THE QARASE v BAINIMARAMA APPEAL CASE

ANITA JOWITT*

INTRODUCTION

This paper was delivered one week after the Court of Appeal decision was released, and was intended to provide background on the decision that would help to frame a general discussion of the case and the situation in Fiji for an audience that had some general familiarity with the history of coups in Fiji. As such, it does not provide a detailed analysis of the Court of Appeal case, or earlier cases. Instead it aims to provide a quick summary of the cases and the events that led up to them, and some key excerpts from the main "coup cases". This summary necessarily glosses over complexities. However, it does provide a quick insight into the relationships between key figures and a short summary of the key points in the Court of Appeal decision. It can be considered a primer for people wanting to get a quick overview of the court decisions that led up to the abrogation before reading the cases for themselves.

TIMELINE OF EVENTS[1]

In order to understand the 2008 decision of the High Court[2] and the 2009 decision of the Court of Appeal[3] in the *Qarase v Bainimarama* proceedings we need to have some knowledge of the constitutional cases that arose following Fiji's 2000 coup. The 2000 coup also provides a convenient starting point for understanding the relationships between "the players" in the recent case.

- May 1999: Mahendra Chaudhry becomes Prime Minister following democratic elections. Chaudhry is Fiji's first Prime Minster of Indian ethnicity.

- 19 May 2000: A group of men led by George Speight occupy Parliament and hold many members of Parliament hostage. The ostensible motivation for the coup is the protection of ethnic Fijian rights and interests. On the same day President Ratu Sir Kamisese Mara declares a state of emergency.

- 27 May 2000: Acting Prime Minister Ratu Tevita Momoedonu is appointed by Mara. Acting on advice of Momoedonu, Mara prorogues Parliament for 6 months and Momoedonu resigns as Acting Prime Minister.

* Lecturer in Law, University of the South Pacific. The help of the USP students Lili Vuiyasawa, Vienna Macomner and Varanisese Temo in contributing to discussions at the conference is acknowledged.

[1] This timeline is largely drawn from paragraphs 23 – 72 of *Qarase v Bainimarama* [2009] FJCA 9 http://www.paclii.org.

[2] *Qarase v Bainimarama* [2008] FJHC 241 http://www.paclii.org.

[3] *Qarase v Bainimarama* [2009] FJCA 9 http://www.paclii.org.

- 29 May 2000: The Commissioner of Police informs Mara that he can not guarantee security and requests that a state of emergency be instituted.

- 29 May 2000: Commander of the Royal Fiji Military Force Josaia Voreqe (Frank) Bainimarama assumes executive authority and establishes an interim military government. His first decree purports to abrogate the *Constitution*. Mara refuses to accept office of President under the new regime.

- 4 July 2000: An interim civilian government is created by Bainimarama, with Laisenia Qarase as Prime Minister.

- 14 July 2000: The hostages are released. The Great Council of Chiefs appoints Vice-President Ratu Josefa Iloilo as Interim President.

- 15 November 2000: The decision in the High Court *Prasad* case[4] is released.

  In this case the plaintiff sought a number of declaratory orders, including 'That the declaration of a state of emergency under the doctrine of necessity by the President Ratu Sir Kamisese Mara was unconstitutional; that the revocation of the 1997 Constitution by decree by the Interim Military Government was unconstitutional; and that the 1997 Constitution still remains in force.'[5] The defendant (the Republic of Fiji) argued that all of the actions were justified by the doctrine of necessity. The Court made declaratory orders in favour of the plaintiff in respect of the last two of these, but declared that 'The declaration of the State of Emergency by the President Ratu Sir Kamisese Mara in the circumstances then facing the nation, though not strictly proclaimed within the terms of the Constitution, is hereby granted validity *ab initio* under the doctrine of necessity.'[6]

  The Court (Chief Justice Gates) stated the following about the doctrine of necessity:

  > Such a law permits emergency action to be taken validly in times of extreme crisis, such action being in normal circumstances illegal. But if such action is taken it must be transient and a proportionate response to the crisis… Whatever is done however should be done in order to uphold the rule of law and the existing constitution. Necessity cannot be resorted to in order to justify or support the abrogation of the existing legal order… It is obvious therefore, that the doctrine of necessity could come to aid Commodore Bainimarama in resolving the hostage crisis, imposing curfews, maintaining roadblocks and ensuring law and order on the streets. Once the hostage crisis was resolved and all other law and order matters contained if not entirely eradicated, the Constitution, previously temporarily on ice or suspended, would re-emerge as the supreme law demanding his support and that of the military to uphold it and to buttress it against any other

[4] *Prasad v Republic of Fiji* [2000] FJHC 121 http://www.paclii.org.
[5] Ibid.
[6] Ibid.

> usurpers. The doctrine could not be used to give sustenance to a new extra-constitutional regime…[7]

The formulation of necessity from *Mitchell v Director of Public Prosecutions*[8] was adopted. This case defined necessity in the following manner:

> (i) an imperative necessity must arise because of the existence of exceptional circumstances not provided for in the Constitution, for immediate action to be taken to protect or preserve some vital function to the State;
> (ii) there must be no other course of action reasonably available;
> (iii) any such action must be reasonably necessary in the interest of peace, order, and good government; but it must not do more than is necessary or legislate beyond that;
> (iv) it must not impair the just rights of citizens under the Constitution;
> (v) it must not be one the sole effect and intention of which is to consolidate or strengthen the revolution as such.[9]

- 15 December 2000: Mara agrees to accept a pension as retired President.

- 1 March 2001: The High Court *Prasad* decision is upheld in the Court of Appeal.[10]

- 1 March 2001: Chaudhry, asks (constitutionally appointed) Vice President Iloilo, who is acting as President following the (constitutionally valid) resignation of Mara, to summon Parliament.

- 13 March 2001: Iloilo is appointed President under the re-established *Constitution*. He dismisses Chaudhry as Prime Minister

- 14 March 2001: Momoedone is appointed as caretaker Prime Minister by Iloilo.

- 15 March 2001: On the advice of caretaker Prime Minister Parliament is dissolved. The caretaker Prime Minister resigns.

- 16 March 2001: Qarase is appointed caretaker Prime Minister.

- 11 July 2001: The *Yabaki* case[11] is heard.

  This case sought declarations that:

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[7] Ibid.
[8] [1986] LRC (Const) 35.
[9] Ibid, 88.
[10] *Republic of Fiji Islands v Prasad* [2001] FJCA 2 http://www.paclii.org.
[11] *Yabaki v President of the Republic of the Fiji Islands* [2001] FJHC 116 http://www.paclii.org.

> the President… acted in a manner inconsistent with the Constitution when he failed to summon Parliament… that the purported dismissal by the President of… Chaudhry as the Prime Minister… is inconsistent with the Constitution and is therefore null and void, that the purported dissolution of Parliament by the President on about 14 March 2001 is inconsistent with the provisions of the Constitution and is therefore null and void… [and] that the purported appointments of… Qarase as Prime Minister and of other persons as Ministers of a Caretaker Government for Fiji made on or about 15th, 16th and 19th March 2001 are inconsistent with the Constitution and… null and void.[12]

The Court (Mr Justice Scott) ruled that the actions of the President in dismissing Chaudhry, dissolving Parliament and appointing Qarase as caretaker Prime Minister were justified on the grounds of necessity. In interpreting the *Constitution* he ruled that section 109(1) of the *Constitution*, which states that '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' provides 'powers are exercisable by the President in his own judgment'[13] if exceptional circumstances exist so an actual motion of no confidence in the House of Representatives is not required to exercise this power.[14]

It should be noted that by the time of the judgment the date for a new election had been set, and concerns that legal challenges would lead to delays in elections had been voiced. Pragmatic considerations undoubtedly influenced the decision.

- August 2001: National elections are held and Qarase is elected Prime Minister.

- 14 February 2003: The decision in the *Yabaki* appeal[15] is released. Scott's interpretation of s 109(1) is overturned, with the Court stating,

> The Fiji Constitution, by the prescriptiveness of s109(1), denies the President such a right as that given to the Governor in Ankitola. Consequently, it did not matter that his soundings may have indicated a general lack of support for Mr Chaudhry or indeed that Mr Chaudhry himself supported a dissolution - albeit with himself as caretaker Prime Minister. The framers of the Constitution appear to have been at pains to circumscribe the President's power of dismissal of a Prime Minister and to have required the House and not the President to determine whether the Prime Minister has lost its confidence.[16]

Because this decision was made after elections have been held and a democratically elected government restored it had little practical impact.

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[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] *Yabaki v President of the Republic of the Fiji Islands - Majority Judgment* [2003] FJCA 3 http://www.paclii.org.
[16] Ibid.

- May 2006: National elections are held and Qarase is elected Prime Minister.

- Post May 2006 elections: It becomes more apparent that there is a major rift between Bainimarama and Qarase.

  This rift had been brewing since mid 2005. The involvement of people who had been George Speight supporters in the Qarase administration and the release of people involved in the Speight coup attempt, corruption, and the desire to pass legislation that may increase "indigenous nationalism" and increase ethnic tension including the Reconciliation, Tolerance and Unity Bill, the Qoliqoli Bill and the Land Claims Tribunal Bill are some stated causes of this rift.

- 5 December 2006: The military stages a coup. Bainimarama assumes executive authority as Commander of the military, and declares a state of emergency. Dr Senilagikali is appointed as Prime Minister.

- 6 December 2006: Senilagikali advises the President to dissolve Parliament. Parliament is dissolved with Senilagikali remaining as caretaker Prime Minister.

- 4 January 2007: Senilagikali resigns.

- 5 January 2007: Bainimarama is appointed interim Prime Minister.

- 20 February 2007: Qarase brings proceedings arguing that the actions of the President were unconstitutional. The arguments can be summarised as:

  > The defendants maintain that the President retained prerogative powers which enabled him to act in an emergency for the public good. They say those powers enabled him to ratify the acts of the military in the takeover, and ultimately in consequence absolving the participants of unlawfulness. But did such powers allow him to act without specific authority of the Constitution? Were his powers as the plaintiffs argue circumscribed within the confines of the Constitution with regard to the dismissal of the Prime Minister and his Cabinet and the dissolution of Parliament? Were those powers further confined by the common law by the requisite conditions set out in the case of Prasad.[17]

- Between February 2007 – October 2008: Many cases challenging the actions of the interim government and the laws that have been promulgated are filed. All of these challenges are stayed pending the outcome of the *Qarase* case.[18]

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[17] *Qarase v Bainimarama* [2008] FJHC 241 [1] http://www.paclii.org.

[18] See, for example, *Fiji Independent Commission Against Corruption v Devo* [2008] FJHC 132 http://www.paclii.org; *Fijian Teachers Association v President of the Republic of Fiji Islands* [2008] FJHC 59 http://www.paclii.org. After the High Court *Qarase* case is released and the appeal lodged legal challenges continued. See for example *FICAC v Kumar* [2009] FJHC 76 http://www.paclii.org; *State v Bainimarama, Ex Parte Bokini* [2008] FJHC 380 http://www.paclii.org.

- 9 October 2008: The High Court decision in the *Qarase* case is released.

  The Court, which was comprised of Acting Chief Justice Gates, Justice Byrne and Justice Pathik, ruled that the President, as Head of State, retains prerogative powers 'to act according to discretion for the public good, without the prescription of law'.[19] These prerogative powers are not limited by Fiji's *Constitution*. In the absence of bad faith exercise of these powers the actions of the President in exercising them are not subject to judicial review.

  The Head of State's prerogative powers are distinct from the powers that exist under the doctrine of necessity outlined in *Prasad*, in that the prerogative powers are a residue of the absolute powers of "ancient" monarchs and attach to the position. On the other hand, the doctrine of necessity can be used to justify the actions of others who do not possess the Head of State's prerogative powers who have acted for the public good.

- 9 April 2009: The Court of Appeal decision in *Qarase* is released.

  The Court, which comprised of three Australian judges, Powell JA, Lloyd JA and Douglas JA, ruled that the prerogative power does not exist in Fiji as the 1997 *Constitution* thoroughly delimits powers:

  > It appears to us that a constitution with those aims and aspirations would wish to ensure that when it came to such a delicate matter as the dismissal of a Prime Minister, that the circumstances in which the Prime Minister could be dismissed would be clearly defined. By the time the Fiji Constitution had been drawn up, as appears from the facts set out above, there had already been the abrogation of one Constitution in 1987, and the establishment of military rule. It is clear that in the circumstances in which the Fiji Constitution was drafted, the people of Fiji wished, if at all possible, to avoid another such occurrence. So much is also obvious from the Reeves Report.
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  > Section 109 of the Fiji Constitution deals expressly with the circumstances in which the President may dismiss a Prime Minister. It prescribes that the President may not dismiss the Prime Minister unless the Government fails to get or loses the confidence of the House of Representatives, and the Prime Minister does not resign or get a dissolution of the Parliament. It also goes on to prescribe in s.109(2) that if the President dismisses a Prime Minister, the President may, acting in his or her own judgment, appoint a person as a caretaker Prime Minister to advise a dissolution of the Parliament. In relation to the appointment or dismissal of a Prime Minister, this and s.98 are the only provisions that state that the President can exercise his own judgment. In the case of s.98, that judgment is

[19] Ibid [100].

> carefully confined, and in the case of s.109 that judgment is for a very limited purpose.
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> The question really is whether under the Fiji Constitution the President has a discretion to dismiss a Prime Minister in circumstances other than those set out in s.109, and appoint another caretaker Prime Minister to advise a dissolution of Parliament, and appoint an Interim Government, particularly in circumstances where it is said that an emergency situation has arisen. In our view, the answer to this question is to be found in s.96(2) which provides: "*This Constitution prescribes the circumstances in which the President may act in his or her own judgment*". This express provision, in our view, makes it clear that under the Fiji Constitution it is not intended that the President, in the exercise of discretion, dismiss a Prime Minister in circumstances other than those set out in s.109, and in effect establish an Interim Government.[20]

The Court also confirmed that the doctrine of necessity could not be used to justify a 'revolutionary regime'.[21]

- 10 April 2009: The *Constitution* is abrogated.

DISCUSSION

This paper was delivered less than a week after the abrogation, so it is too early to tell yet what impact this will have. One thing that can be noted, though, is that this decision came as something of a surprise. There was certainly a perception that the Court of Appeal could easily be "stacked" so that it would act as a "rubber stamp" for the High Court decision. Another point to note is that the abrogation that was the consequence of the decision may have also surprised many. Maybe after the *Prasad* decision some people had a naïve faith in the power of a court decision to restore democracy. I spent much of semester 1 2009 debating with my Fiji based students in one of my courses whether court challenges were strategically wise, on the basis that once (if) a court challenge was successful then the next move would be an abrogation of the *Constitution*. My assumed next move was not, however, an assumption shared by all. My question was, 'is it better to have constitutional human rights that may be able to be upheld, or no clear human rights protections at all?' Or, 'is it better to have a piece of fabric in a tear with it, or no piece of fabric at all?'[22] I personally prefer the notion of retaining a "torn fabric", although there is also validity in the argument that removing any illusions of the existence of "the rule of law" is more honest. Whilst it is not possible to "turn back the clock", given my personal preferences, maybe the strategy of court challenges could have been better considered.

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[20] *Qarase v Bainimarama* [2009] FJCA 9 [91 – 94].

[21] Ibid [43].

[22] The metaphor came up during discussions at the Pacific and Maori Legal Issues Conferenceand I am borrowing the imagery. Unfortunately I cannot remember who gave me this imagery. If they are reading I apologise for the lack of acknowledgement.

As to the question of whether the Court of Appeal decision is "right" or "wrong", or whether presidential prerogative powers do have scope to exist in light of the wording of Fiji's *Constitution*, the decision is, I think, legally correct. The High Court decision made more use of case authorities, but did not deal with the narrow drafting of Fiji's *Constitution* in any satisfactory manner.

Finally, what makes this situation most difficult is that it is probably fair to say that many agreed with most of what Bainimarama was saying about problems in the Qarase administration. The initial ideals of Bainimarama were about "good governance". Whilst using the mechanism of a coup to instill "good governance" is conceptually problematic there was, at least in early 2007, at least some sense that (at least once the coup was a *fait accompli*) the interim regime could be a positive change. The abrogation of the *Constitution* has also been justified as being the best way to maintain stability whilst moving towards "true democratic elections" with the President's announcement of the abrogation of the *Constitution* stating:

> My fellow citizens you cannot have a country without a Government. The machinery of the State like any other country needs to be in place all the time...
>
> To facilitate the holding of true democratic and parliamentary elections I hereby abrogate the 1997 Constitution…
>
> Let me assure all of you that the basic human rights of all citizens shall be protected in the new legal order…
>
> You will agree that this is the best way forward for our beloved Fiji. It not only gives certainty but provides stability and the opportunity to carry out reforms which are crucial before true democratic elections can be held. In this respect I believe that a period of 5 years is necessary for an interim government to put into place the necessary reforms and processes.[23]

At this point, the hope is that the ideals of "good governance" remain as guiding principles for the interim government and that Fiji can move forward from the point.

[23] President's Address to the Nation, 10 April 2009, http://www.fiji.gov.fj/publish/page_14681.shtml (Accessed 25 August 2009).