



FIJI HUMAN RIGHTS COMMISSION

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The Assumption of Executive Authority on December 5th 2006 by Commodore J.V. Bainimarama, Commander of the Republic of the Fiji Military Forces: Legal, Constitutional and Human Rights Issues.

PART II

Report to the UN High Commissioner for Human Rights on alleged breaches of international law and the 1997 Constitution of Fiji in the removal of the Prime Minister, Laisenia Qarase on December 5th 2006.

**By Dr Shaista Shameem
DIRECTOR**

1.0 Introduction

The Fiji Human Rights Commission on January 4th 2007 published its first investigative report on the December 5th 2006 ‘assumption of executive authority’ by the Commander of the Republic of the Fiji Military Forces.

This second report, titled Part II for convenience, is a continuation based on investigation of events as they unfolded subsequent to the Commission’s January 4th assessment of legal, constitutional and human rights issues. The two parts can be read as discrete documents.

Part II is written in response to a complaint made that the December 2006 takeover of the Government of Fiji was a human rights violation *inter alia* of the Prime Minister, Laisenia Qarase.

2.0 Assumption of executive authority: is it a human rights issue?

The Commission was notified in February 2007 that a ‘matrix’ table had been sent to the UN High Commissioner for Human Rights setting out human rights provisions that were allegedly breached by the removal of the Prime Minister (as well as others listed) by the Commander of the Republic of the Fiji Military Forces (RFMF) on December 5th 2006. The document sent to the UN High Commissioner, based on selective facts, was not copied to the Commission.

Nevertheless, an inquiry was immediately instigated by the Commission. The alleged respondents (the RFMF) were requested to provide responses which were received and assessed between March and August 2007.

Part II therefore is based on the responses provided, as well as further investigations, and an analysis of the law and the facts.

The document sent to the UN High Commissioner for Human Rights contained specific allegations that the removal of the Prime Minister breached Articles 9, 12, 13, and 24 of the Universal Declaration of Human Rights, Articles 9 and 12 of the International Covenant of Civil and Political Rights and sections 23, 34 and 37 of the 1997 Constitution of Fiji. This report contains our findings and conclusions with respect to the allegations.

In its first Report, the Commission assessed the decisions in the Yabaki¹ and Chandrika Prasad² cases in 2001 as they related to the first Qarase Government. The Report also stated that second Qarase Government had failed to hold a census to enable constituency boundaries to be constitutionally drawn prior to the 2006 elections. The validity of both Qarase Governments, that is, of 2001 and 2006, was therefore questioned.

The new question for the Commission was whether the complaint that the removal of the Prime Minister on December 5th 2006 constituted a breach of human rights law could be substantiated.

¹ Yabaki v President of the Republic of the Fiji Islands [2001] FJHC 116

² Chandrika Prasad v the State [2001] NZAR 21; [2001] 1 LRC 665 (Fiji HC)

The first constitutional hurdle we faced in assessing this complaint arose in relation to the question of identifying the party which carries responsibility for this type of human rights violation. Normally the State bears responsibility for human rights. In the event of a removal of Government, the question was whether, and in what state capacity, someone could be held responsible for a human rights breach.

The second constitutional hurdle arose out of the fact of Presidential immunity granted, by promulgation, for the removal of the Prime Minister and members of his Government.

The third (and related) constitutional hurdle arose because a separate provision in the Immunity Promulgation ousted the jurisdiction of the court.

These three impediments were quite significant. It was only after they were addressed that we could consider the substantive issue in this case, that is, whether the removal of the Prime Minister breached his constitutional or other human rights. Any investigation of the alleged human rights violation associated with the removal of the Government on December 5th 2006 therefore required a rigorous preliminary assessment of the relevant constitutional issues.

3.0 Constitutional Hurdle No 1: Who is the respondent?

In allegations of human rights breaches investigated by the Commission, the respondent is usually the government. In Fiji, the Constitution sets out the relevant provisions on respondents at section 21(1):

This Chapter 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

But in this human rights complaint, who is the respondent? Mr Qarase still claims to be the Prime Minister, an issue yet to be determined by the court. Therefore the problem of identifying the respondent becomes a legal issue in its own right.

In his application to court on the issue of legality of December 5th 2006 events, the Plaintiff, Laisenia Qarase, listed the Commander of the RFMF, J.V. Bainimarama, the RFMF, the State of the Republic of the Fiji Islands, and the Attorney General of the Interim Regime as Defendants.

This resolved the problem of the identity of the respondent in this human rights allegation. The first Defendant is a public officer and was a public officer prior to December 5th 2006. The second Defendant, the institution of the RFMF, is a public office established prior to December 5th events and is established by section 112 of the 1997 Constitution (Amendment Act) and section 94 of the 1990 Constitution. The third Defendant, the State of the Republic of the Fiji Islands, was similarly established prior to the December 5th events.

The exception is the Interim Attorney General, whose assumption of public office is the only ‘usurpation’ that was a new element after the events of December 5th. Nevertheless the Interim Attorney General was appointed to office and is presumed to be exercising public authority. The Human Rights Commission is not assessing the legality or otherwise of the Attorney General’s position post- December 5th 2006. That may be the subject of collateral proceedings in the Qarase case currently before the court as it was in the Chandrika Prasad case in the High Court in 2000.

Constitutionally, however, human rights claims can be made against ‘all persons performing the functions of any public office’. Since the question of the identity of ‘government’ is yet to be decided by the courts, individual public offices would be the respondents in the meantime in such a case, pursuant to section 21 (1) (b) of the Constitution.

Thus the respondents were identified in this investigation as the Commander of the RFMF, the RFMF itself and the State, that is, the Republic of the Fiji Islands.

4.0 Constitutional Hurdle No 2: Presidential Immunity: validity in human rights matters

Executive authority returned to the President of Fiji on January 5th 2007, the day after the Human Rights Commission published its first Report on the ‘assumption of executive authority...’

On January 18th 2007 a Presidential Promulgation of Immunity was gazetted. In relevant paragraphs the Promulgation provides reasons for the December 5th takeover:

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

I DO IRREVOCABLY GRANT FULL AND UNCONDITIONAL IMMUNITY to all persons scheduled below from any prosecution and for any civil liability and all other legal or military or disciplinary or professional proceedings or consequences as a result of directly or indirectly or pertaining to or arising from the acts and omissions of the Fiji Interim Military Government from 5th December 2006 until the restoration of executive power of the State in me the President and no Court or Tribunal whatsoever shall have any jurisdiction to entertain any action or proceeding or make any decision or order or grant any remedy or relief in any such proceedings.

Schedule of Persons Granted Immunity

- (a) Commodore J V Bainimarama, OSJ, MSD, jssc, psc; Acting President of the Republic of the Fiji Islands, Commander of the Fiji Military Forces and Head of the Interim Military Government of Fiji

Provisions (b) - (g) contain references to all other officers of the RFMF, Fiji Police Force, Fiji Prisons Service and all other persons who acted under the orders and directions and instructions of those listed in (a) – (f) of the Promulgation.

The President's Promulgation of Immunity resulted in two subsidiary constitutional hurdles to be overcome by the respondents, that is, the RFMF and the State. The first was whether, in international law, immunity from prosecution is valid. The second was whether a court can be prevented from considering allegations of a constitutional or human rights breach by a promulgation of this nature,

4.1 **Subsidiary constitutional hurdle No 1- human rights and state immunity in International law- general principle**

Immunity granted to state officials for human rights violations does not hold much weight in international law. As Geoffrey Robertson states in his seminal work, Crimes Against Humanity (1999), the judgment at Nuremburg heralded the removal of the shield of state sovereignty for crimes against humanity:

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced...it was submitted that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal [this contention] must be rejected...The principle of international law, which under certain circumstances protects the representative of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.

Certain crimes are regarded as offences and contrary to *jus cogens*- the peremptory rules of international law which no state or official can ever claim a licence to breach. Racial discrimination and persecution is one of them. There are a number of other offences, for example torture, and religious persecution, which are also included in the *jus cogens* principle.

The Pinochet case is often cited as the classic example of the way in which state immunity is considered in international law. Most of the argument at trial in the House of Lords case of R v Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet addressed the parameters of state immunity for crimes against humanity.

However, international law on immunity deals only with state immunity claimed for crimes **against** humanity. Would such precedents be relevant in the circumstances prevailing in Fiji at the time of the December 5th 2006 removal of the Prime Minister?

Before this question could be addressed, first we needed to consider whether the provision in the immunity promulgation ousting the court's jurisdiction could be sustained.

4.2 **Subsidiary constitutional hurdle No 2: court's jurisdiction**

The Immunity Promulgation states that:

‘...no court or Tribunal whatsoever shall have any jurisdiction to entertain any action or proceeding or make any decision or order or grant any remedy or relief in any such proceedings’

This is an explicit provision. Can it exclude a court’s jurisdiction in a human rights complaint?

This question must be addressed with reference to the constitutional position of the court compared with the constitutional status of the President.

The first Yabaki decision established the precedent that a court does have jurisdiction to examine the extent of constitutional Presidential power. Scott J in the High Court ruled that the sovereign or head of state had the capacity to decide that departure from the normal requirements of the Constitution was permitted.

This decision seems to be consistent with that of the Supreme Court of Fiji in the Bavadra case³ where the court said that it had the jurisdiction to ‘inquire into the existence or extent of any alleged prerogative... (i) f any prerogative is disputed’.

However, the court then decided that:

‘Constitutional law clothes the person of Sovereign with supreme sovereignty and pre-eminence. She is however bound by the terms of her coronation, oath and the maxims of the common law, to observe and obey the law... the Queen can do no wrong. It follows that anything done in the Queen’s name which is contrary to law will be a nullity and of no effect’

The court struck out the declaration sought by Dr Bavadra that:

‘there remains in the Crown no residual power to amend the Constitution of Fiji..and that the Constitution may be validly and lawfully amended only by strict compliance with the provisions of section 67 of the (1970) Constitution’.

It should be emphasized that the court’s own authority is derived firstly from the Constitution and is based on the principle of separation of powers. This is expressed in section 118:

The judges of the State are independent of the legislative and executive branches of government

³ Bavadra v Attorney General [1987] S.P.L.R 96

The second relevant authority of the court is derived from the Bill of Rights provisions of the Constitution at section 21(1):

This Chapter binds:

- (a) the legislative, executive and **judicial branches** of government...

(emphasis added)

Given this purportedly equivalent power, the extent of the court's scrutiny into presidential prerogative can only be determined by inquiring further into the constitutional status of the prerogative.

4.3 Presidential Prerogative Power in the Constitution

It has already been noted that Scott J's High Court decision in Yabaki gave prerogative power an extra-constitutional validity. This decision should be compared with the Court of Appeal's observations on appeal. In relation to section 109 of the Constitution, the Court of Appeal decided that the reserve powers of the President were circumscribed by Constitution. Thus it was decided by a superior court that reserve powers can only be exercised constitutionally.

The Constitution contains a provision that has largely been overlooked in previous discussions of reserve powers, and that is section 86, which states:

The President is the Head of State and symbolizes the unity of the State.

Section 194 (7) of the Constitution unequivocally states the scope of the power:

A person, authority or body upon which functions are conferred by this Constitution has power to do everything necessary or convenient to be done for, or in connection with, the performance of those functions.

Clearly sections 86 and 194 (7) permit presidential residual powers to be exercised constitutionally. These powers can be far-ranging indeed and any restrictions on them without good reason may not be imposed.

The Reeves Commission⁴ had recommended that the 1997 Constitution should provide expressly that the President is the Head of State of the Republic of the Fiji Islands. Comparing the position of President in their recommendations with that of the Governor General's role in the 1970 Constitution, the Commission said that the President's office 'closely resembles that of the former Governor-General'.

The Commission recommended furthermore that the Constitution should provide expressly that the Office of the President 'symbolises the unity of the Republic'. The President also 'personified the State'. Moreover,

'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'.

The Report also recommended that:

'the role of the President should continue to parallel closely the former role of the holder of the office of the Governor General. In exercising that role, the President should take account of the express constitutional provision already recommended, that the office of the President symbolizes the unity of the nation. The nature of the President's role should be reflected in the arrangements for choosing the holder of the office'.

Clearly these recommendations articulated the sovereign status of the President of Fiji.

Then, in Chapter 12, the Commission noted:

'the most important of the President's personal discretions are concerned with finding or changing a Prime Minister'.

It was recommended that the Prime Minister be required to inform the President, as sovereign, of governance issues:

'the Prime Minister is required to keep the President informed concerning the general conduct of the government of Fiji, a duty corresponding to that owed to the sovereign in Britain'.

On the President's additional role, that of Commander-in-Chief of the armed forces, the Reeves Commission noted that there was a general desire to continue to designate the President as Commander-in-Chief and the Constitution should 'so provide'. The Commission also said that in countries comparable to Fiji, most if not all aspects of the governance of the armed forces:

⁴ The Fiji Islands: Towards a United Future: Report of the Fiji Constitution Review Commission

‘are now comprehensively provided for by statute. That is presumably a matter which will be looked closely in the current Defence Review’.

The Commission went further to say that the title of the Commander-in-Chief is..

‘purely honorary. It is well understood that it conveys no power of actual command over the military forces’.

Section 87 of the Constitution states that the President is the Commander-in-Chief of the military. However, the section circumscribes no explicit restriction on this title.

Regarding the President’s executive role, the Reeves Commission recommended that this should be circumscribed as much as possible within the parliamentary system of government.

This recommendation seems to have been followed in the construction of a number of sections in the Constitution. For example, Section 96 states:

the President, acting in his or her own deliberate judgment, appoints as Prime Minister who, in the President’s opinion, can form a government that has the confidence of the House of Representatives.

And section 109:

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 in Parliament

Both these sections link presidential executive authority to the parliamentary system of government.

The Constitution of Fiji provides three roles for the President, embodied in the same person: as sovereign, as commander-in-chief of the armed forces and as executive authority. The Reeves Commission Report as well as the Joint Parliamentary Select Committee (JPSC) Report on the Fiji Constitution Review Commission⁵, in accordance with constitutional law principles, expressed sovereign as well as executive status of the President. This is supported by the Yabaki decisions and our survey of the historical role of a head of state which can also include an additional dimension as head of the armed forces.

⁵ Parliamentary Paper No 17 of 1997.

With respect to his **executive** status, the President exercises his functions in accordance with the advice of Parliament and/or the Prime Minister. Beyond that, the President has **sovereign** status derived from that element of his role that requires the exercise of discretion, prerogative and, in specific instances, his ‘own deliberate judgment’ as explicitly provided under certain sections of the Constitution.

It should be noted that the 1970 and 1990 Constitutions did not contain any provision similar to section 86 of the 1997 Constitution. Under the 1970 Constitution, the Queen in England through the Governor and Governor General, retained residual (prerogative) power. After 1987 the constitutional position of the Head of State was transformed.

Section 86 is therefore a new provision introduced in the 1997 Constitution through which the people of Fiji gave constitutional discretionary sovereign power to the President to be exercised on their behalf. The Preamble of the Constitution states that the people of Fiji gave themselves their Constitution.

WE THE PEOPLE OF THE FIJI ISLANDS, WITH GOD OUR WITNESS, GIVE OURSELVES THIS CONSTITUTION.

(Preamble of the 1997 Constitution Amendment Act)

4.4 The exercise of sovereign prerogative: December 5th 2006 and January 5th 2007

The events as they unfolded in Fiji from late November to early December 2006 are mostly a matter of public record. Our own investigations revealed that the President was confronted with a number of constitutional dilemmas as he attempted to steer the country through a turbulent political period. In the process, the office of the President came under great strain.

In the last few days of November, it apparently became obvious to the President that the Prime Minister was acting unilaterally in matters of governance in breach of section 104 of the Constitution which states:

The Prime Minister must keep the President generally informed about issues relating to the governance of Fiji and must supply the President with such information the President requests concerning matters relating to the governance of the State.

Specifically, the President was kept in the dark about the looming presence of the Australian naval taskforce⁶ just outside Fiji waters in late November. He was not informed about the Prime Minister's request to Australia and New Zealand for military intervention.

In late November the President was also apparently made aware that the Prime Minister had breached an agreement reached with the Commander of the RFMF at a meeting brokered by the New Zealand Foreign Affairs Minister just a few days previously. The official record of the Wellington meeting was substantially different on key points from the advertisement relating to that meeting which was released to the public by the Prime Minister upon his return to Fiji.

Finally, on the morning of December 5th the Prime Minister refused point blank to attend a meeting with the President when called to do so.

Subsequent to these series of events, the President reportedly sought a number of opinions regarding the dismissal of the Prime Minister for breaches of the Constitution. The President appears to have contemplated these opinions in private for some time on the morning of December 5th.

An hour or so later, the RFMF Commander visited the President and a decision to remove the Prime Minister was reportedly made. Shortly afterwards this decision was executed by the Commander who announced to the public at 6 pm that evening that he had 'stepped into the President's shoes...'

However, sometime in the afternoon of December 5th, the Vice President unilaterally released a press statement which stated that the President:

'neither condones nor supports the actions of the military today, which are clearly outside the Constitution, contrary to the rule of law and our democratic ideals. The military has acted contrary to the wishes of their Commander in Chief which was that a solution to the impasse be found within the boundaries of the law'

⁶ These were described as 'warships' with at least 100 soldiers on board, as well as BlackHawk and Seaking Helicopters which were reportedly making forays into Fiji waters. It was also reported that Australian Elite SAS troops had their leave cancelled and a Sydney-based commando task force placed on standby. An unknown number of troops, including SAS with military equipment, were already in the Australian High Commission in Suva after secretly entering the country on November 3rd. They were initially placed with the Police Tactical Response Team presumably at the invitation of the then Commissioner of Police, Andrew Hughes, an Australian high ranking former Federal police officer. These troops were hastily withdrawn to the Australian High Commission when the RFMF threatened to deal with them as mercenaries.

But this was contradicted in the President own speech to the nation on January 5th 2007, referring to December 5th events that:

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

He told the nation that in early December:

‘I wasunable to fully perform my duties as I was prevented from doing so’

The President was not made aware that a press statement had been sent out by the Vice President without his authority.

The fact that a press statement was released on December 5th 2006 in the name of the President, but without his authority, indicates an attempted ‘palace coup’. How this was perceived by Great Council of Chiefs at its meeting on December 22nd may indicate the extent of complicity of the GCC in the matter.

Given the series of events taking place on December 5th, it would seem that the only constitutional authority that would have been available to the President to act in the public interest in defence of the State is section 86.

Section 86 of the Constitution gives the President **constitutional** power to avert constitutional breaches of certain magnitude. Section 86 provides the President with sovereign reserve functions required to take any action on behalf of the people of Fiji in the event that an essential governing arm of the parliamentary system fails or when there is a threat to his own position as the Head of State and symbol of the unity of the State.

The 1997 Constitution of Fiji thus sets down the principle of *salus populi* without detracting from the possibility that during emergencies and certain types of crises, for example when the Prime Minister flouts or threatens the Constitution and the President’s own position is made precarious by an attempted palace coup, *salus populi* can become *suprema lex*.

In summary, on December 5th 2006 the President appears to have exercised his prerogative powers in response to a series of constitutional crises. The Commander of the RFMF ‘stepped into the President’s shoes’ to remove the Prime Minister and do what the President himself was prevented from doing. On 5th January 2007, the President stated that he:

‘fully endorse(d) the actions of the Commander of the RFMF and the RFMF... I was..unable to fully perform my duties as I was prevented from doing so’

The President subsequently granted immunity for all acts, omissions relating to certain actions taken before December 5th 2006 and up to January 5th 2007. The January 18th Promulgation of Immunity was a further exercise of presidential discretionary sovereign power.

Our investigations reveal that the events of late November and early December seemed to call for the exercise of constitutional sovereign power. Sovereign power is not an extra-constitutional power arising out of the doctrine of necessity. It is exercised constitutionally in certain circumstances under the doctrine of sovereignty. It is a constitutional authority provided by section 86.

This is not something that the courts can overlook or easily set aside. Sovereign power may be exercised in rare circumstances but it is not unknown in legal precedents.

Whether or not the President employed the right approach in exercising sovereign power in December 2006 is not for the courts, nor the people of Fiji, to judge. The constitutional and conventional power of prerogative was provided to the President as Head of State to make his own judgment in this regard, and the specific justification for them cannot be investigated by the courts.

Nevertheless, sovereign power is a discretionary power and the discretion is required to be exercised by the President only for the public good.

4.5 The ‘public good’

By convention, the reserve or prerogative power of the sovereign cannot be used to wield power **against the public interest**. It can only be employed **for the public good** for it to remain constitutional.

D.L Keir in the Constitutional History of Modern Britain since 1485 (1966) states at page 496:

The Prerogative, however circumscribed by conventions, must always retain its historic character as a residue of discretionary authority to be employed for the public good. It is the last resource provided by the Constitution to guarantee its own working.

A Presidential Prerogative may be examined by the court only to the extent of determining whether the President exercised his powers for the public good, that is, **in favour** of human rights. Protection of human rights is the epitome of the phrase ‘public good’ as emphasized in the Universal Declaration of Human Rights which is the fundamental human rights document affirmed by all members of the United Nations, including Fiji. The public good is, similarly, the only limit placed on sovereign discretionary prerogative in English law.

The same principles apply to judicial scrutiny of any immunity granted to public officials. With respect to the Immunity Promulgation, the courts can, within certain limits, examine whether the Promulgation served a ‘public good’. The key legal principles would be distilled from an analysis of reserve powers provided by section 86 as fortified by section 194 (7) of the Constitution and the Bavadra and Yabaki decisions.

However, an evidential inquiry into events leading up to the exercise of presidential prerogative on 5th December may be limited by the rules established by the United States Supreme Court on executive privilege.

It is to be noted that the ‘public good’ principle also binds the Government. In Fiji the Government obligation to act in the public interest is contained in the Compact provisions of the Constitution and in Chapter 4 Bill of Rights.

It is open to the courts to judge whether the ‘public good’ reasons given by the President in the exercise of his prerogative power were sufficient without infringing the separation of powers doctrine. In fact, this can be determined by evidential scrutiny of the actions of the Prime Minister and his Government during their terms of office which is contained in the first Human Rights Commission’s investigative report released on January 4th 2007.

The Human Rights Commission Report of 4th January provided illustrations of the serious disregard for constitutionality of the Qarase Government and its failure to protect the human rights of all the people of Fiji. The Affirmative Action Report of the Commission, released in May 2006, set out examples of the racially exclusive policies employed by Qarase’s administration during its tenure in violation of the *jus cogens* peremptory norm in international law as well as section 38 and Chapter 5 of the Constitution of Fiji.

In the latter part of 2006, Government's proposal to implement the Indigenous Claims Tribunal Bill and Qoliqoli Bill through Parliament without the requisite support of all sections of the community and even Parliament, also raised issues of concern with respect to the 'public good'. The grundnorm of the nation of Fiji was threatened by these proposals. Indeed our analysis of the constitutional situation since 2001 is a matter of public record.

On 5th January 2007, the President addressed the nation and set out his Mandate to the Interim Government. The President's speech will undoubtedly serve as an important consideration in addressing the public good elements of the exercise of presidential prerogative on December 5th 2006.

5.0 Can the (former) Prime Minister claim a breach of his rights?

The removal of Fiji's Prime Minister was not a breach of his human rights as guaranteed in the Universal Declaration of Human Rights (Arts 9, 12, 13 and 24); the International Covenant of Civil and Political Rights (Arts 9 and 12); and Sections 23, 34 and 37 of the Constitution of Fiji.

With respect to the alleged breaches of sections 23, 34 and 37 of the Constitution, it should be noted that there are significant limitations to these rights:

Section 23 states:

'a person must not be deprived of personal liberty... except:

if a person is reasonably suspected of having committed an offence

It is to be noted that flouting a provision of the Constitution constitutes an offence against the Constitution.

Section 34 protects freedom of movement except where a law limits this right:

(a) in the interests of national security, public safety, public order...

to the extent that the limitation is reasonable and justifiable in a free and democratic society.

Limitation clauses in human rights law are usually activated in the public interest, for example in the interests of national security, public safety and public order as outlined in the UN Siracusa Principles which accept a limitation as that which can, *inter alia*, be applied to:

‘protect the essence of the nation or its territorial integrity or political independence against force or threat of force’.

Section 37 of the Constitution states that every person has the right to personal privacy. Privacy can also be limited by a law that is reasonable and justifiable in a free and democratic society. Privacy is not an absolute right and cannot be used to shield a person from legal scrutiny.

From an analysis of these constitutional provisions and the facts at hand, it would appear that the (former) Prime Minister has no recourse in constitutional human rights provisions. The UDHR and ICCPR Articles which were also tagged on the complaint to the UN High Commissioner, it appears for convenience, are similar to rights protected in sections 23, 34 and 37 of the Constitution of Fiji. They require no separate analysis here.

The sole human rights recourse available to the (former) Prime Minister, under such circumstances, is pursuant to section 29 (2) of the Constitution which states:

every party to a civil dispute has the right to have the matter determined by a court of law.

This means that a court of law can examine first, whether or not scrutiny of the Immunity Promulgation of 18th January would be protected by the constitutional sovereign power given to the President and second, whether Mr Qarase would be able to dislodge the constitutional ‘public good’ basis of the Presidential Prerogative exercised to remove him from Government.

Next, we review whether the events of December 5th 2006 can be defined as a ‘coup’.

6.0 Was the December 5th 2006 takeover a ‘coup’?

The word ‘coup’ has legal connotations. It means the removal of that critical apparatus or the ‘essence’ of state power, namely a **head of state** or **constitution**. It does not necessarily include the removal of a government. The French term *coup d’etat* means to ‘hit the state’.

In Australia, the removal of the Whitlam Government by the Governor General, Sir John Kerr, was not defined as a 'coup'. The Head of State (in Australia, that is the Governor or Governor General, who is the representative of the Queen) could not have a coup against himself. In fact, over the years, various Governors and Governors General of Australia have removed (elected) ministers and dissolved parliament rather more frequently than is commonly known- the precedents of Queensland in 1907, Victoria in 1908-9, Tasmania in 1914, New South Wales in 1916, 1926, and 1932, Commonwealth in 1918, and the well-known dismissal of Whitlam by Kerr in 1975⁷ are relevant in this regard. None of these incidents in Australia were ever termed a 'coup' which means that the 'essence of state power' had not been removed.

Professor F. Brookfield in his book Waitangi and Indigenous Rights⁸ confirms that:

'A coup consists of the infiltration of a small but critical segment of the state apparatus, which is then used to displace government from its control of the remainder'

In Fiji that 'small but critical segment of the state apparatus' is the Head of State and the Constitution. The Head of State is the guardian of the Constitution. The 'sovereign' reserve power comes from his or her guardianship role in protecting the Constitution and the State itself.

Our investigations have revealed that the Head of State of Fiji, that is the President, was not removed on December 5th 2006. There was an attempt to usurp his role through a 'palace coup'. Nevertheless, the President remained in place and was protected at Government House. The Commander of the RFMF acted under a delegated sovereign authority and 'stepped into the President's shoes'. From December 5th to January 5th the Commander of the RFMF facilitated the authority of the President in defence of the State and its people fortified by the RFMF's own constitutional role defined by section 94 of the 1990 Constitution, section 112 of the 1997 Constitution and the RFMF Act.

⁷ Surveyed in Evatt, H.V. The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions Frank Cass and Co. Ltd. 1967

⁸ Brookfield, FM Waitangi and Indigenous Rights: Revolution, Law and Legitimation Auckland University Press, Auckland, 2006 at page 217 n 7

Acting pursuant to his reserve powers in section 86, the President's nominee for the time being carried out the President's wishes in the public interest. The court is unlikely to look into whether the use of reserve power in this instance was justified. All the court can examine is whether it was exercised for the public good given the circumstances prevailing at the time and the functions of the Head of State provided under sections 86 and 194 (7) of the Constitution. On January 5th 2007 the President retrieved executive authority.

It may be noted that this Report does not refer to the case of Chandrika Prasad which is the most recent constitutional case dealing with the removal of a Government. The Prasad case is distinguished on the facts. The December 5th 2006 takeover, unlike that of May 2000, made no attempt to remove the Head of State or the Constitution. In fact, the intention appeared to be to protect both from further harm.

Neither did issues in 2006 turn on points of 'the doctrine of necessity' or 'effectiveness'. These are issues which are relevant only in the event of extra-constitutional powers required by an 'usurper'. In 2006, all actions appeared to have been authorized by the President in defence of the Constitution which remained in place. From the additional facts obtained since March 2007, the answer to our constitutional questions appears to lie in the doctrine of sovereignty rather than doctrine of necessity.

Indeed, we can safely say that Fiji has had only one 'coup', that of September 1987. The 'takeovers' of May 1987, May 2000, and December 2006 were either not sufficient (May 1987 and May 2000), or not designed (December 2006) to dislodge that 'small but critical segment of state apparatus', which is the Constitution/ Head of State. It would therefore be legally wrong to refer to December 5th events glibly as Fiji's 'fourth coup' as many NGOs and foreign governments have done. If a 'coup' is merely a dismissal of a government by a Head of State, we could then, with some confidence, assert the proposition that Australia has experienced at least eight 'coups' since 1907- a surprising record.

7.0 Conclusions

The Human Rights Commission has reached the following conclusions after investigations into allegations that the Prime Minister Laisenia Qarase's rights were violated in his removal on December 5th 2006:

1. That the President has sovereign prerogative powers which are constitutionally provided under section 86 of the Constitution, and its scope explained in section 194 (7).

2. That this power was exercised on December 5th 2006 and January 18th 2007, first by removing a Prime Minister who was acting against the Constitution and, secondly, by providing immunity from civil or criminal prosecution for those that undertook the task for the President, namely the Commander of the RFMF and the RFMF itself.
3. That a court can examine the question of sovereign prerogative power only to a limited extent, that is, to the extent whether it was exercised in the public good.
4. That the former Prime Minister has the right to request a court to determine his rights under the Bill of Rights provisions of the Constitution
5. That individual rights are protected by Constitution but public good limitation provisions also apply where relevant
6. That the extent of rights protected is a factual matter, to be assessed by an examination of all the circumstances prevailing at the time the sovereign prerogative power was exercised by the President of Fiji.
7. That the three main elements, namely, the court's jurisdiction to consider presidential prerogative, the extent of the prerogative and whether it was exercised constitutionally are matters that can only be decided on the facts and circumstances prevailing at the time, and with reference to the principles of executive privilege.
8. That legally and constitutionally, the events of December 5th 2006 cannot be defined as a coup. The actions were of those of a President exercising his prerogative power pursuant to section 86 of the Constitution.
9. That it is irrelevant whether the people of Fiji accept or acquiesce in the presidential exercise of power to remove the Prime Minister of Fiji on December 5th 2006. In 1997 the people gave the President power to use his public good discretion on their behalf.
10. That the doctrine of sovereignty is the only relevant doctrine that can be applied to the events of December 5th 2006. There was no extra-constitutional power exercised by the President. The doctrine of necessity and doctrine of effectiveness are irrelevant in this case.

In summary, the removal of Prime Minister Laisenia Qarase on December 5th 2006 did not violate his human rights.

By authorizing his removal, the President appears to have exercised his sovereign power under section 86 of the Constitution to protect both the Constitution and the State of Fiji and to provide immunity for those who carried out his wishes in the public interest.

The Fiji Human Rights Commission will draw the court's attention to the authorities cited in this Report if requested to do so. The Report is also released in the public interest at www.humanrights.org.fj.

August 29th 2007