the right to vote in secret to every person having a right to vote. Moreover, no limitations may be imposed on this right, even when a state of emergency is declared under Chapter 14 of the Constitution.¹¹ The democratic process is also protected by the fact that, even where limitations may be placed on certain human rights, these limitations may not exceed those that are “*reasonable and justifiable in a free and democratic society.*”¹²
8. The application of the second principle can be seen in the following provisions.
 - 8.1. Section 97 provides that “[g]overnments must have the confidence of the House of Representatives”. The process by which that occurs is prescribed by s 98 which provides that the President is to appoint “*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.*” Conversely, s 109 provides that the President may not dismiss a Prime Minister unless the government fails to obtain or loses the confidence of the House of Representatives and the Prime Minister does not fulfil his or her constitutional responsibilities by resigning or requesting a dissolution of the Parliament.
 - 8.2. In turn, the Cabinet is formed from the government that has the confidence of the House of Representatives¹³ and is collectively responsible to that

¹⁰ By contrast, the Senate is not elected but is comprised of members appointed by the President on the advice of the Bose Levu Vakaturaga, the Prime Minister, the Leader of the Opposition and the Council of Rotuma: s 64, Constitution. However, it has no power to initiate bills, and any amendments proposed by it must be agreed to by the House of Representatives: s 47, Constitution.

¹¹ Section 187(3), Constitution.

¹² See e.g. s 32 (freedom of association).

¹³ Section 99, Constitution. Note also that the Code of Conduct in s 156 of the Constitution provides that the President, Ministers, members of Parliament and public officers, “*must*

democratically elected House of Parliament, while Ministers are individually responsible (s 102).¹⁴

(3) There can be no source of legitimacy for executive powers outside the Constitution

9. From these provisions, it can be seen that the fact that sovereignty ultimately resides with the people of Fiji is translated into a form of government in which:

9.1. legislative and executive power are exercised by the people's elected representatives on their behalf; and

9.2. the legislature and the executive are made accountable to the people.

10. As, for example, Mason CJ of the High Court of Australia explained in *Australian Capital Television Pty Ltd v Commonwealth*, albeit in the context of the Australian Constitution:

"The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives. ... Despite its initial character as a statute of the Imperial Parliament, the [Australian] Constitution brought into existence a system of representative government for Australia in which the elected representatives exercise sovereign power on behalf of the Australian people."¹⁵

11. As his Honour then observed, that means that both the executive and the legislature exercise their powers as representatives of the people:

"The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act."¹⁶

12. Similarly, in *Guadalcanal Provincial Assembly v Speaker of National Parliament*, Palmer J of the High Court of the Solomon Islands observed:

"It is axiomatic that representative and responsible government is the hallmark of a democratic state. In the book titled 'Democracy' by Dorothy Pickles... at page 13, the learned Author had this to say about 'democracy' as a system of government:

so conduct themselves in relation to the performance of their public duties as not: ... (e) to cause respect for, or confidence in, the integrity of the Government to be diminished."

¹⁴ See also s 74(3), Constitution.

¹⁵ (1992) 177 CLR 106 at 137.

¹⁶ (1992) 177 CLR 106 at 138. See also *ibid* at 230, McHugh J; and *Egan v Willis* (1998) 195 CLR 424 at 451, Gaudron, Gummow and Hayne JJ.

“As a minimum, democracy is a system of government, a set of institutions, that fulfils at least two essential requirements. It must, first, be able to elicit as accurately as possible the opinion of as many people as possible on who shall be their representatives and on how the country ought to be governed. This means as a minimum, universal suffrage, ... political parties, ... and the organisation of free voting in uncorrupt elections at relatively frequent intervals. Second, it must provide ways of ensuring that those chosen by the public do in fact do what the electorate wants them to do or that they can be replaced if they do not, even between elections (accountability).”¹⁷

13. In ensuring, therefore, that a government is formed that has the confidence of the House of Representatives, ss 97, 98, 99 and 109 are key elements of the democratic system of government established by the Constitution.
14. By contrast, the proposition that an unelected president could dismiss the Prime Minister notwithstanding that the Prime Minister is the head of a government with the confidence of the elected representatives of the people directly conflicts with:
 - 14.1. the form of representative and responsible government created by the Constitution; and
 - 14.2. the ultimate sovereignty of the people.
15. Equally, the proposition that the President could appoint as the Prime Minister a person who he does not consider can form a government that has the confidence of the House of Representatives is inconsistent with these fundamental elements of the democratic republic created by the Constitution, as is the proposition that a person could be appointed who is not elected at all.
16. Rather, the role of the unelected President is to facilitate the democratic process. It is not to govern.¹⁸
 - 16.1. Thus, s 96(1) of the Constitution provides that the President “acts **only** on *the advice of the Cabinet or a Minister*” (emphasis added) or on some other person’s advice as the Constitution so provides, save for those circumstances “*prescribed*” by the Constitution in which the President may act “*in his or her judgment*” (s 96(2)). There are only eight such circumstances.¹⁹ Accordingly, as the Reeves Commission observed in its

¹⁷ [1997] SBHC 5.

¹⁸ Reeves Report at [12.7].

¹⁹ Sections 68(3) (summoning the Parliament to meet upon request by no fewer than 18 members of the House of Parliament), 76(3) (appointing the chairperson of the

report, “most executive authority will ... rest with the Cabinet,”²⁰ and the role of the Fijian President whose “office closely resembles that of the former Governor-General” is to be distinguished from that of an executive President “who combines the role of Head of State with that of head of the government”.²¹

16.2. The reason why the President acts only on his own judgment in appointing the Prime Minister under s 98 is that “that task is logically prior to the President’s duty to act on the advice of the Cabinet and other Ministers”.²² However, as the Reeves Report also explains, the Prime Minister’s role in appointing the Prime Minister is that of ascertaining the will of the Parliament, while remaining distanced from the political negotiations from which there should be an outcome made public by the political parties themselves.²³

16.3. Similarly, the power to dismiss the Prime Minister is not a power that is intended to involve the President in the political machinations of the government. Rather, as the Reeves Report explained with respect to s 109 of the Constitution:

Constituency Boundaries Commission, after consultation with the Prime Minister and Leader of the Opposition), 78(7) (appointing the chairperson of the Electoral Commission, 82(8) (appointing as Leader of the Opposition the person who is acceptable to the majority of Opposition members in the House of Representatives, and dismissing the Leader if he or she ceases to be so acceptable), 98, 108 (if the Prime Minister advises a dissolution of the House of Representatives, appointing another person as Prime Minister if he or she is able to get the confidence of the House of Representatives), 109 (if the Prime Minister is validly dismissed, appointing a caretaker Prime Minister) and 115 (appointing two members of the Commission on the Prerogative of Mercy (along with the Attorney-General), Constitution.

²⁰ Reeves Report at [9.41].

²¹ Ibid. The primary role of the Cabinet in exercising executive power is recognised in several other places in the Reeves Report. See [9.39] (the executive authority is “exercisable mainly through Ministers”), [9.48] (“The essence of the President’s ‘reserve’ powers is that they are a backstop – there only to ensure that the Prime Minister and other political leaders themselves act constitutionally”) and [12.6] (“The Cabinet, Ministers acting under the authority of the Cabinet, and, through them, the departments and other government agencies, are the main instruments through which executive authority is exercised”).

²² Reeves Report at [12.8].

²³ Reeves Report at [12.39]-[12.41].

*“The President should have a residual power to dismiss a Prime Minister **only** in circumstances where the Prime Minister is under a constitutional duty to resign but does not do so.”²⁴*

16.4. As such, the Commission considered that the power was a “*fail-safe mechanism... which should never need to be used*”.²⁵

17. Given these considerations, the proposition that ss 98 and 109 of the Constitution can be overridden by some power belonging to the President outside and above the Constitution cannot be sustained. Such a power manifestly could not derive from the sovereignty of the people. It is inconsistent with that concept and would run counter to the democratic system of government established by the Constitution. That being so, there is no other source of legitimacy for the existence of any such power, and it would be inconsistent with the supremacy of the Constitution declared in s 2.

(4) A written constitution provides for government under the rule of law

18. The office of the President is created by s 85 of the Constitution which also vests the executive authority of the State in the President as the Head of State. This reflects the choice by the Fijian people of a republican form of government.²⁶ As a purely constitutional creation, that office has no legitimacy or powers outside the Constitution or laws made in accordance with the Constitution. Particularly is that so with respect to the prerogative powers.²⁷ These powers were vested by common law exclusively in the Crown, and ceased to apply in Fiji when it became a republic in 1987 and thereby severed all constitutional links with the Crown.
19. The conclusion that the source of executive power (leaving aside the doctrine of necessity²⁸) is found in the Constitution is also one that best promotes the rule of law, that is, that the exercise of public power is legitimate only where authorised

²⁴ Reeves Report at [12.45] (emphasis added).

²⁵ Reeves Report at [12.45].

²⁶ Reeves Report at [12.5].

²⁷ The prerogative power was defined by Dicey as ‘the residue of discretionary authority, which at any given time is legally left in the hands of the Crown’: *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) at 424-425.

²⁸ See further below.

by law.²⁹ As the Reeves Commission explained at [3.6] of its Report: “[r]ules about what a government may do and how it may do it are a main purpose of requiring a country to be governed under a constitution.” A construction of the Constitution that gives an unconstrained and unreviewable power to the executive to take action that the Constitution expressly constrains would conflict directly with that purpose. As such, it is not to be preferred.³⁰

20. In this regard, the significance of the rule of law is expressly recognised in the preamble to the Constitution. In recommending its inclusion in the preamble, the Reeves Report explained that the rule of law:

“...is a constitutional concept which today signifies:

- a preference for law and order within the community, as distinct from anarchy and strife;
- the conduct of government in accordance with the law;
- the need for the law to conform to standards of fairness and justice, both in its substantive content and in the procedures for its application by the court.”³¹

21. In line with this, one of the principal recommendations of the Commission as to the purposes and underlying values of the Constitution was that “[t]he Constitution should: ... (c) control the actions of government”.³² The importance of this is highlighted by the fact that the 1997 Constitution was drafted against a history of racial conflict that had seen two coups in 1987, abrogation of the 1970 Constitution, and the adoption of the 1990 Constitution that entrenched political supremacy for indigenous Fijians.³³ This history explains, among other things, the presence of Chapter 14 in the Constitution, which deals with the functioning of government during an emergency. The 1997 Constitution was, therefore, intended to minimize sources of conflict and increase the likelihood of

²⁹ See Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) at 193.

³⁰ Section 3(a), Constitution.

³¹ Reeves Report at [5.41].

³² Reeves Report, Recommendation 8(c) at p. 673.

³³ See further the historical outline in the Annexure. See also the Reeves Report at pp. 4-16. As to the need to have regard to the context in which the Constitution was drafted, see s 3(b) of the Constitution. Context may, of course, also reveal purpose: see e.g. by analogy *Project Blue Sky* (1998) 194 CLR 355 at [69].

constitutional stability by creating a system of government that took proper account of Fiji's multi-ethnic character.³⁴

22. The primacy given to the rule of law in this sense can be seen in a number of fundamental provisions of the Constitution.

22.1. First, s 2 of the Constitution provides that the Constitution is the supreme law of the State, and any inconsistent law is invalid to that extent.

22.2. Secondly, s 21 provides that the Bill of Rights in Chapter 4:

“...binds:

(a) *the legislative, executive and judicial branches of government at all levels: central, divisional and local; and*

(b) *all persons performing the functions of any public office.”*

Further, those rights cannot be limited by law save where such a limitation is expressly permitted by the Constitution, with such limitations being closely confined and limited to that which “*is reasonable and justifiable in a free and democratic society.*”³⁵

22.3. Thirdly, s 120(2) confers original jurisdiction on the High Court “*in any matter arising under this Constitution or involving its interpretation,*” and appeals as of right in such matters lie to this Court under s 121(2). Jurisdiction is also conferred on the High Court under s 21 to enforce the Bill of Rights. As such, the judiciary's function of adjudicating upon the boundaries of executive and legislative power is constitutionally

³⁴ This was reflected in the terms of reference (unanimously approved by the Parliament) to the Reeves Commission that required the Commission to recommend constitutional arrangements that will promote racial harmony and national unity, guarantee full protection for the rights of the indigenous Fijian and Rotuman people, and have full regard for the rights of all other ethnic groups: Reeves Report at p. 4 [2.1]. It also finds expression in the preamble to the Constitution (in particular, in the commitment in the preamble “*to living in harmony and unity...*”), and in the compact of the people of Fiji contained in s6 of the Constitution.

³⁵ See e.g. s39(4), Constitution. See also s 43(2) which requires that in interpreting Chapter 4, “*the courts must promote the values that underlie a democratic society based on freedom and equality...*”. Note also the role of the Human Rights Commission (created by s 42, Constitution) in educating the public about the Bill of Rights and promoting compliance with the Bill of Rights by the Government (s 42(2), Constitution) and that the Constitution envisages that the House of Representatives will establish a sector standing committee responsible for matters concerning human rights (s 42(4) and 74(3), Constitution).

entrenched.³⁶ It is also protected by s 118 of the Constitution which provides that judges of the State are independent of the legislature and executive, and by the protections afforded by ss 130-139 in relation to the appointment, dismissal and remuneration of judges. As the High Court of Australia, for example, stated in the *Boilermaker's Case*, "...the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive".³⁷

22.4. Finally, Chapter 14 of the Constitution, which protects against the possibility of further constitutional crises, provides that the rule of law must be upheld even in an emergency and confines the extent to which the rights in the Bill of Rights may be limited.³⁸

23. The primacy given to the rule of law, as evident in these provisions, embodies a fundamental principle of constitutional law. As the Supreme Court of Canada held in *The Matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada* in words equally apt to apply here:

*"Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch ... They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the power allocated to them under the Constitution and can come from no other source."*³⁹

24. This principle was endorsed by the Constitutional Court of South Africa in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 at paras 56 to 58.

³⁶ As, for example, Brennan J stated in *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70: "Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly." (Cited with approval, e.g., by Gleeson CJ in *Plaintiff S157/2002 v Commonwealth of Australia* (2004) 211 CLR 476 at para 31).

³⁷ *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 540 (PC).

³⁸ Section 187(3), Constitution.

³⁹ *Reference re Secession of Quebec* [1998] 2 SCR 217 at para 72.

(5) The conclusion that there is no executive power outside the Constitution is supported by overseas authority

25. In common with Fiji, the Republic of South Africa is a former British colony.⁴⁰ In common with the Fijian Constitution, the Constitution of South Africa declares that it is the supreme law of the State⁴¹ and vests the executive power of the State in the President as the Head of State.⁴²

26. In *President of the Republic of South Africa v Hugo*,⁴³ the Constitutional Court of South Africa held that, while the powers vested in the President under the (then) interim South African Constitution have their historical antecedents in the prerogative power of the Crown, there were no powers derived from the royal prerogative conferred on the President other than those set out in the Constitution.

27. Consistently with this, in *Pharmaceutical Manufacturers Association of South Africa; In re ex parte President of the Republic of South Africa*,⁴⁴ the Constitutional Court held that there is only one system of law in South Africa, being that governed by the South African Constitution. In holding that there is no additional source of executive power outside the terms of the Constitution, the Court stated:

*“There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.”*⁴⁵

28. The Court continued:

“Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have reversed. The written Constitution articulates and gives effect to the

⁴⁰ South Africa (or rather the historical states of South Africa) is a former British colony. The Union of South Africa became an independent dominion of Great British in 1910. It then became republic on 31 May 1961. South Africa has enacted four different Constitutions over its history (in 1910, 1961, 1984 and 1996).

⁴¹ Section 2, South African Constitution.

⁴² Sections 83 and 85, South African Constitution.

⁴³ 1997 (4) SA 1 at para 8.

⁴⁴ 2000 (2) SA 674.

⁴⁵ 2000 (2) SA 674 at para 44.

*governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution ... the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control.*⁴⁶

29. Similarly, and notwithstanding Australia's status as a constitutional monarchy, the Australian courts have concluded that it is s 61 of the Australian Constitution, and not the prerogative power, which is the source of the executive power in Australia.⁴⁷ For example, in *Re Ditfort; Ex parte Deputy Commissioner of Taxation*, Gummow J stated:

*"In Australia ... one looks not to the content of the prerogative in Britain, but rather to s 61 of the Australian Constitution, by which the executive power of the Commonwealth was vested in the Crown."*⁴⁸

30. This view was endorsed by French J (as he then was) (with whom Beaumont J agreed) in *Ruddock v Vadarlis*:

*"The Commonwealth of Australia is constituted by the Constitution (s 4). The legislative Executive and judicial powers of the Commonwealth are conferred by the Constitution **and not otherwise.**"*⁴⁹

31. Accordingly, as his Honour then held:

*"The executive power of the Commonwealth cannot be treated as a species of the royal prerogative, 'The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown.' – De Keyser at 526. While the executive power may derive some of its content by reference to the royal prerogative, it is a power conferred as part of a negotiated federal compact expressed in a written Constitution distributing powers between the three arms of government reflected in Chapters I, II and III of the Australian Constitution and, as to legislative power, between the polities that comprise the federation."*⁵⁰

32. If the royal prerogative at common law is no longer considered to be a source of executive power in a constitutional monarchy such as Australia, then there can be no basis on which it can be said that it is a source of executive power in a republic such as Fiji where all constitutional links with the Crown have been severed. As such, the passage quoted by the Court below from *Halsbury's Laws of England* that the prerogative power 'extends to all parts of the Commonwealth

⁴⁶ 2000 (2) SA 674 at para 45.

⁴⁷ Section 61 of the Australian Constitution is similar to s 85 of the Fijian Constitution but vests the executive power of the Commonwealth in the Queen and exercisable by the Governor-General as the Queen's representative in Australia.

⁴⁸ (1988) 19 FCR 347 at 369.

⁴⁹ (2001) 110 FCR 491 at para 179 (emphasis added). See also *id* at paras 178-180.

⁵⁰ (2001) 110 FCR 491 at para 183.

*of which the Queen is monarch as fully in all respects as to England*⁵¹ has no application to a republic such as Fiji. As the footnote to that passage in Halsbury's states (albeit not quoted by the High Court), "*le not to those parts that have a republican constitution*".

33. Nor is any authority cited by the respondents that supports the sweeping proposition at [71] that "...a Head of State in a common law country possesses the power found by the High Court." Rather, as paragraphs [72] and [73] of the respondents' submissions demonstrate, the power found by the High Court was said to be one of the Crown prerogatives at common law.

(6) Clear and plain intention to abrogate the prerogative is the wrong test

34. The respondents place considerable weight on the passage from French J's judgment in *Ruddock v Vadarlis* where he accepted that "[t]he greater the significance of a particular executive power to national sovereignty, the less likely it is that, absent clear words or inescapable implication, the **parliament** would have intended to extinguish the power."⁵² His Honour was there speaking of whether a law made by the Parliament might be construed as having abrogated or restricted executive power under s 61 which "*may have derived some of its content by reference to the royal prerogative.*"⁵³ That approach to statutory construction is consistent with the approach taken in other common law jurisdictions, as the authorities to which the respondents refer demonstrate.
35. However, that proposition lends no support to the proposition that there must be clear words or an inescapable implication before the **Constitution** can be said to have abrogated or limited a common law prerogative. That is the wrong question to ask in the context of a written constitution, and takes French J's words out of context. Rather, the question concerns the scope of executive power conferred by the Constitution. Thus, as French J had earlier explained in his reasons, s 61 executive power:

⁵¹ Reasons below at [120] (quoting from *Halsbury's Laws of England*, (4th ed, reissue, 1996) at para 370 of Vol 8(2).

⁵² Respondents' submissions at [101] (emphasis added).

⁵³ (2001) 110 FCR 491 at para 183.

“...will not authorise the Commonwealth to act inconsistently with the distribution of powers and the limits on power for which the Constitution provides. Nor will it authorise the Commonwealth to act otherwise than according to the laws of the Commonwealth.”⁵⁴

36. The same point was made, for example, by the High Court of Australia in *Davis v Commonwealth*.⁵⁵

(7) Implied powers and limitations, and the *Prasad* doctrine of necessity

37. The construction for which CCF contends does not deny that written constitutions such as the Constitution of Fiji may confer *implied* powers on the institutions of government or impose *implied* limitations. As for example, Dixon J held in *West v Commissioner of Taxation (NSW)*, a method of construction that would deny the drawing of any implications “...would defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it could be applied.”⁵⁶ Rather, it is submitted that there cannot be extra-constitutional powers conferred on the executive outside and above the Constitution or a law enacted in accordance with the Constitution.
38. It may be that the doctrine of necessity recognised in *Prasad* is an exception to the proposition that extra-constitutional powers are not conferred on the executive, albeit the sole exception. This question was left open by Haynes P of the Court of Appeal of Granada in *Mitchell v Director of Public Prosecutions*⁵⁷ (whose formulation of the doctrine was adopted in *Prasad*). Arguably, necessity needs no constitutional legitimisation because it can apply only where the constitutional system mandated by a Constitution has utterly broken down.
39. However, it is important to emphasise that, even though the doctrine permits action to be taken that would otherwise be in breach of the Constitution, this does not mean that it conflicts with the Constitution.⁵⁸ To the contrary, the doctrine can apply only where circumstances prevent compliance with the Constitution, and it

⁵⁴ (2001) 110 FCR 491 at para 176.

⁵⁵ *Davis v Commonwealth* (1988) 166 CLR 79 at 98 Mason CJ, Deane and Gaudron JJ.

⁵⁶ (1937) 56 CLR 657 at 681. The requirement of the separation of judicial power, the freedom of political communication and the implied nationhood power are examples of implications drawn from the Australian written Constitution.

⁵⁷ [1986] LRC (Const) 35 at 88

⁵⁸ Cf the respondents' submissions at [134].

exists to safeguard the Constitution and the rule of law which is itself a constitutional principle.⁵⁹ Furthermore, action purportedly taken in reliance on the doctrine is itself susceptible to judicial review consistent with constitutional values.⁶⁰ As such, the doctrine stands in stark contrast to the effectively unconstrained power posited by the respondents and lends no support to their contentions.⁶¹

40. However, the *Prasad* doctrine is probably best analysed as a constitutional implication – effectively an implied “self-protection” clause available only where there is such a complete breakdown in the government of the State such that not even Chapter 14 of the Constitution can be applied and where the conditions set out in *Prasad* are otherwise met. This analysis is consistent with the conditions that must exist before the doctrine may validly be invoked, the purposes for which the doctrine may permit deviations from the normal operation of the Constitution, and the temporary and strict limitations upon such deviations.⁶² As Sir Maurice Casey P in *Republic of Fiji v Prasad* stated of the doctrine, the court’s duty to uphold the legal order is qualified by other manifestations of the necessity principle:

*“...one of which, as recognised by the courts in some modern cases under written Constitutions, has allowed temporary and strictly limited deviations from the Constitution for the express purpose of safeguarding it or for preserving the rule of law.”*⁶³

⁵⁹ *Republic of Fiji v Prasad* [2001] 2 LRC 743 at 760 (quoting with approval F M Brookfield, *Waitangi and indigenous rights: revolution, law and legitimation* (1990) at p. 20) (emphasis added).

⁶⁰ As the respondents accept: respondents’ submissions at [138]-[139].

⁶¹ Cf the respondents’ submissions e.g. at [62]-[64] and [84] contending that the doctrine of necessity trumps s 2(1) of the Constitution thereby demonstrating that s 2(1) does not exclude the possibility of an extra-constitutional power above the Constitution that is inconsistent with the Constitution.

⁶² *Republic of Fiji v Prasad* [2001] 2 LRC 743 at 761, Sir Maurice Casey P (quoting *Mitchell v DPP* [1986] LRC (Const) 35 at 388-389, Hayne P (Court of Appeal in Granada)). See also *Attorney-General of the Republic v Mustafa Ibrahim and Others* [1964] Cyprus Law Reports 195 at 227, Triantafyllides J; and Brookfield, “The Fiji Revolutions of 1987” (1988) *New Zealand Law Journal* 250 at 251 (“... 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”).

⁶³ *Republic of Fiji v Prasad* [2001] 2 LRC 743 at 760 (quoting with approval F M Brookfield, *Waitangi and indigenous rights: revolution, law and legitimation* (1990) at p. 20) (emphasis added).

41. Ultimately, it does not matter whether the question is one of the application of the doctrine of necessity or the scope of the executive power *per se*.

42. First, on either view, the doctrine of necessity imposes limits on the exercise of executive power by a Head of State, contrary to the suggestion by the Court below at paras 146 to 149. As, for example, *Halsbury's Laws of England* states:

*"The Crown has the same power as a private individual of taking all measures which are absolutely and immediately necessary for the purpose of dealing with an invasion or other emergency."*⁶⁴

43. Similarly, Gates J in *Prasad v Republic of Fiji*⁶⁵ considered that the *Prasad* doctrine of necessity applies even to the actions of the Fijian President, finding 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."*⁶⁶

44. Secondly, on either view, the existence and extent of the power is reviewable. Thus, even in relation to pure prerogative powers, for example, Lord Hoffman stated in *R (On the Application of Bancourt) v Secretary of State for Foreign and Commonwealth Affairs*:

*"It is for the courts to inquire into whether a particular prerogative power exists or not, and, if it does exist into its extent."*⁶⁷

45. This does not, of course, mean that the Court would attempt to "*second guess the President's actions*"⁶⁸ or "*substitute its own judgment for that of the Head of*

⁶⁴ *Halsbury's Laws of England* (4th ed. reissue, 1996) at para 820 of Vol 8(2). Accordingly, the doctrine of necessity has been applied to limit the actions of the legislative and executive branches of government in, e.g. *Attorney-General of the Republic v Mustafa Ibrahim* [1964] Cyprus Law Reports 195 (regarding laws passed in violation of the Cypriot Constitution).

⁶⁵ [2001] 1 LRC 665.

⁶⁶ There is nothing in the Court of Appeal decision from Gates J's decision that is inconsistent with this. See also the passage quoted in *Prasad v Republic of Fiji* [2001] 1 LRC 665 at page 26, from Brookfield FM, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (1999) that: "*The courts, then, are under a duty to uphold the legal order of which they are part. But in doing so they may sometimes recognise as valid emergency action which is taken by the executive government or its armed forces which would be unlawful in normal circumstances but which is justified in times of extreme crisis by the principles of necessity.*"

⁶⁷ [2008] UKHL 61 at [69]. See also *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 398 per Lord Fraser. In Australia, see *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 218 per Gummow J; and *Re Diftort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 368 per Gummow J.

State".⁶⁹ Questions as to the existence and extent of executive power concern the legality of executive action, as opposed to the merits of its exercise – a distinction that the respondents' submissions fail adequately to draw. Once it is appreciated that the concern is only with the legality of executive action, the reasons given in paragraph [121] of the respondents' submissions as to why the Court should not "*review the **exercise** of this power*" fall away.

PART III: CONCLUSION

46. For the reasons set out above, CCF submits that no power relevantly exists to appoint or dismiss a Prime Minister otherwise than in accordance with ss 98 and 109 respectively of the Constitution.

Date: 1 April 2009

Dr M A Perry QC

Ms N McGarrity

⁶⁸ Respondents' submissions at [112].

⁶⁹ Respondents' submissions at [126].

**Annexure to the submissions of the Citizens Constitutional Forum Ltd
Constitutional History of the Fiji Islands (1874-1997)**

1. This annexure briefly describes the historical context against which the 1997 Constitution for the purposes of assisting the court in construing the Constitution in accordance with s 3(b) of the Constitution.
2. On 10 October 1874, Fiji was ceded by the Chiefs of Fiji to Great Britain. Fiji became a separate British Colony by virtue of a Charter passed under the Great Seal of the United Kingdom on 2 January 1875.⁷⁰ In November 1879, the Chiefs of Rotuma likewise ceded Rotuma, which thereupon became part of the Colony of Fiji.⁷¹
3. The composition of the Fijian population changed significantly over the years of British colonisation, as labourers from the Indian sub-continent were brought to Fiji as indentured labourers on the sugar plantations.⁷² The British administration traditionally allocated seats in Parliament among the various ethnic communities. In 1966, a new electoral system was introduced. This system involved a compromise – it consisted of both a ‘communal’ roll (with separate seats for Fijians, Indo-Fijians and people of other races) and a ‘common’ roll (where members of each community could be elected by all voters).⁷³ By this time, the populations of Fijians and Indo-Fijians were roughly equivalent.⁷⁴
4. A constitutional conference held in London in July and August 1965 resulted in the enactment of a new Constitution for Fiji, conferred by the Fiji (Constitution) Order 1966 and commencing on 23 September 1966. For the first time, a majority of the members of the Legislative Council (36 of 40 members) were to be elected by the Fijian people.⁷⁵
5. On 17 January 1970, the Chief Minister of Fiji and the Leader of the Opposition made a joint public statement that Fiji should proceed to independent Dominion status.⁷⁶ A constitutional conference held in London in April 1970⁷⁷ resulted in the enactment of a new Constitution for an independent Fiji. This Constitution was

⁷⁰ Fiji Government, Online Portal, ‘Historical Timeline’,
<http://www.fiji.gov.fj/publish/historical_timeline.shtml> (accessed 28 March 2009..

⁷¹ Parliament of Fiji, Parliamentary Paper No. 32 of 1997, ‘The Fiji Constitution and the Commonwealth: Final Report’ (1997) 3[6].

⁷² *Ibid.*

⁷³ *Ibid* 3 [7].

⁷⁴ *Ibid* 3 [6].

⁷⁵ Nainendra Nand, ‘Constitutional Reform in Fiji’ (Paper presented at Australasian Law Reform Agencies Conference, University of the South Pacific, Port Vila, 10-12 September 2008),

<[www.paclii.org/other/conferences/2008/ALRAC/Papers/Session%206/Session%206%20\(Nand\).doc](http://www.paclii.org/other/conferences/2008/ALRAC/Papers/Session%206/Session%206%20(Nand).doc)> (28 March 2009) 1.

⁷⁶ *Ibid* 2.

⁷⁷ *Ibid* 2-3.

conferred as a Schedule to the Fiji Independence Order 1970 and commenced on 10 October 1970.⁷⁸ Features of the 1970 Constitution included:

- * The creation of a Parliament consisting of the Queen, an elected House of Representatives and an appointed Senate.⁷⁹
 - * The compromise electoral system described at paragraph 4 above was adopted for the 52-member House of Representatives. Twenty-two members were elected from each of the Fijian and Indo-Fijian communities (12 from voters on the communal roll and 10 from voters on the common roll). Eight members from among non-Fijian and Indo-Fijian communities were elected in the same manner (in the proportion of 3 to 5).⁸⁰
 - * The twenty two members of the Senate were appointed by the Governor-General (8 on the advice of the Great Council of Chiefs, 1 on the advice of the Council of Rotuma and 13 on the advice of the Prime Minister and Leader of the Opposition).⁸¹
 - * The legal framework for the protection of the rights of Fijians was insulated from ordinary processes of amendment, with the amendment of certain legislation requiring a three-quarters majority of the House of Representatives and/or the votes of at least 6 of the members of the Senate appointed on the advice of the Great Council of Chiefs.⁸²
 - * The executive authority of Fiji was vested in the Queen, as Head of State, with this authority to be exercised by a Governor-General appointed by her.⁸³
 - * Ministers were drawn from and accountable to the Parliament. The Prime Minister was appointed by the President. This was to be the person who appeared to the President to be 'best able to command the support of the majority of the members of that House'.⁸⁴
 - * There was also a Chapter on the Protection of Fundamental Rights and Freedoms of the Individual.⁸⁵
6. In April 1987, the Fiji Labour Party and National Federal Party formed a coalition government. For the first time, there were a majority of Indo-Fijian Cabinet Ministers.⁸⁶ On 14 May 1987, the Royal Fiji Military Forces overthrew the elected government. The widespread view was that the coup was designed to restore

⁷⁸ Parliament of Fiji, Parliamentary Paper No. 32 of 1997, 'The Fiji Constitution and the Commonwealth: Final Report' (1997) 1 [1].

⁷⁹ 1970 Constitution s 30.

⁸⁰ *Ibid* ss 31-32.

⁸¹ *Ibid* s 45(1).

⁸² *Ibid* s 68.

⁸³ *Ibid* s 27.

⁸⁴ *Ibid* s 73(2).

⁸⁵ *Ibid* Ch II.

⁸⁶ Parliament of Fiji, Parliamentary Paper No. 32 of 1997, 'The Fiji Constitution and the Commonwealth: Final Report' (1997) 5 [13].

- Fijian political supremacy.⁸⁷ The Governor-General resumed government in the name of the Queen on 20 May.⁸⁸ However, on 25 September 1987, a second military coup was staged. The leader, Sitiveni Rabuka, became Head of a Council of Ministers and, on 7 October, a Republic was declared. The Governor-General resigned eight days later.⁸⁹ At a meeting of the Commonwealth Heads of Government in Vancouver, it was resolved that Fiji's membership of the Commonwealth had lapsed.⁹⁰
7. Civilian government was restored on 5 December 1987. However, the 1970 Constitution remained abrogated and legislation was by decree. Parliamentary government did not resume until elections were held on 2 June 1992.⁹¹ In the interim, a Constitution Review Committee was established to prepare a report charting a new constitutional arrangement for Fiji.⁹² The recommendations of the Commission formed the basis for the Constitution of the Democratic Republic of Fiji,⁹³ which was promulgated by the President on 25 July 1990.⁹⁴ Features of the 1990 Constitution included:
- * The President was appointed by the Great Council of Chiefs.⁹⁵ The Prime Minister and the acting Prime Minister were required to be Fijians.⁹⁶
 - * At least 50% of judicial and legal offices at each level must be filled by Fijians or Rotumans.⁹⁷ A similar provision applied to the public service generally.⁹⁸ The Chairman and at least one other member of the Police Services Commission must be Fijians.⁹⁹
 - * The common roll of electors was eliminated. A racial imbalance in the distribution of seats was also created (37 Fijian members, 27 Indo-Fijian members, 1 Rotuman member and 5 other members).¹⁰⁰

⁸⁷ *Ibid.*

⁸⁸ *Ibid* 5[14].

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid* 5-6 [15].

⁹² Nainendra Nand, 'Constitutional Reform in Fiji' (Paper presented at Australasian Law Reform Agencies Conference, University of the South Pacific, Port Vila, 10-12 September 2008),

<[www.paclii.org/other/conferences/2008/ALRAC/Papers/Session%206/Session%206%20\(Nand\).doc](http://www.paclii.org/other/conferences/2008/ALRAC/Papers/Session%206/Session%206%20(Nand).doc)> (28 March 2009) 4.

⁹³ *Ibid.*

⁹⁴ Parliament of Fiji, Parliamentary Paper No. 32 of 1997, 'The Fiji Constitution and the Commonwealth: Final Report' (1997) 1 [2].

⁹⁵ 1990 Constitution s 31.

⁹⁶ *Ibid* s 83(2).

⁹⁷ *Ibid* 124(4).

⁹⁸ *Ibid* 127(11).

⁹⁹ *Ibid* 128(2).

¹⁰⁰ *Ibid* 41(3)-(6).

- * Provision for 24 members of the Senate to be appointed by the President on the advice of the Great Council of Chiefs, 1 Rotuman member on the advice of the Rotuma Island Council, and 9 members from other communities (including Indo-Fijians).¹⁰¹
 - * The protections of the rights of Fijians in the 1970 Constitution were re-enacted¹⁰² and expanded.¹⁰³
 - * A review of the Constitution was required after seven years, and thereafter every 10 years.¹⁰⁴
8. On 22 September and 7 October 1993, the House of Representatives and the Senate respectively unanimously endorsed the appointment of a Constitutional Review Commission by the President. In 1994, the Joint Parliamentary Standing Committee on the Constitution (JPSC) was convened to ‘assist in the work of the Constitutional Review Commission’.¹⁰⁵ The JPSC made recommendations as to how the review of the 1990 Constitution should be carried forward and as to the composition of the Constitutional Review Commission.¹⁰⁶ By Commission dated 15 March 1995, the three-person Fiji Constitution Review Commission, headed by Sir Paul Reeves, was established.¹⁰⁷ The Commission’s Terms of Reference required it to ‘review the Constitution promoting racial harmony and national unity and the economic and social advancement of all communities’ and ‘to recommend constitutional arrangements likely to achieve the objectives of the Constitutional Review’.¹⁰⁸ The Commission conducted extensive public consultations, receiving well over 1,000 oral and written submissions. Its report, of nearly 800 pages, made a total of 694 recommendations for legislative and administrative action.¹⁰⁹
9. The Commission reported to the President in September 1996.¹¹⁰ The JPSE was given the task of considering the findings of the Commission, and reported to the Parliament on 14 May 1997.¹¹¹ Of the 674 recommendations of the Commission, the JPSE accepted 577, amended 40 and rejected or treated as redundant 77. The

¹⁰¹ *Ibid* s 55(1).

¹⁰² *Ibid* s 78(1).

¹⁰³ See for example *ibid* ss 21, 135(2) and 100.

¹⁰⁴ *Ibid* s 161.

¹⁰⁵ Parliament of Fiji, Joint Parliamentary Select Committee on the Commission, ‘Report of the Joint Parliamentary Select Committee on the Report of the Fiji Constitution Review Commission’, Parliamentary Paper No. 17 of 1997, 1 [1.1].

¹⁰⁶ Parliament of Fiji, Parliamentary Paper No. 32 of 1997, ‘The Fiji Constitution and the Commonwealth: Final Report’ (1997) 8 [21].

¹⁰⁷ *Ibid*.

¹⁰⁸ Fiji Constitution Review Commission, *The Fiji Islands: Towards a United Future*, Parl Paper N 34/1996, Appendix B, 754-755.

¹⁰⁹ *Ibid*.

¹¹⁰ Parliament of Fiji, Parliamentary Paper No. 32 of 1997, ‘The Fiji Constitution and the Commonwealth: Final Report’ (1997) 8 [21].

¹¹¹ *Ibid* 11 [27]-[28].

JPSE also made proposals of its own for dealing with certain issues.¹¹² The 20-member JPSE was unanimous (except that one Fijian member refused to sign the report and an Indian member dissented from a number of the proposals).¹¹³ The three main areas in which the JPSE dissented from the Fiji Constitution Review Commission were:

- * The JPSE agreed that the common roll should be reinstated. However, while the Commission recommended 45 common seats and 25 communal seats, these numbers were reversed by the JPSE.¹¹⁴
 - * The JPSE went further than the Commission in recommending that the Constitution should provide for the establishment of 'a multi-party Cabinet which would, as far as possible, be a fair representation of all parties represented in Parliament'. The Prime Minister would be required to invite into the Cabinet representatives of all political parties reaching a certain threshold.¹¹⁵
 - * The Commission recommended that the Senate should be comprised of 28 members elected to represent the 14 provinces, 1 member elected to represent Rotuma and 6 members appointed by the President to represent other groups. The JPSE recommended a similar process to that in the 1970 Constitution, namely, appointment by the President on the advice of the Great Council of Chiefs (14 members), the Prime Minister (9 members), the Leader of the Opposition (8 members) and the Council of Rotuma (1 member).¹¹⁶
10. The Constitution Amendment Bill 1997, which was tabled on 23 June 1997, was based squarely on the recommendations of the Commission, as modified by the JPSE. The Bill was passed unanimously by both the House of Representatives and the Senate.¹¹⁷

¹¹² Parliament of Fiji, Joint Parliamentary Select Committee on the Commission, 'Report of the Joint Parliamentary Select Committee on the Report of the Fiji Constitution Review Commission', Parliamentary Paper No. 17 of 1997, 12 [8.2].

¹¹³ Parliament of Fiji, Parliamentary Paper No. 32 of 1997, 'The Fiji Constitution and the Commonwealth: Final Report' (1997) 11 [27]-[28].

¹¹⁴ Parliament of Fiji, Joint Parliamentary Select Committee on the Commission, 'Report of the Joint Parliamentary Select Committee on the Report of the Fiji Constitution Review Commission', Parliamentary Paper No. 17 of 1997, 20 [H.9]-[H.11].

¹¹⁵ *Ibid* 17 [G.1].

¹¹⁶ *Ibid* 20 [H.13]-[H.14].

¹¹⁷ *Ibid* 13 [35].

IN THE COURT OF APPEAL FIJI
AT SUVA
CIVIL JURISDICTION

Civil Appeal No. ABU0077 of 2008

Between:

**LAISENIA QARASE & RATU NAIQAMA
LALABALAVU & RO TEIMUMU KEPA, RATU
SULIANO MATANITOBUA & ADI SIVIA QORO &
JOSEFA VOSANIBOLA**

Appellants

And:

JOSAIA VOREQE BAINIMARAMA Commander of
the RFMF

First Respondent

And:

THE REPUBLIC OF FIJI MILITARY FORCES

Second Respondent

And:

**THE STATE OF THE REPUBLIC OF THE FIJI
ISLANDS**

Third Respondent

And:

THE ATTORNEY GENERAL of the Interim Regime

Fourth Respondent

FIJI HUMAN RIGHTS COMMISSION

CITIZENS' CONSTITUTIONAL FORUM LIMITED (a
company registered under the *Companies Act*, Cap.
247, and having its registered office at 25 Berry
Road, Suva)

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