

ON CHAUDHRY V QARASE AND QARASE V CHAUDHRY – AND LAW VS ORDER IN THE SOUTH PACIFIC

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This paper examines the parties' positions in this year's challenge to the constitutional legality of the Fijian government, *Chaudhry v Qarase*. It touches on the legal arguments as such, but its emphasis is on what these arguments signify about the role of law in governance in the South Pacific.

The focus is on the nature of constitutionalism in the region. Countries with still active indigenous traditions of customary law, and an adopted common law explicitly modelled on the British, have nonetheless opted for written, justiciable constitutions rather than the Westminster model. *Chaudhry v Qarase* is about the application of such a constitution when it is politically awkward – as PM Qarase effectively argues, Fiji's government can be legal but unworkable or illegal but workable.

How Fiji got into such a quandary, and how judges deal with it, is already an intriguing subject; it becomes more so when one appreciates that the particular written constitutional provision involved amounts to a genuinely indigenous model of government. What the current Fijian government is arguing for is the maintenance of the imported model.

After introducing the judicial case, currently on appeal, the paper describes the several options open to the courts in dealing with it. These are presented as emphases on law, on order, and on law and order together. The conclusion is neither a recommended judgment nor a proposed constitutional text, but a clearer appreciation of just what is at issue in this sort of litigation.

Cet article s'intéresse particulièrement aux diverses implications constitutionnelles générées par l'affaire *Chaudhry v Qarase* récemment soumise à l'attention des juridictions fidjiennes.

A partir des différentes thèses proposées par les parties au procès, l'auteur procédant par extrapolation, s'interroge sur le bien-fondé du système constitutionnel dit de 'Westminster' dans certains pays du Pacifique Sud et sur sa compatibilité avec les règles coutumières qui, comme à Fidji, y jouent encore un rôle très important.

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I INTRODUCTION: LAW OR ORDER

Chaudhry v Qarase sounds like an appropriately personal rendition of Fiji's current political and legal problems. It is that, superficially. But it is also the style of cause of the latest existential challenge to the governing regime – to become *Qarase v Chaudhry* in the Supreme Court – and this dispute is profoundly apposite to the nature of constitutionalism in Fiji. As with a personal relationship, however, examination of the problems leads to more hopes, and fears, than predictions.

As leader of a party which won more than 10% of the seats in the House of Representatives in the 2001 elections, Mahendra Chaudhry was entitled to an invitation to his party to join the national Cabinet. As Prime Minister after those elections, Laisenia Qarase was obliged to extend that invitation. The source of this entitlement and this obligation was a few lines in section 99 of the country's Constitution. In fact, Mr Qarase did extend the invitation, in writing, and Mr Chaudhry did respond, in writing, that he would accept it; but then Mr Qarase said that he could not accept Mr Chaudhry's acceptance. As leader of the Fiji Labour Party (FLP), and an ethnic Indian, Mr Chaudhry represented both a party platform and an image of Fiji which Mr Qarase, as leader of the Soqosoqo Duavata ni Lewenivanua (SDL), and the PM initially brought to power by the unlawful overthrow of the same Mr Chaudhry, simply could not see at the heart of his government.

So Chaudhry sued in the High Court. Those few lines of constitutional text are indubitably justiciable, and a remedy, in principle, is simple – a declaration that the plaintiff is entitled to several ministries in the Fijian government – so, from a legal point of view, this is clearly an issue for judicial resolution. In view of the political consequences, the High Court judge referred the matter as a stated case to the Court of Appeal (CA). Thus it was five judges who, on 15 February 2001, gave what amounts to the trial decision: Chaudhry is right.

The Constitution provides for appeals from the CA to a still higher court, the Supreme Court. Although this court was abolished by a decree of the Interim Governments, those decrees may be regarded as void, so appeal is possible.¹ Qarase was quickly on record as stating that he would appeal,² and Chief Justice Tuivaga has announced his selection of (foreign) judges to constitute the Supreme Court. (Qarase could have appealed the decision

1 *Judicature Decree 2000* (Decree 22/2000) of the Interim Military Government, confirmed by the *Administration of Justice Decree 2000* (Decree 5/2000) of the Interim Civil Government. It should be noted that Tuivaga CJ advised on the drafting of the *Judicature Decree*, which has inspired objections to the legitimacy of his naming the panel of the Supreme Court. The Decrees 'may' be regarded as void: the Interim Governments, apart from the period of the hostage crisis, were declared unlawful by the Court of Appeal in *Republic of Fiji and the Attorney-General of Fiji v Prasad* (unreported, 1 March 2001, No. ABU0078/2000S; published by the (electronic) Journal of South Pacific Law at http://www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/Volume_QR/Republic_v_Prasad.html), thus, presumably, rendering their Decrees unlawful as well. Even the acts of the Interim Government during the hostage crisis, according to the Court of Appeal in that decision, do not have the effect of permanently altering the Constitution, and the Supreme Court is a creature of the Constitution. On the other hand, these Decrees are the only purported legal basis for the very existence of the government that called the elections last year. (Discussed *infra*, with the decision in *Yabaki*, at n. 32).

2 See 'Let the Supreme Court decide on whether Labour should be in Government: Fiji PM Qarase', *Daily Post* (Fiji), 16 February 2002.

itself, but he seemed to prefer to await the High Court decision, made in light of the CA's response to the case stated.) The High Court declaration has been made, duly following the CA's direction.³

A *First questions*

This whole issue, in both its elements as an issue and in the story of how it arose and how the relevant actors have dealt with it, illustrates a great deal about the role of law in Fiji. To at least a large extent this can be extended to the region generally; in most of the South Pacific political/legal issues are not played out quite so openly on the record as they are in Fiji. A consideration of this issue and affair suggests, too, some useful insights into the future of the rule of law in the region.

The governments of the English-speaking South Pacific, and the notions of 'law' with which they are associated, take the British as models: 'Westminster' and the common law. One essential and, in the West, distinctive feature of those models is the key role of rules which are not legislated, and which are subject to change in their very application. It is a feature shared with the various customary laws in the islands. Can this feature operate within the Fijian constitution?

Nonetheless, the constitutions of the English-speaking South Pacific are written documents, fairly detailed in constituting the structure and operations of government. In this respect they do not follow the Westminster model. Custom, of course, knows no written law. Can Fiji abide a rule of law based on such a constitution?

These constitutions are also justiciable, as the supreme law of their jurisdictions. It is the judiciary, therefore, which has the final say as to what they mean, whether the acts of politicians violate them, and even whether such violations are, at a level higher than constitutionalism, unlawful.⁴ The institution of judge, a leader in adjudication but not more generally, is an import to Pacific cultures – one of long standing, to be sure, but still actually embodied, at the higher levels, by foreigners. Can this subordination to law, not only in the sense of pre-written rules referred to above but in the institutional sense of judicial decisions, be integrated into Fijian governance?

I will approach these issues as they are presented in the ways open to the Supreme Court in *Qarase v Chaudhry*. What scenarios constitute Fiji's options in this affair? How can the Court express or facilitate these options? Most simply put, the options are: Law; Order; and Law as Order. For each there is an appropriate judicial route available, but the different options promise very different consequences for the rule of law in Fiji.

3 High Court 24 April 2002, unreported; see 'Fiji PM Qarase ordered to open up Cabinet to Opposition', *The Age* (Melbourne), 25 April 2002.

4 That last jurisdiction was most clearly asserted in *A-G v Prasad*, *supra* n. 1, in which the Fiji Court of Appeal relied on the common law to adjudge the lawfulness of executive and usurping-power acts violating the 1997 Constitution.

B *The issue*

The spring from which Qarase's preferred interpretation of the Constitution flows is the 'Westminster model' of government. This is, in a rough way, the independence model of government in areas once parts of the British Empire.⁵

A Parliament, often of one chamber rather than the Westminster two, is the legislature, consisting of members elected by geographical area in a first-past-the-post (plurality) count. Parliament also serves as the pool of politicians eligible to be ministers (each in charge of a section of the executive, a department), who together make up the Cabinet that governs the political executive. One of them is the Prime Minister, the head of government. The PM works under a largely ceremonial head of state, often a president rather than the Westminster monarch, whose signature is formally necessary for appointing ministers, enacting statutes, dissolving a Parliament, and calling elections. But in all of these decisions the head of state is to follow the PM's advice, with a varying degree of discretion. The PM chooses the ministers, after formally being chosen as PM by the monarch's representative or president, but all together the Cabinet remains in place only so long as a majority of the Parliament does not vote to dismiss it. The executive and the legislature are thus intimately connected. The judiciary, however, is rigorously separate (more so indeed than in the Westminster original, where the top judge of the country is a minister in Cabinet). In the Westminster original, there are only two large parties, both more or less permanent, so that there is always one party in power, making up the Cabinet, and the other in opposition, ready to replace the one in power.

Fiji at independence (in 1970) had such a system, complete with Queen's representative, although its operation was affected by several factors.⁶ There was a more rapid change in the fortunes of political parties, and a greater number of these, than in Westminster itself. Elections were not as simple, for seats in Parliament were assigned to racial categories. The judiciary, too, was different in nature, its independence being limited by the fact that judges served on brief contracts rather than on career-long tenure. Apart from the racial distinctions, Fiji was in these respects like all other South Pacific Commonwealth members (most of whom achieved independence later, with Samoa already independent since 1962).

The coups of 1987 changed a great deal, of course, but they did not basically change this model of government. A president did replace the governor-general; the Great Council of Chiefs was assigned more powers (which actually made the system more like Westminster,

5 The *independence* model, that is – a concept rather than an experience, and one which arrived only for Fiji, in 1970. The 'government' actually familiar to people in the South Pacific, until formal independence, was of course of a very different kind. Colonial administrations, with or without elected assemblies, featured locally irresponsible executives – precisely the contrary of Westminster. '[A]n executive chosen from the legislature was an imposition of decolonisation rather than colonisation': Peter Larmour, *Westminster in the Pacific: A 'Policy Transfer' Approach*, State, Society, & Governance in Melanesia Discussion Paper 01/1 (ANU Research School of Pacific and Asian Studies, 2001), p. 3.

6 See Brij Lal, *Broken Waves: A History of the Fiji Islands in the Twentieth Century* (Honolulu: University of Hawaii Press, 1992), in particular the well-titled Chapter 5, 'The Center Cannot Hold'.

in that the GCC more closely approximated the House of Lords). The 1990 Constitution, too, changed no fundamentals.

Thus the Fijian norm was a Westminster model throughout its existence as an independent state – for the 29 years to 1999. In that year, the ‘1997’ Constitution came into effect. With its introduction the model did change. Elections were conducted by an ‘alternative preference’ system, rather than the plurality one. And the Cabinet was to consist of legislators representing all major parties, rather than just the ones sufficient to command majority support in Parliament. Both changes very quickly moved the earth of Fijian politics. The complexity and novelty of the electoral system may have confused voters, and certainly was blamed by many observers (and the participating losers) for the overwhelming victory of the Fiji Labour Party in the first, 1999 elections.⁷ And after the second, 2001 elections, the Cabinet-formation system provoked the acts that caused the Court of Appeal effectively to declare the existing government unlawful.

The potted description of the Westminster model given above is pitched at such a basic level in order to portray Qarase’s point in *Chaudhry v Qarase*. In his view the operation of section 99 is a violation of the norms of Fijian politics. A section 99 Cabinet is fundamentally different from a Westminster one: so different that, to someone raised to consider Westminster the norm, it doesn’t seem like a ‘Cabinet’ at all. Qarase, like every other Fijian politician (and civil servant, lawyer, political commentator), was so raised. Thus the essence of his complaint to the Court of Appeal, responding to Chaudhry’s claim: this simply will not work, whatever the Constitution says. How can I govern with those whose unfitness to govern I have just waged a campaign to demonstrate – a campaign I won?

It is important to notice that Qarase’s view is not idiosyncratic. Not only would his dismay be shared by any British, Australian, Canadian, or Indian Prime Minister, all of whom see Cabinets as teams agreed on the general mission of the administration espoused by the PM – even when the parties represented are in coalition – but people in Fiji itself who are involved or professionally interested in politics see Cabinets in just the same way. There has been a striking lack of commentary since the Cabinet-formation crisis of 2001, by politicians, academics or political columnists, in favour of the ‘power-sharing’ model of Cabinet found in the Constitution.

The assumed context of a Westminster Cabinet is a division of the legislature between government supporters and an Opposition – indeed, that distinction is made primarily by ‘opposed’ reactions to the nominated PM. Only the supporters participate in the executive branch of government, the Opposition being relegated to the legislature, where although outvoted on ordinary legislation they constitute a potential alternative government – hoping to win over watching voters (or, where governments are coalitions, to win over the main governing party’s partners).

7 Another article in this issue also considers political and institutional consequences arising out of the new electoral system adopted by Fiji and introduced at the 1999 elections: see J Fraenkel, ‘Institutions without Architects: Reassessing Fiji’s May 1999 Elections in the Wake of George Speight’s Coup’, *RJP*, numéro hors série, vol 2, 2002, pp. 167-189 [eds.].

Since this is seen as the norm, the power-sharing model of the Constitution must be seen as deviant. In it the Cabinet includes ministers opposed to the PM, and there is not necessarily any 'Opposition' in the legislature. The grouping called the Opposition may consist only of the minor parties, those with less than 10% of the seats, and this may in practice be too small a proportion of the legislature to credibly challenge the government's policies. More importantly, as a divergence from the Westminster model, such an 'Opposition' will almost necessarily not be or contain an alternative government. Every important party may already be found in government. The new model, in sum, abandons the adversarial approach of Westminster, in which winners oppose losers.

The Cabinet, therefore, consisting of winners and losers together, cannot be the coherent team Westminster contemplates, and the story of a Parliament cannot be a record of government initiatives and Opposition criticism. One aspect of Westminster politics that Fiji does exhibit is the importance of party affiliation. Presumably, the Labour backbenchers in this Parliament, if section 99 is complied with, will criticise only some members of Cabinet, along with its overall leadership; they could hardly criticise Cabinet's Labour members. (The alternative is to incur splits within parties, also an enfeeblement of Westminster government, as indeed occurred under Chaudhry's administration during 1999-2000). Those Labour ministers will have to concur with that criticism, or at least not reject it, even though it is of their fellow Cabinet members. In the meantime the PM and the ministers who support his policies will struggle in every meeting of Cabinet to see their preferred choices approved. And some departments of government, those led by opposing-party ministers, will be beyond the PM's power to integrate into his overall plan for the country's development.

The issue is not clarified by the legislative history of section 99. The source of the provision was the Joint Parliamentary Select Committee set up to consider the Bill (chaired by the then Prime Minister Sitiveni Rabuka), not the Reeves Constitutional Review Commission (or its Australian drafter). Along with the rest of the Bill embodying the new Constitution, to be enacted as the Constitution (Amendment) Act 1997, it was supported by all members of the legislature – both houses of the elected ones as well as the Great Council of Chiefs. But there was no debate in any forum, from the committee, where Rabuka presented the draft already made, through the House of Representatives and Senate to the GCC. One must wonder how informed this unanimous approval was; but at least at a formal level the entire political establishment simply approved the change from a Westminster Cabinet to a 'power-sharing' one, with no one explaining why (except Rabuka, in Parliament, as discussed below).

C *The claim*⁸

As presented to the Court of Appeal by the plaintiff, the issue was stark. Section 99 on its face requires an invitation to the FLP to join the Cabinet, an invitation Qarase had either not

8 *In re the Constitution, Chaudhry v Qarase, President of Fiji, and Attorney General*, unreported, Court of Appeal of Fiji Islands 15 February 2001 (Civil Action 282/2001; (Eichelbaum JA presiding, Ward, Handley, Smellie, Keith JJA) (published by the University of the South Pacific School of Law at http://www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/Volume_GL/In_re_Constitution,_Chaudhry_v_Qarase.html). (The President did not in fact participate in the litigation).

made or not honoured. By Chaudhry's argument the government was illegal until such an invitation was both made and honoured. Either the government implemented the Constitution, rendering its existence legal, or it did not, rendering its existence illegal.

Qarase put the government's position in a more complex way. First, Chaudhry's argument misread section 99; it merely required that the government's invitation and reaction to a purported acceptance be 'reasonable', not unconditional. Second, Qarase urged an entirely different basis of decision: what would render the government 'workable'. A workable rule about Cabinet membership would permit the PM to exclude parties which were thoroughly opposed to his party's programme. The basis of such a rule could be in the reading he advocated of the Constitution as a whole, as contemplating a traditional 'Westminster' type of Cabinet. Alternatively, that basis could be in a frankly policy consideration that the country was simply not ready for a plain reading of section 99: such an application would amount to 'constitutional experimentation which the country could ill afford'.⁹

Section 99, under the heading 'Appointment of Other Ministers' (section 98 deals with the Prime Minister), is:

(1) The President appoints and dismisses other Ministers on the advice of the Prime Minister.

(2) To be eligible for appointment, a Minister must be a member of the House of Representatives or the Senate.

(3) The Prime Minister must establish a multi-party Cabinet in the way set out in this section comprising such number of Ministers as he or she determines.

(4) Subject to this section, the composition of the Cabinet should, as far as possible, fairly represent the parties represented in the House of Representatives.

(5) In establishing the Cabinet, the Prime Minister must invite all parties whose membership in the House of Representatives comprises at least 10% of the total membership of the House to be represented in the Cabinet in proportion to their numbers in the House.

(6) If the Prime Minister selects for appointment to the Cabinet a person from a party whose membership in the House of Representatives is less than 10% of the total membership of the House, that selection is deemed, for the purposes of this section, to be a selection of a person from the Prime Minister's own party.

(7) If a party declines an invitation from the Prime Minister to be represented in the Cabinet, the Prime Minister must allocate the Cabinet positions to which that party would have been entitled amongst the other parties (including the Prime Minister's party) in proportion, as far as possible, to their respective entitlements under subsection (5).

(8) If all parties (apart from the Prime Minister's party and the party (if any) with which it is in coalition) decline an invitation from the Prime Minister to be represented in the Cabinet, the Prime Minister may look to his or her own party or coalition of parties to fill the places in the Cabinet.

9 *Id.*, under 'First and Third Respondents' Submissions'.

(9) In selecting persons from parties other than his or her own party for appointment as Ministers, the Prime Minister must consult with the leaders of those parties.

There are 71 seats in the House of Representatives. Of these, 32 had gone to Qarase's SDL, 27 to Chaudhry's FLP: 45 and 38% respectively. No other party won more than 10% of the seats; the next greatest winner, the Conservative Alliance Matanitu Vanua (CAMV), had six seats, one fewer than the threshold. CAMV was the party associated with the coup-provoker George Speight (himself one of the six elected),¹⁰ and was in agreement with Qarase's generally chauvinist indigenous Fijian programme. The CAMV was invited to join the Cabinet, and it accepted the invitation.

The invitation to Chaudhry's FLP (a letter from Qarase, entered in evidence before the CA) included notice that the policies of the Cabinet would be based on the SDL's policy manifesto, and an opinion that a workable partnership with the FLP would therefore be impossible since there could be no compromise. It added that allowing the SDL to be a minority in the Cabinet was 'simply inconceivable'.¹¹ Nonetheless Chaudhry accepted the invitation, including in his letter (also in evidence before the CA) notice that the FLP's participation would be on the basis of the Korolevu Declaration – a document incompatible with the SDL's programme of indigenous nationalism.¹² This was the acceptance refused by Qarase.

And there the legal dispute stood – and stands, while appeal to the Supreme Court is in the offing. The politics continue: Chaudhry has challenged the legitimacy of any Supreme Court overruling of the Court of Appeal, based on the personal qualifications of the judges Tuivaga CJ has declared will be named as the Supreme Court bench;¹³ Qarase has indicated that if he does appoint FLP members to his Cabinet, they may occupy portfolios like 'Minister

10 He was subsequently expelled for missing two sittings of the House (being in jail). The by-election returned his brother as candidate for the CAMV.

11 This would be the effect of section 99(6), if both CAMV and FLP were to be in Cabinet; since CAMV is below the 10% threshold, its members count as SDL appointments. The PM's appointees would be the majority, but his *party* would be a minority.

12 The Korolevu Declaration was an agreed guideline to operating a multi-party, multi-ethnic government under the 1997 Constitution. It was produced by the leadership of parliamentary parties in a meeting of the Inter-Parliamentary Union in January 1999. At that time – though the election was just months away – almost all expected that the actual parties key to such a government would be the SVT and the NFP, already effectively allied.

13 See 'Supreme Court being stacked, says Chaudhry', *Sydney Morning Herald*, 26 February 2002: 'Fresh controversy has erupted in Fiji with claims that the newly reconvened Supreme Court – the highest court in the land – has been 'stacked' in favour of the government of Laisenia Qarase. CJ Sir Timoci Tuivaga would sit with two relatively junior judges from elsewhere in the Pacific [Chief Justice Patu Sakota of Samoa and Chief Justice Arnold Amet of Papua New Guinea], neither having the experience of judges in the Court of Appeal, on whose rulings they are to decide ... Justices Sakota and Amet are causing Mr Chaudhry further concern. He said yesterday: "I would not want to condemn these people, but compared with the Appeal Court justices, they are very junior ... Seniority and experience are needed to decide on questions of constitutional law, and neither would be regarded as senior to the Appeal Court justices."'

for Seaweed’;¹⁴ Chaudhry has threatened to sue Qarase on another cause of action, for comments Qarase has made that he, Chaudhry, is a liar.¹⁵ Despite this, however, and perhaps most saliently, Qarase and Chaudhry have in fact worked together, discussing the issues they would discuss in Cabinet – but in the forum of ‘talanoa’ sessions.¹⁶

II THE LAW OPTION

The ‘law option’ is the one taken by the Court of Appeal. On the Court’s approach, the law is by its nature distinct from political matters, being fixed and clear, or at least as clear as words can be. In the case of section 99, that is quite clear. Law comprises rules, conceptual equivalents to lines demarcating permissible political play.

A court’s role, the Court carefully reminded its readers in an ‘Introduction’, is restricted to deciding legality. Under this constitution legality is not dynamic: ‘The Constitution must be applied to current events and personalities, but is not affected by them ... The Constitution speaks and applies impersonally.’ Like linesmen in football, the court observes the actors and decides only whether they have crossed a line: either a pass is offside or it is not. The matter is not so much of wise judgment as of accurate perception.

In this view, the salient argument made by Qarase was, as stated, that the requirement implied by section 99 of the PM’s invitation is reasonableness, rather than unconditionality. But the section is indeed not very complex, and it does not employ terms or concepts capable of many meanings. The avenue of ‘plain meaning’ is wide open, and the CA did not hesitate to take it. The text says that the Prime Minister ‘must invite’ parties with 10% or more of the seats in the House of Representatives to join the Cabinet. Labour had such a number. ‘Must’ is elsewhere (section 194(12)) defined as equivalent to the more usual drafter’s ‘shall’. There is thus no discretion arising from the text, nor even any apparent ambiguity to justify reading a discretion into the text, and the text’s application to the facts is as plain as applying a Bees Act to bees.

One could argue, however, about the sense of ‘invite’. One could ask the court to permit the term to include ‘invite upon conditions’; the phrase, ‘Please come to my party, BYO’, after all, is usually considered an invitation. This might allow Qarase to attach conditions which would either assure Chaudhry’s refusal or emasculate Labour’s participation if it did accept. This would take section 99 to be, as Qarase urged, a feature added to a Westminster-model Cabinet, rather than a transformation of that model. A condition that

14 See ‘No portfolios for Labour?’, *Daily Post*, 26 February, 2002: ‘Prime Minister Laisenia Qarase is considering making Labour members of Parliament Ministers without portfolios or giving them junior portfolios. A Government source said this was one of the options being considered to enable Mr Qarase to stay within the law if the Supreme Court upholds the Fiji Court of Appeal decision. Mr Qarase seemed to confirm this strategy on Sunday when he told Fiji Television’s Talanoa programme [that] if he wanted to appoint a Labour member as the Minister responsible for seaweed farming on Ono-i-Lau, he could do that. He said there was nothing in the Constitution that could stop him ...’

15 See ‘Chaudhry may sue Qarase’, *Daily Post*, 26 February 2002. He does not seem to have acted on this threat.

16 Discussed *infra* at n. 62; this development does promise lasting effects.

the invited party be in basic accord with the PM's policies would, 'reasonably', maintain the model while accommodating section 99.

The CA should have had some difficulty determining this point. The suggested ambiguity is not fanciful, and there are interpretive aids elsewhere in the Constitution that could reinforce Qarase's preferred sense: notably, those creating Westminster-style features of Cabinet operations.¹⁷ But the judges held themselves to be saved from such a quandary. There is a precedent on section 99, *President of Fiji Islands and Kubuabola*, a decision of the Supreme Court of Fiji binding on the CA, and it concerns precisely this point.¹⁸

Kubuabola deals with various issues concerning the formation of the first government under the new constitution, one of which was the status of the Prime Minister's refusal of the Opposition Leader's acceptance of the section 99 Cabinet invitation. PM Chaudhry had extended the section 99 invitation to the SVT, whose leader, Sitiveni Rabuka (replaced before the case by Inoke Kubuabola), had responded with an acceptance conditional upon Chaudhry's agreement to a list of terms. The terms included Rabuka being made Deputy PM, three other ministries going to the SVT, and the maintenance in office of all the SVT appointments to high diplomatic posts and boards of statutory/state-owned enterprises. (The SVT had formed the government displaced by Chaudhry's 'People's Coalition', which featured the Labour Party led by Chaudhry).

Understandably, the Supreme Court's decision on that point was terse:

These were clearly conditions which the Prime Minister, acting reasonably, was not bound to accept. The Constitution does not provide for an acceptance [of the section 99 invitation] qualified in this way. In the circumstances, what purported to be a conditional acceptance amounted to a declining of the invitation.¹⁹

Qarase argued that this amounted to a requirement that in purporting to follow section 99, the PM must act 'reasonably'. Chaudhry argued that it meant acceptances – and by extension invitations – could not be 'hedged about with conditions'. The Court of Appeal did not directly address these points: rather than elaborate on the text of the *Kubuabola* ruling, it relied on its reading of the decision's rationale, and of section 99 itself.

That provision is clear, the CA held, on its face. 'The obligation placed on the PM [to invite a party over the 10% threshold] is clear and precise. There is no ambiguity. There is no necessity for reading in any words.' This is unaffected by 'practical difficulties'. Moreover, the significance of *Kubuabola* is its expression of the Constitution's spirit. The Supreme Court 'makes it clear that a prime object of the Constitution is to promote the sharing of power'; a

17 Sections 97 and 102 make the Cabinet collectively responsible to the House of Representatives for governance of the country; section 101 imposes Cabinet confidentiality.

18 *President of Fiji Islands and Kubuabola, Chaudhry, and Speed*, unreported, Supreme Court of Fiji Islands 3 September 1999 (Misc. 1/1999) (Tuivaga P, Cooke of Thorndon, Mason, Brennan, Toohey JJ) (published by the University of the South Pacific School of Law at http://www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/Volume_M-P/President_v_Kubuabola.html). Unlike *Chaudhry v Qarase*, a civil suit, this was a reference.

19 *Id.*, response to Added Question D9 (whether the SVT had 'declined' the invitation to join Cabinet).

condition that the invited party conform to the PM's policies is thus 'contrary to the Opinion of the Supreme Court'.²⁰ The ambiguity has been resolved to a plain meaning, and what seem to be practical problems are the necessary travails of a mandated policy.

The Court of Appeal made it clear that the power-sharing policy was indeed democratically mandated, at least in form. The innovations of section 99 had been considered, and rejected, by the Reeves Commission, and this was described in their public report. The power-sharing concept arose in the Joint Parliamentary Select Committee (JPSC) responsible for the Bill enacting the new Constitution, chaired by Rabuka, on which there were members not only of the ruling SVT but of the five other largest parties. Most tellingly, in presenting the Bill for second reading, Rabuka made the radical nature of this concept quite clear to his fellow parliamentarians. He told Parliament that the new rules of Cabinet formation made 'a fundamental change', and that:

The provisions contemplate the formation of multi-party Cabinets in which parties whose membership in the House of Representatives reach a particular numerical threshold must be invited by the Prime Minister to participate in Cabinet. I should mention that this is one section of the Bill that is still under active discussion. ... Clearly, we shall need to weigh very carefully the benefits of showing greater political goodwill in this way, and the practical importance of having a system of Cabinet government that is decisive in providing leadership and is able to maintain the discipline of collective Cabinet responsibility and unity ... The most important area where we have made our Constitution a positive instrument of inter-ethnic co-operation and national unity is in our acceptance of the concept of a multiparty Cabinet ... We have to move away from the ethnic divide ...²¹

When Rabuka spoke, the proposed provision merely entitled minority parties to seats in Cabinet. The text of section 99, including for the first time an explicit requirement of the invitation, was in fact added to the Bill one week later in the JPSC. There was then no debate there, nor was there debate when Parliament subsequently voted on the Bill.

All of this is set out in the CA opinion. As 'Constitutional History', it is not presented as an explicit response to the parties' arguments; nonetheless, it serves to rebuke the suggestion, implicit in Qarase's argument, that the government of Fiji was somehow inveigled into enacting greater change than it realised. (Whether it does plausibly refute that point is an issue revisited below.) By the CA's judgment, the SDL would just have to live with the change wrought by its predecessor once removed.

III THE ORDER OPTION

It is not hard to see why Qarase would resist admitting FLP members into his Cabinet. The FLP is the main rival of his own party, the SDL (created to administer the Interim Civil Regime, under Qarase, then continued to fight the election as the vehicle of Qarase's Prime Ministership). Not only do the FLP policies on social and economic issues oppose those of

20 *Chaudhry v Qarase*, *supra* n. 7, under 'The Interpretation of Section 99'.

21 Rabuka, in the Lower House of Parliament, moving the second reading of the *Constitution (Amendment) Bill 1997*: Hansard 3347 (23 June 1997), quoted in *Chaudhry v Qarase*.

the SDL, but the FLP is widely perceived as the party favouring, and favoured by, Fijian Indians, whereas the SDL is just as widely perceived as the party favouring, and favoured by, chauvinist indigenous Fijians – heir to Sitiveni Rabuka's Soqosoqo Vakavulewa ni Taukei (or SVT, similarly created after Fiji's first coups in 1987). The FLP stands for class-based solutions to Fiji's problems, the SDL for ethnically-based ones. Moreover, Chaudhry's reputation as an abrasive man of union-boss attitudes extends to antagonistic personal relations with the ex-banker Qarase.

It is Qarase's 'workability' argument that follows this 'Order' line. In essence, and justifiably, the CA's judges took counsel's presentations here to mean that they could either approve an illegal but workable government, or insist on a legal but unworkable one. This is not a choice for a linesman and, not surprisingly, they unanimously found in it no real choice at all. At issue was not a point of judge-made common law, after all, but the meaning of a legislative provision, drafted and enacted less than five years ago. Judges could only decide whether the defendant's acts had conformed to the correct meaning of the terms chosen by the drafters.

What public support Chaudhry has had, in insisting on the FLP's portion of Cabinet, is based on the point that the position taken by him fulfills the Constitution. That in itself, not the substance of the Constitution's rule, is seen as the virtue of Chaudhry's argument. In 1999 Chaudhry himself was saved from having to put the provision into effect, and work with the result, by the 'acceptance' of the section 99 invitation with its extraordinary (and fatal) conditions by Sitiveni Rabuka, the then leader of the main opposition. The issue of how a power-sharing Cabinet could function did not come before the public until after the 2001 election.

The Qarase arguments seek to reflect public opinion. They take the view that now, given the graphic example of what section 99 means in a context other than the NFP-SVT partnership that was dominant when it was drafted, section 99 should simply be dropped.²² Naturally, as a constitutional change, this is somewhat difficult to do by formal amendment. It seems impossible to do now, when the effect would be a reduction in power for Labour and Labour controls enough seats in the House to block constitutional amendments.²³ So

22 During the years of the 1990 Constitution, the National Federation Party (NFP) under Jai Ram Reddy was the main vehicle of Indian politics. It developed an implicit partnership with the SVT, loosely formalised for the 1999 elections; it was through their partnership that the new Constitution was enacted. Although Labour existed through these years, the almost complete extent to which it replaced the NFP in the 1999 elections surprised most observers.

The ease with which section 99 was enacted seems to reflect a judgment, then, that the parties sharing power would remain the NFP and SVT. In fact, of course, both lost heavily in the 1999 elections. See Satendra Prasad, 'Fiji's 1999 General Elections: Outcomes and Prospects' in A. Haroon Akram-Lodhi, ed., *Confronting Fiji Futures* (Canberra: Asia Pacific Press, 2000).

23 By section 191(1)(b) of the 1997 Constitution, a majority of two-thirds of the members of each House – i.e., 48 votes in the House of Representatives – is required for an amendment to the Constitution. A special procedure in sub-section (3) for urgent amendments requires 53 votes. Since there are only 44 HR seats not held by Labour, Labour has an effective veto on constitutional amendment.

Qarase invites the court to approve his direct approach – to ignore this awkward provision; to ignore the law when it seems manifestly to frustrate order.

Thus my characterisation of this approach as ‘Order’. The argument is essentially that whatever may be the text of the Constitution, a workable, sensible procedure for naming a Cabinet cannot feature the inclusion of parties deeply opposed to the governing party. What people know as a ‘Cabinet’ is the Westminster version of that institution, in which the ministers are drawn from the PM’s own party – or, if it has required a coalition to gain the majority support of the legislature, from the parties that have agreed to accept the PM. This approach seeks a Westminster order, and it does so despite the terms of the written Constitution.

The argument from order, for establishing the legitimacy of a government, is a familiar one in Fijian courts. It is substantially the argument made by the Interim Civil Government (ICG) to justify the suspension of the Constitution as a whole by the military, and then by the ICG, during and after the Speight hostage crisis. In that context the argument was accepted by the courts. When order is sufficiently frustrated, the law may indeed be lawfully ignored. Qarase’s argument in this case is nothing more than the natural child of that much greater preference for order over law.

The decision acknowledging that primacy of order is *Prasad*.²⁴ A unanimous decision like *Chaudhry v Qarase*,²⁵ it likewise carefully begins with a reminder that ‘our task is limited to determining legal issues. We have no jurisdiction or authority to pass judgment on non-legal questions, particularly those of a political nature ...’ The issue was, nonetheless, the legality of contemporary Fijian politics.

In order to determine that issue – and in order, it seems, to maintain its ‘legal’ character – the Court relied on precedent, rather than first principles:

We resist the temptation to discuss the theoretical basis for exercising this supra constitutional jurisdiction. It is sufficient to observe that such a jurisdiction has been exercised by Judges in other cases.²⁶

And of course it has been; Fiji is far from the first Commonwealth country to experience a change of government by coercion. From the precedents (in Grenada, Southern Rhodesia, Uganda, Seychelles, and Lesotho²⁷) the Court generated a test of when a government illegal

24 *Supra* n. 1. On the events of the hostage crisis and coup, see Robbie Robertson and William Sutherland, *Government By the Gun: The Unfinished Business of Fiji's 2000 Coup* (NSW: Pluto Press 2001).

25 Although a largely different bench: Casey CJ and Barker and Kapi JJA sat with Ward and Handley JJA.

26 *Prasad*, under ‘Our jurisdiction’.

27 *Mitchell v DPP* [1986] Law Reports Commonwealth (Constitutional) 35 (CA Grenada), *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, *Uganda v Comm Prisons, ex p. Matovu* [1966] East Africa 514, *Vallabhaji v Controller of Taxes* (11 August 1981, unreported, CA Seychelles), *Mokotso v HM King Moshoeshoe II* [1989] Law Reports Commonwealth (Constitutional) 24 (HC Lesotho), *Makenete v Lekhanya* [1993] 3 Law Reports Commonwealth 13 (CA Lesotho).

under the constitution of its jurisdiction becomes lawful in some (unidentified) higher sense. The test has two branches. One, based on 'necessity', grants temporary lawfulness; the other, based on 'efficacy', grants a permanent lawfulness – i.e., a recognition that the change of regime was a revolution.²⁸

Necessity validated the seizure of power by the military during the Speight hostage crisis; although the Constitution provided for a state of emergency, it did not do so in a way which allowed for the unavailability of Cabinet (by section 187 the President required the advice of Cabinet to declare emergency). However, this condition of lawfulness could last only as long as the necessity. Once the Cabinet was freed (a little more than six months before the CA judgment), nothing 'necessitated' the usurpation of its constitutional power. Thus 'necessity' could not justify a permanent change to the Constitution; for that, a revolution had to have occurred.

Efficacy was the basis of that test, but it included not merely the effective operation of an administration but also two other features: the absence of a rival government, and the presence of 'popular acceptance and support as distinct from tacit submission to coercion'. The burden of proving these features was on the government claiming lawfulness, and by a 'high' standard. Although this was all derived from the precedents, the Court did acknowledge an adjustment of case law in light of 'the modern shift towards insistence on basic human rights' – hence the requirement of popular support rather than mere acquiescence.²⁹

In fact the evidence of lawfulness adduced by the ICG demonstrated only popular acquiescence (about which there was no doubt). Since any evidentiary value of mere cooperation with the new government was vitiated by the continued application of emergency decrees restricting public dissent, and since the 'powerful' evidence of efficacy would be through elections as yet unheld, the ICG failed to discharge its burden. The Court therefore declared that, contrary to the decrees of the ICG, the 1997 Constitution remained in force (having resumed force upon the release of the hostage Cabinet); the purported dissolution of Parliament only prorogued it; and the Vice-President was Acting President, as per the Constitution, for the three months after the resignation of President Mara.

The issue relevant to *Chaudhry v Qarase* arises from the CA's understanding in *Prasad* of 'necessity'. It was elaborated as the need of any legal system to avoid 'anarchy'. As long as anarchy is the alternative, the court held, it is indeed lawful to abandon the constitution. Thus the lawful quality disappears as soon as anarchy ceases to be the alternative: when fidelity to the constitution could be resumed without plunging the country into chaos. In Fiji in 2000, the CA held, that point was reached at about the time the hostages were released.

28 If not permanent, then indefinite; *Makenete, id.*, validated a Lesotho regime replacing the revolutionary one the courts had validated, by clear popular 'enthusiasm', four years before in *Mokotso, id.*

29 The 1997 Constitution's own emphasis on human rights was taken as evidence of this 'modern shift'. One can understand why the Court found some of the earlier law to be 'over-influenced by Kelsen'; the Court's test is, to this extent, evaluating the establishment of a *new* basic norm according to its congruence with the *old* one.

At that time, Chaudhry and the other members of Cabinet should have been returned to power; from that time, therefore, the Interim Civilian Government became an unlawful government.

Although they differed on its application, the regime (and its supporters) seemed to adhere to the same principle as the Court: order is prior to law. Fidelity to the constitution can only be afforded when order is assured. The regime took power and retained it because the alternative, in its view, was the loss of order. The point of difference in this stand from the CA's view was the operational conception of 'order'.

In the CA's view, it seems to be something like the practical feasibility of running a government, of obtaining obedience from the public to the government's orders – obedience that, in the mass of people, is willing.³⁰ Anarchy, thus, is the condition that occurs when this is impossible: when, practically, the society generally is out of control. To the regime and its supporters, both order and anarchy are very different from these conceptions. 'Order' is peace, something not far from the custom ideal of 'social harmony'. 'Anarchy' is a condition lacking such peace. If the government, practically, can only maintain control by coercion, that is anarchy; 'peace' is not wild demonstrations, marches in the streets and populist leaders shouting for radical change to enthusiastic crowds.³¹ For the CA, on the other hand, as long as there was no 'rival' government, and as long as the mass of the population 'supported' the regime, such a social condition would be 'order' – so the threat to it cannot justify abandoning constitutional legality.

This cultural difference is politically fundamental. It is based on different ideals of social relations. A fairly high degree of confrontation and even violence among public groupings, including open opposition to the government as an institution, is acceptable in the common law tradition. The criminal law will be enforced, to be sure, and police will have and use powers of coercion up to and including lethal force in order to maintain physical control of the mob, but this will all be done within the framework of constitutional legality. The criminal law will be the ordinary criminal law – and if martial law is declared, that too, whether by common law or (in modern times) by statute, will be within ordinary constitutional law – and the police powers will be powers granted them by the ordinary law. Such ordinary law can stretch to a very high degree of repression, if it has to; for after all it is made up of relative judgments of what is reasonable and proportionate (whether literally common law or codified into statute or constitutional provisions). It is not the necessity for violent repression but the inefficacy of violent repression which, in the CA view, qualifies a situation as 'anarchy' of the sort justifying the suspension of the constitution.

30 Cf. a test of sufficient stability to permit fruitful investment and avoid international embarrassment of Fiji's aid partners, which would probably amount to the same thing and explains the *Prasad* decision as well as do the explicit reasons: see Michael Head, 'A Victory for Democracy? An Alternative Assessment of *Republic of Fiji v Prasad*', [2001] 2 Melbourne Journal of International Law 535, for persuasive analysis along these lines. The clash with indigenous custom described in the text would remain as striking, on this view of *Prasad*.

31 Qarase has since expressed this view clearly, with reference to plans for marches on the occasion of the 2002 African, Caribbean, and Pacific nations' summit in Fiji – 'Demo marches alien to Fiji: PM', *Daily Post*, 14 July 2002, quoting him: 'Marches and demonstrations are not part of the Pacific culture and are foreign to the way things are done here.'

That, it seems, is not how many people in Fiji (certainly its elite) see things. If widespread physical coercion is the only way to maintain order, then real 'order' has already been lost. Anarchy has arrived. Active opposition by a non-trivial minority is enough to warrant extraordinary action. The necessity for doing whatever it takes to avoid the confrontations that would require such repression is the 'necessity' recognised by the common law doctrine: sufficient justification, already, for suspending the constitution.

To the regime, this condition still existed after the hostages were released. They could have used the material and human resources of the disciplined forces, and the great police powers inherited from the common law, to keep the peace legally – but it would be only a common law 'peace'. Instead they kept power as a *tauvei* government, a government of indigenous Fijians frankly for indigenous Fijians, on the understanding that only by doing so could the necessity to battle protesters in the streets be avoided. If doing this entailed a continued suspension of the constitution, then that suspension was 'necessary'.

Qarase – who led the ICG as 'Prime Minister' – demonstrated such a notion of governmental legitimacy in the much less dramatic context of bypassing section 99, after the elections. Those elections had, of course, provided the 'powerful' evidence of his regime's lawfulness. Under the decision in *Prasad* this should go a long way to legitimising a regime wholly unconstitutional; why should it not justify the disregard of a single provision which manifestly, at least in Westminster terms, endangered 'efficacy'?³²

An approach to the relationship between law and order more congenial to Qarase's argument has achieved some recognition in Fijian courts. Scott J of the High Court, in *Yabaki v President*, a challenge to the lawfulness of the 'caretaker' government formed after the CA decision in *Prasad*, declared a version of the necessity doctrine which verges on casual:

In some unusual or extreme situations a departure from the normal requirements of the Constitution is in my opinion permitted. ... As those of us with even a little general knowledge know, under extreme conditions the rules governing normal situations tend to break down. This is the experience of physicians, mathematicians, psychiatrists and sociologists. It is also the experience of lawyers.³³

Scott J rejected the plaintiffs' argument squarely on the core issue of what sort of 'anarchy' justifies the application of the necessity doctrine. There were affidavits supplied by the President (who did participate in this litigation) from the GCC, the Methodist Church, the Fijian Affairs Office on behalf of all Provincial Councils, and the Army's Commander, all supporting the President despite his unconstitutional appointment – the Army, in particular, warning that the country 'cannot be allowed to revert to the pre-19 May 2000 status'. The

32 Counsel in *Chaudhry v Qarase* left this argument, it seems from the report, in terms of 'workability'. One has to wonder whether the term 'efficacy' might have had more resonance with the Court.

33 *Yabaki et al v President and Attorney-General* (unreported; High Court 11 July 2001, Civil Action HBC 119 of 2001S; published by the Journal of South Pacific Law at: http://www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/Volume_U-Z/Yabaki_v_President.html (The plaintiffs were members of the Citizens Constitutional Forum, an association advocating full restoration of the 1997 Constitution. Although instituted days after *Prasad*, the action was not heard until the end of June, after the elections were called).

plaintiffs' effort to dodge the effect of these by omitting the presidency from the elements of the regime they considered unconstitutional was rejected as incoherent;³⁴ but Scott J made his decision on the merits. What the plaintiffs called 'ordinary times' were, rather, 'very serious' conditions. Heavily armed troops had surrounded the courthouse where *Prasad* was heard, and indeed were present for *Yabaki* itself. The President was right to believe that 'turning back the clock' would create a 'wholly unacceptable risk to the peace and welfare of the nation' (as he had said in a public speech shortly before the *Yabaki* hearing). Finally:

[I]t should not be necessary to wait until there is a breakdown of law and order before the necessity doctrine can be invoked. ... Courts must remember that they are part of society and not above it. Their Judgments must be sensible and practical and should avoid excessive legalism.

Scott J did grant one declaration, that the President's failure to summon Parliament violated the Constitution; but necessity was full justification for the other violations of the Constitution's 'normal' requirements. The Constitution, on this view, is also 'part of society' – to think that it rules the government of society is 'excessive legalism'.

In a situation socially very different but legally analagous, the Supreme Court of Canada, too, held that the terms of a written constitution must give way when the acts of politicians have made judicial insistence on respect for those terms practically untenable.³⁵ In *Manitoba Language Rights* it decided that it had the power and the duty 'as protector and preserver of the Constitution ... temporarily [to] treat as valid and effective laws which are constitutionally flawed in order to preserve the rule of law'.³⁶ A provincial legislature had enacted a statute which, by making English the sole official language of the legislature, squarely violated the provincial constitution, and rendered all legislation passed in compliance with it unconstitutional. The practical problem was that this statute was passed almost a century before the Supreme Court reference – the entire legal order of the province was therefore unconstitutional. The doctrines of *de facto* authority, *res judicata*, and mistake of law saved some of the myriad rights and legislation endangered by this legal vacuum, but, in the court's view, not all of them.

To maintain the integrity of the legal order as a whole, the court declared that it would deem the invalid laws to be valid. Its power to do so arose not from the constitution but from something deeper: 'the Court may have regard to unwritten postulates which form the very foundation of the Constitution ... the unwritten postulate [in this case] is the rule of

34 They argued that the appointment of the Qarase Cabinet violated the Constitution, without advocating a declaration that the prior appointment of the President violated the Constitution, despite the same factual and legal circumstances applying. The rationale was simply that a court should confine itself to a plaintiff's claim. Scott J refused to do this, insisting that as a 'constitutional court' he had to consider the whole situation. If he accepted the plaintiffs' claim that necessity did not justify Qarase's appointment, the same would apply to everything else done since *Prasad*, and he would have to declare the whole 'governance' of Fiji null and void.

35 *Reference re Language Rights under the Manitoba Act 1870* (1985) 19 Dominion Law Reports (4th) 1.

36 *Id.* at 25 and 33.

law.³⁷ An unlawful legal order will be declared lawful if it is, practically, the only legal order there is.

However, the Canadian court's acceptance of unlawful law was carefully temporary: for the minimum period of time necessary for the Manitoba legislature to re-enact all its legislation in compliance with its constitution. In this, *Manitoba Language Rights* is consistent with *Prasad* rather than *Yabaki*. That decision, like Qarase's arguments in *Chaudhry v Qarase*, would have an unconstitutional state of affairs rendered permanently lawful for the sake of 'something deeper' – order.

IV THE LAW AS ORDER OPTION

Must law and order be alternatives? Must a court, wishing to declare the law, choose between legality and workability? There are two routes to the answer. The first takes the Westminster approach to such problems. The other route proceeds by statutory and case law interpretation.

A Westminster: Understanding law as order

The section 99 issue in *Chaudhry v Qarase* could never arise as a legal issue under a Westminster system, of course. There are no written, justiciable rules about the formation of Cabinets in the Westminster model. And when what written, justiciable rules there are in that model prove seriously unworkable politically, they may quite 'legally' be bypassed, even replaced, by sheer political consensus. The Westminster system operates by conventions rather than justiciable rules, creating norms and modifying legislative rules.

Fiji is not the only country in the common law world whose written constitutional provisions seem at odds with what is politically workable. In fact that situation is common to the older constitutions, the ones actually following the 'Westminster' model.

In those jurisdictions – Australia, New Zealand, and Canada – the rules written down as indubitable and plausibly justiciable 'law' grant the power to dismiss Parliament and call elections, the final approval or disapproval of bills passed by the legislature(s), and the appointment of ministers, all to the monarch (i.e., to a Governor-General representing her). Indeed, many other powers remain the monarch's, as a matter of recorded law, from the appointment of ambassadors to ultimate command of the armed forces. Under almost any circumstances, these powers would never be 'workable' if actually exercised – if, that is, the Governor-General overrode the wishes of the Prime Minister, or simply acted without the latter's instructions.³⁸ But there has not been amendment to the written constitutional provisions. There has not even been a movement, popular or professional, for such

37 *Id.* at 25. This something deeper is of the constitution, the judges insisted, not superior to it – not 'some law which is above the Constitution [but] the unwritten but inherent principle of rule of law which must provide the foundation of any constitution' (*id.* at 35, finding support in some of the same Commonwealth decisions cited in *Prasad*). The court held this to be 'analogous' to the doctrine of 'state necessity' (*Manitoba Language Rights* at 29), the basis of *Prasad* and *Yabaki*.

38 'Almost', because, of course, of the Whitlam-Kerr affair in Australia in 1975, in which Governor-General Kerr did call elections against the wishes of PM Whitlam. Of exactly what power this was

rationalisation, apart from the much broader republican movement in Australia. Instead there are ‘conventions’, developed as part of the Westminster legacy.

Convention is a term in law and political science for a rule which everyone involved regards as binding, yet is not enforceable in a court of law.³⁹ Most such conventions include transfers to the Prime Minister of powers assigned by written constitutional provisions to the monarch (or her representative). A peculiar feature of them is the conservation of the form of the ostensible rule. The documents implementing a transferred decision are still signed by the monarch or her representative, even though their contents, by the conventional rule, are exclusively the province of the PM. Hence the absence of constitutional amendment. The procedure persists even as the substance changes.

Thus most of the features of a Westminster system that must be considered fundamental are not in the constitution, if by ‘constitution’ one means the written, legally enforceable rules. The UK and New Zealand, famously and almost uniquely, ‘have no written constitution’, in the sense that they have no single document so identifiable, and in the extended sense that much of the actual rules are mere conventions. Australia and Canada are faithful to this pattern despite their written constitutions, since these are products of federalism, not an impulse to rationalise the law of government. Nowhere in the constitutions of those countries, or in the legislation recognised (conventionally) as having constitutional status in the UK and New Zealand, is there even mention of political parties, the office of Prime Minister or the institution of the Cabinet. The very existence of these basic features of the Westminster system, still more the rules governing their operation, is a matter of convention rather than ‘law’, if by law one means positive law, rules enforceable in courts of law.⁴⁰

These conventions, both in the UK and as transplanted to the Dominions, concern very ancient powers, powers whose conventional validity indeed began waning in the 17th century. The British constitution is remarkable, after all, not only in its ‘unwritten’ quality but in its sheer age. One could question its relevance to the use of more recently created constitutional powers. But there are some examples of conventions altering the sense of fairly recent enactments.

an example remains debatable – precisely the essence of Westminster ‘constitutional law’. Despite fierce political debate concerning the legality of Kerr’s act, there was no action in court, Whitlam and the country obeyed the G-G, duly participating in elections (lost by Whitlam’s Labour Party), and the affair entered Australian constitutional law as a precedent of what is conventionally permitted.

39 See S Levine, ‘The New Zealand Constitution: Context, Conventions and Contemporary Issues’, *RJP*, numéro hors série, vol 2, 2002, pp. 225-240, for a discussion of constitutional conventions and their contemporary meaning and application in the New Zealand context [eds.].

40 The constitutional provisions that are law in the sense of being enforceable in court include most of those creating the federal division of powers, as well as those creating the courts themselves. Australian and Canadian constitutional law is generally about that division of powers, rather than about how power is exercised within a particular government (with the exception, since 1982, of cases brought under the Canadian Charter of Rights and Freedoms, itself an exception to the globally distinctive absence of constitutional bills of rights that accompanies the UK-Dominions ‘Westminster’ model).

B Conventions in Canada

The Canadian written constitution grants powers of ‘reservation’ and ‘disallowance’ of provincial legislation to the Governor-General – which by convention means the federal Cabinet (provinces have Lieutenant-Governors). Last century these were acknowledged to be unusable, even as judicial decision recognised their continued validity.⁴¹ The powers, after all, amounted to a federal veto on provincial legislation, and such a centralisation of power had become politically unfeasible. They became null by convention, even as they remained on paper. Thus their validity in ‘law’ for judicial purposes was complemented by an invalidity in ‘law’ for political purposes – where law in the second sense is as understood outside courtrooms, by scholars of constitutional law (as well as by politicians and the public).⁴²

More recently, the nature of the federal arrangement itself was litigated when the Canadian federal government undertook radical change to the constitution. By the imperial Statute of Westminster 1931, the UK Parliament, whose British North America Act (originally 1867) was the Canadian constitution, would amend that Act only upon, and according to, Canadian request. (The BNAA did not itself provide for amendment.) An issue developed as to what counted as such a request – the word of the federal government alone, or a unanimous request by all the provincial governments as well, or something in between. At the time the federal government had prepared a request, which would enact an amendment formula excluding the UK Parliament (‘patriating’ the constitution) as well as a bill of rights binding all governments in Canada (the Charter of Rights and Freedoms). Negotiations with the provincial governments were ongoing, frequently shifting, and sometimes acrimonious. In early 1981 the agreement of two of the ten provincial governments had been secured, and the federal government proposed to proceed with the request. Would this be ‘legal’, the other eight provinces objecting?

Like Fijian courts, the Supreme Court of Canada and the provincial Courts of Appeal have jurisdiction to hear ‘reference’ cases, declaring the law on issues put to them by government. Three of the objecting provinces referred this issue to their CAs, and the SCC heard the appeals together.⁴³ By a majority the Court decided that a convention – here based on the historical record of the federal government only requesting amendments to the BNAA with unanimous provincial accord – could not ‘crystallise’ into justiciable law. That would confuse conventions with common law.⁴⁴

41 *Reference re Power of Disallowance and Power of Reservation* [1938] 2 Dominion Law Reports 8 (Supreme Court of Canada).

42 See, e.g., Peter Hogg, *Constitutional Law of Canada* (2d ed.) (Carswell: Toronto, 1983) at 90: ‘[T]he modern development of ideas of judicial review and democratic responsibility has left no room for the exercise of the federal power of disallowance.’

43 *Reference re Amendment of the Constitution of Canada (Nos. 1, 2, and 3)* (1981) 125 Dominion Law Reports (3d) 1 (Supreme Court of Canada).

44 *Id.* at 22 (majority 7-2).

That, however, disposed only of ‘the legal side’ of the issue (in the terms used by the majority). By a different majority the Court also decided the question of whether a convention forbade unilateral amendment requests. Their discussion suggests how ‘Westminster’ might cope with a section 99:

The main purpose of constitutional conventions is to ensure that the legal framework of the Constitution will be operated in accordance with the prevailing constitutional values or principles of the period. ... [Conventions are not enforceable in courts because they are] generally in conflict with the legal rules which they postulate and the Courts are bound to enforce the legal rules. ... The conflict is not of a type which would entail the commission of an illegality. It results from the fact that legal rules create wide powers, discretions and rights which convention prescribes should be exercised only in a certain limited manner, if at all.⁴⁵

This was not to say, the majority specified, that a legislative provision could be effectively repealed. That was not the issue; it was the use of a legislative provision that was at issue. The judges proceeded to adopt a three-pronged test for the existence of conventions concerning such use: there must be precedents of political actors adhering to the purported rule; they must have felt themselves bound so to act; there must be valid reason for the rule.⁴⁶ The judges then applied the test, and declared that, based on ‘the federal principle’, the proposed amendment would be an unconstitutional exercise of the power granted the federal government by the Statute of Westminster: ‘the agreement of the provinces of Canada, no view being expressed as to its quantification, is constitutionally required for [the request]’.⁴⁷

The result was the political impossibility of proceeding with the request. Federal-provincial negotiations resumed. A month later, a different deal obtained the agreement of the federal government and all provincial governments but one. That one was Quebec’s (formed by a party whose platform featured outright independence for Quebec); and by some understandings of Canadian federalism, the French-speaking minority concentrated in that province enjoyed an amorphous sort of political, even ‘national’, equality with the English-speaking majority. If substantial provincial agreement was the conventional rule for amendments to the Constitution, could that exclude Quebec in particular? Again the issue was submitted to the courts by reference, and again the SCC accepted the question.⁴⁸

By the time the Supreme Court of Canada was prepared to hand down its decision, the amendments had already been enacted and proclaimed. It could, therefore, have based that decision on a species of ‘necessity’. But it proceeded instead, unanimously, to pronounce

45 *Id.* at 84-85 (majority 6-3).

46 *Id.* at 90 (adopting the definition formulated in W. Jennings, *The Law and the Constitution* (5th ed., 1959)).

47 *Supra* n. 41 at 103, 107. In fact they *did* express a view as to quantification (at 103) – ‘a substantial degree’ of provincial consent was required. The term ‘substantial degree’ echoed the conclusion of an earlier UK Parliamentary inquiry into the conventions of amending the BNAA: House of Commons Foreign Affairs Committee (1981) *British North America Acts: the role of Parliament* (London, HMSO).

48 *Reference re Attorney-General of Quebec and Attorney-General of Canada* (1982) 140 Dominion Law Reports (3d) 385 (Supreme Court of Canada).

upon the convention, 'to dispel doubt'.⁴⁹ There was no evidence that Canadian politicians believed, or ever had believed, that Quebec had a veto over constitutional change. Such explicit 'recognition' of the supposed convention is 'the most important element, because it is the normative one, the formal one which enables us unmistakably to distinguish a constitutional rule from a rule of convenience or from political expediency'. Nor could a rule which had never been expressed be a convention, 'except perhaps at the inchoate stage when it has not yet been accepted as a binding rule'.⁵⁰ Amendment over the objection of the Quebec government was therefore constitutional.

These cases are instances, recent ones, of a debatable interpretation of a constitutional rule – based on legislation old but not ancient – being judicially approved as correct as a matter of political convention. There is, of course, a paradox in a court of law setting the definitive terms of a rule which, by legal definition, is not justiciable. But the terms were accepted by Quebec, politically at the time, and legally, in the absence of legal challenge, since.

That the Canadian court's judgment turned out to be correct is not the point of citing the cases here. It is, rather, the precedential value. It reinforces the example set by practice – not by the courts – in the original Westminster. By the House of Lords Act 1911 the Lords retain the power of delaying the enactment of a Bill passed by the House of Commons. The statute does not qualify this power. However, when the 1945 elections returned a Labour government with an ambitious programme of contentious, far reaching reforms, to which the Conservative majority of Lords was opposed, the House of Lords adopted a convention of restraint in the use of this power. By the convention known as 'the Salisbury rule', the Lords will not so delay a Bill which embodies a plank of the platform on which the governing party won the previous election.⁵¹ Like the Canadian judicial decisions, this is an instance of restraint on the exercise of written constitutional powers.

C *Conventions in Fiji*

The Canadian decisions were based on a political judgment: in a longstanding atmosphere of tension between two sections of the country, divided essentially by ethnicity, approval of the deal reached by most political leaders – constitutional amendment supported by all governments except Quebec's – was acceptable to both sides. (The Salisbury rule, ultimately, addresses a society divided essentially by class.) Such a decision was thought legitimate in a legal system like Fiji's, and so should not be ignored in Fiji if it is relevant to a significant dispute in Fiji.

And of course it is relevant. The elections that produced the current Qarase Cabinet are in themselves unchallenged and attracted wide participation. There is no question but that

49 *Id.* at 396.

50 *Id.* at 403-404. Quebec had argued that the 'reason' for the rule was the most important element.

51 The convention survived the *Parliament Act 1949* (which reduced the delay possible from two sessions to one), although its application became increasingly controversial during the 1990s, particularly after Labour returned to power and began massive restructuring of the House of Lords itself. See Ian Loveland, *Constitutional Law: A Critical Introduction* (2d ed.) (London: Butterworths, 2000) at 152-154 and 169-172.

the government is ‘accepted’, in the sense used by the CA in *Prasad*, and even in the sense there effectively advocated by the Interim Civil Government. The political climate would seem appropriate for the application of a ‘conventional’ interpretation to the constitutional provision that appears to be threatening this relative peace – if, of course, the relevant authorities can accept the notion of conventional rules complementing, even qualifying, written constitutional rules.

Some of Qarase’s acts already are compatible with such a convention. If Chaudhry had accepted them, one could hypothesise that the convention was in the making (‘inchoate’, in the SCC’s terms). But Qarase’s acts have not been particularly clear: he did offer Chaudhry the Cabinet seats, only to refuse Chaudhry’s acceptance. It is only Qarase’s refusal of the other’s acceptance which is coherent with his philosophy, and with a possible applicable convention. One could interpret the sequence of events in 2001 as an offer to Chaudhry to abandon much of his platform, postponing the refusal of participation to a confirmation that Chaudhry would indeed maintain that platform. Nonetheless, given Chaudhry’s well-established reputation for not making such surrenders, the initial invitation seems, rather, insincere – product, perhaps, of a mysteriously imperfect reading of the constitution. It weakens Qarase’s case, both as actually argued (on an ostensibly plausible reading of section 99 as law) and, as I suggest here, on the invocation of a convention frankly extraneous to section 99 (albeit marginally plausible as a legal interpretation).

And that convention? It is what would implement Qarase’s political philosophy regarding the role of Cabinet, and so depends for validity as a convention on a wide sharing of that philosophy. It embraces, that is, the ‘Westminster’ model of Cabinets, indeed of governments, and seeks to realise this despite the words of section 99. The convention would be:

When the platform of a party entitled to the section 99 invitation is squarely opposed to the platform(s) of the party(ies) forming the government, so that its working with the government is not reasonably feasible, then that difference in political platforms may be considered an implicit refusal, in advance, of any such invitation. (Thus the PM need not extend the section 99 invitation to that party).

The convention would amount to a party’s conduct being deemed to represent the choice it is promised by section 99. The section 99 right is not removed, exactly; rather, its exercise is made compatible with a ‘Westminster’ model of Cabinet government. Only if a party’s participation in Cabinet would be minimally compatible with the traditional ‘Westminster’ model would it be entitled to an invitation. Like the Canadian and British conventions described above, this would inhibit the implementation of a written rule’s literal meaning.

But there are several obvious objections, at different levels, to the recognition of such a convention in Fiji. Conventions as such are not inconceivable, even upon the adoption of a written Constitution model. The Reeves Commission recognised and approved several operating under the 1990 Constitution (as under the 1970 one), and considered Fiji free to develop others as necessary.⁵²

⁵² Reeves, Vakatora, and Lal, *Towards a United Future: Report of the Fiji Constitution Review Commission* (Parliament of Fiji, Parliamentary Paper No. 34 of 1996), paragraph 12.3 (emphasising that this

One objection is that conventions develop through practice. They may arise from repetition over decades of history, and most have, but on the authority of Jennings and the Canadian court, they may also arise from even one instance. But there has been the one instance only if the 2001 sequence is not interpreted as a change of mind on Qarase's part. On the only previous occasion when the convention could have applied, when Chaudhry was forming his own Cabinet, he did invite the party (the SVT) whose platform squarely contradicted his own.

The second objection is that a convention should be regarded as normative by the politicians involved in its application – the politicians on both sides of its application. And not only does Qarase's initial invitation fail to suggest a belief in such a convention, Chaudhry's reaction certainly suggests a denial of it: indeed, Chaudhry has displayed a faith in the literal sense of section 99. And the same is so of Chaudhry's invitation to Rabuka in 1999, and of Rabuka's reaction.

A third objection, relevant only in court, is that 'conventions' are political rather than legal. A Fijian court would have to make the leap made by the Canadian court from law to politics, but facing the other way. Where the Canadian courts declared a government move to be legal but unconstitutional, the Fiji court, following *Chaudhry v Qarase*, would have to declare Qarase's refusal to be illegal under the Constitution but 'constitutional' in the broader, conventional sense. The model would be *Prasad*. The ruling would revisit the boundary between constitutionality and lawfulness touched there, finding constitutionality of a political sort in the violation of strictly legal constitutionality, as *Prasad* found lawfulness in the violation of the Constitution. Can *Prasad's* notion of a lawfulness beyond the constitution be recast as 'conventional' constitutionality?

A fourth objection is the most telling, flowing from the status of section 99. It is not an inherited anachronism but the embodiment of recent and, on the record, studied, legislative reform of the Constitution. It is difficult to see how its effect could be bypassed without explicitly acknowledging that the unanimous passage of the 1997 Constitution by Fiji's legislative organs does not, in reality, manifest informed consent.

These objections are enough to demonstrate how far from Westminster the Fijian Constitution really is, despite its parliamentary institutions. But the fourth, most substantive objection demonstrates more, in the nature of section 99. What the section actually accomplishes is not just reform, and not just a (partial) rejection of the Westminster heritage, but an alternative view of modern Fiji. The view is indeed an indigenous one, literally and conceptually: the consensus of a custom 'council' of chiefs.

includes conventions not shared with other Commonwealth jurisdictions). Indeed, part of their Recommendation 371, on the formation of Cabinets, is that '[t]here should be convention' that no more than a quarter of the Cabinet be of the upper House. (This was, of course, replaced by section 99 in the enacted Constitution). Yash Ghai, writing before the May 2000 events, noticed that 'inadequate attention' was paid by the 1997 Constitution's drafters to the operation of multi-party government, and anticipated that 'conventions or even possibly laws' would have to be developed if the section 99 regime was ever to succeed: 'The Implementation of the Fiji Islands Constitution' in Akram-Lodhi, ed., *Confronting Fiji Futures*, *supra* n. 21, at 40-41.

In place of the winner-take-all ‘elective dictatorship’ consequent upon majority rule, which, in a country as divided as Fiji, must mean for the foreseeable future the political disenfranchisement of one major ethnic community after each election, the section 99 scheme implements the slow and cautious approach to change characteristic of custom. If even one important section of the relevant community – the nation, here – is resolutely opposed to a measure, the measure is not approved, regardless of who wins or would win a vote. Like a custom council, and emphatically unlike a Westminster government, a section 99 power-sharing Cabinet could only act when all major political opinions were in accord.

To complete the shift from Westminster to the village, there would be, in a House of Representatives under such a Cabinet, no ‘Opposition’ in the sense inherited from the UK. The major parties would be in government rather than forming an adversary to government. Politics would be pluralised, rather than polarised, by the formal institutions.

Section 99 embodies all this, and surely was intended to, by its authors – if not, realistically, by its enactors. Given the objections above, one cannot anticipate a judicial ruling opening up a ‘conventional’ bypass of the section. Nonetheless, the interpretation of section 99 outlined just above, and the interpretation of *Kubuabola* relied upon in *Chaudhry v Qarase*, are not – contrary to the CA’s opinion – irresistible.

D Interpreting law as order

As mentioned above, the term ‘invite’ does not have to mean ‘without conditions’. It is ambiguous and so can be read to be congruent with its context – with the rest of the 1997 Constitution. The Court of Appeal, rightly, noted the importance of the concept of power-sharing in that document. But Qarase’s argument, equally validly, noted the continued contemplation of a Cabinet (and Opposition) on the Westminster model by the Constitution. One implies the obligation to invite unconditionally, the other implies a power to impose conditions (at least the minimal one of acquiescence in the governing party’s major policies). Neither is compelled by the text. What justifies the CA’s reading is the authority of the Supreme Court’s holding in *Kubuabola* – as interpreted by the CA. And that interpretation is not compelling.

Strictly speaking, *Kubuabola* held only that conditions like those Rabuka sought to impose exceeded the bounds of a Prime Minister’s section 99 duty to accept. By extension, similar conditions, if insisted upon in an invitation by a PM, would violate section 99. But Qarase’s ‘conditions’ in 2001, albeit vague, were not obviously as restrictive as Rabuka’s in 1999. Simply by being conditions they could not, on the authority of *Kubuabola*, invalidate the 2001 invitation. (A holding to that effect in the CA could certainly be valid, but its authority would be only the CA’s, not the Supreme Court’s.)

The CA’s opinion must rest on a substantive, not a formal, evaluation of the invitation: Were the conditions, explicitly or implicitly, restrictive enough that they contradicted the constitutional ‘prime object’ of power-sharing? Only with an affirmative answer to that question can *Kubuabola* be said to compel the decision in *Chaudhry v Qarase*. And answering that question, of course, is some way from the kind of ‘matter of law’ to which the Court of Appeal wished to restrict itself.

It would, rather, be treading the path taken by Scott J in *Yabaki*. There he had little difficulty in deciding that the Constitution's requirement that a Prime Minister have the confidence of the House of Representatives need not apply to a caretaker PM. A caretaker government exists, after all, because none has the House's confidence. Indeed the caretaker PM need not even be a member of the House. Simply to apply the constitutional provisions as written would be 'paralysing', so they should be read as 'directory'. The requirement that a President comply with a PM's advice to summon Parliament, on the other hand, is a 'most fundamental aspect of our representative parliamentary system of government', and so should be interpreted as mandatory.⁵³ Such a view of the judicial role in constitutional law – in keeping with the Westminster tradition of constitutional law as common law – is in marked contrast to *Chaudhry v Qarase*.

To maintain the stance of merely applying what the constitutional drafters have written in section 99 is not possible – unless the court involved decides, on its own grounds, that section 99 cannot contemplate conditions. The CA opinion might be read as doing that, reinterpreting *Kubuabola* to contain this principle, but this strategy is vulnerable, since *Kubuabola* remains the higher authority and it does not exclude conditionality. Something must replace the *Kubuabola* formulation of what vitiates an acceptance – 'conditions which the Prime Minister, acting reasonably, was not bound to accept' – with 'any conditions'; and only the Supreme Court itself may supply that.

V CONSTITUTING A PACIFIC RULE OF LAW

That last point is the substantive issue in *Chaudhry v Qarase*. Whether the terms of the constitutional text should be followed when, in the view of the government, they frustrate effective governing is – of course – a fundamental point, and a sharp one in modern Fiji, as it must be in any country which has experienced, and accepted, three coups in a generation. It is so divisive an issue, bringing into sharp relief such strong beliefs about the very point of constitutions, indeed law, that it is perhaps easy to lose sight of what the particular constitutional text in question is about.

A *The paradox*

Section 99 is about the 'power-sharing', consensus model of government discussed above. It is what a specifically Pacific rule of law would look like. What else would characterise a constitution inspired by Pacific ways and values, rather than one adapted from an abstracted British model?

Consider how custom governance differs from state governance in Europe (and Europe's extensions). The details must vary depending on precisely what part of the Pacific one has in mind, notably on the point of political equality, but any discussion will feature the same points of general form. One constancy is a rejection of the priority attached by the West to decision. Western political institutions, and legal ones, compared to those indigenous to the Pacific, are designed to produce decisions. Westminster is indeed the extreme in this regard. The basic device used to achieve this is the vote, the greatest source of legitimacy in Western

⁵³ *Yabaki*, *supra* n. 32. (Qarase was not a member of the House).

politics. A legislative representative retains his or her powers in full for the entire period of the relevant ‘mandate’, regardless of the constituents’ manifestations of dissatisfaction, because of the precise count of votes on the day dedicated to the purpose. And under the original Westminster system, still extant in this regard in the UK and Canada, and in the Pacific outside Australia, New Zealand, and now Fiji, this vote is tallied by simple plurality – the oft-criticised but rarely reformed first-past-the-post count.

‘First-past-the-post’ is a revealing simile: elections are races, in the sense that they produce one and only one winner. Just as trials in the common law (and in the civil law of continental Europe) produce one winner and one loser, however finely balanced the issues that lead to that distinction, so in the corresponding political system elections at the constituency level produce winners however divided the electorates actually are.

As in the selection of people to govern, so in their operations as a government. A statute is enacted by majority vote in the legislature, with the same masking simplicity as in general elections. Thus the Cabinet is selected – to reach, finally, the point of these observations – and thus the Cabinet operates. In the Westminster system, as in other variants of Western government, the people’s representatives may be profoundly divided on the question of who should be in Cabinet.⁵⁴ (Indeed they normally are, and the division is formalised by the notion of an ‘Opposition’.) More to the point here, many of them may be unsure of their opinion, or unenthusiastic, or give support only because of particular issues or on particular conditions – they may prefer ministers from opposed parties – but, as with the general elections that put the representatives in their seats, the institution of the vote dissolves all these vagaries of human judgment and feeling into a simple outcome. Either the proposed Cabinet gets a Yes or it gets a No.

Likewise, the Cabinet itself operates by votes: all the qualifications and uncertainties and degrees of approbation and disapprobation are lost in the decision, Yes or No, by vote, whether to approve a measure proposed by the Prime Minister. At all levels the system translates the variety of real political opinion into the artificially, but legitimately, decisive acts (and Acts) of government.

Does any custom institution in the Pacific operate like this? Although itself unelected, Fiji’s own Great Council of Chiefs operates by vote, as does the (much less powerful) National Council of Chiefs of Vanuatu. The Samoan Land and Titles Court operates by (judicial) vote, and the synods and presbyteries of some churches take decisions by vote. The vote is perhaps the most characteristically Western element in these institutions, all of them colonial or foreign in origin.⁵⁵ But the political institutions of indigenous origin, from variously-extended families to village councils to sub-national assemblies of chiefs, do not operate by vote. And they are emphatically not oriented to decision.

54 The United States is somewhat different, its Constitution creating a real ‘separation of powers’ between executive and legislature, but even there the decision of the legislature (in one house, the Senate) to *confirm* a ‘Cabinet’ appointment is made by majority vote.

55 The Vanuatu NCC, or Malvatamauri, is more precisely the product of independence negotiations among France, the UK, and ni-Vanuatu politicians.

The notorious character of indigenous institutions is the subordination of decision to other desiderata: harmony; participation (and deference, thus, participation appropriate to status); and a sense that everything has been taken into account. The characteristic mode of collective decision-making is thus 'consensus' – and ongoing consensus at that, whereby past decisions may wax or wane in legitimacy in the light of new opinion or circumstances.

The contrast with Western, and especially Westminster, institutions must be striking. If anything is to be changed in those models to reflect Pacific political values, it must surely reflect that. It is precisely such a change that section 99 of the 1997 Fiji Constitution enacts.

Cabinet may include all the important parties, not just the 'winners'. The governing party or coalition of parties, therefore, cannot operate as though it embodies in any simple way the country, decisively implementing its own programme as though that were the unqualified wish of 'the people'. Such a pose is permitted the winners in a Westminster system, including that of Fiji from independence to 1987 – to the satisfaction of chauvinist indigenous Fijians – but under the impact of section 99 a Fijian government must take into itself the representatives of all the major doubts, conditions, and even rejection which Fijian citizens felt strongly enough to vote for in the previous election. It is as though the government were a Melanesian village council, able to come to decisions only with the acquiescence of virtually all the village's elders (or chiefs or bigmen), no matter how varied the ideas of these people may be. Not to be so patient risks 'disorder', in the sense that condition is understood in the South Pacific – in the sense implicitly employed by the Interim Civil Regime in *Prasad*.

Section 99, that is, robs the Fijian government of its artificial Western-style clarity, infusing it with the awkward, but real, uncertainty and discord of indigenous political decision-making. Thus the paradox of this dispute.

It is Mr Qarase, apparently representing at least the elite of indigenous Fijian opinion, who wishes to regain that foreign, Westminster heritage of artificial decisiveness – and Mr Chaudhry who wishes to maintain the indigenous, consensus model section 99. On Qarase's part this cannot be from a wish to promote indigenous values and forms of government. Can it be from a wish for that mantra of Pacific political commentary, 'stability'? But the swings of political power assured by the Westminster model, whereby either one party (or coalition) has all the power or the other one does, do not seem calculated to produce stability. It is the indigenous model, rather, that promises that. (Indeed it may promise stability to the point of paralysis).

There seem to be two responses to this point. One is that despite the above considerations, it was under the section 99 constitutional regime that Chaudhry came to power in 1999, with a government widely perceived in Fiji precisely as too imbalanced.

Perhaps Rabuka's strategic error, in attaching such overreaching conditions to his acceptance for the SVT of Chaudhry's invitation to Cabinet, is to blame. It led, via the Supreme Court interpretation of section 99, to the absence from Cabinet of the main vehicle of indigenous Fijian nationalism. But the problem may have been broader: the political power of indigenous leaders outside Parliament, who were never available to be drawn into power-sharing by section 99.

The GCC, to be sure, involves the chiefs in government, at least in the Western sense of their representatives being involved.⁵⁶ Perhaps representation is too tenuous a connection between the GCC and its ‘constituents’ – a proposition too complex to go into here. Fiji’s Constitution, in any event, has little to do with the formal but non-governmental power of custom authorities in the villages.⁵⁷ Nor, of course, does it touch the informal power of men who can attract crowds.

Or perhaps the case is described by the second response to the question of why indigenous chauvinists reject an apparently indigenous political form: they wish, quite simply, for indigenous domination of government.⁵⁸ Neither the power-sharing instituted by section 99 nor the alternating exclusive power of the Westminster system suffices; there must be a Westminster-style domination by the winning party or coalition, and that party or coalition must always be the indigenous one. Then there would be ‘stability’ – and stability without paralysis, for one large section of political opinion could be ignored. But this amounts to racism, of course, and flies in the face of the official international opinion on which Fiji’s finances depend (even Israel, a state whose *raison d’être* is ethnic, does not go so far); and rejecting it as the explicit core of the constitution was the impulse leading to the 1997 constitutional reform in the first place.

B *The questions revisited*

But the ‘indigenous’ form of Cabinet government embodied in section 99 was introduced in a way very distant from indigenous tradition: by vote, in representative chambers, on a document. This brings up the first of the questions with which this paper began – can the Westminster/common law feature of rules which develop in application, rather than a priori declaration, operate within the 1997 Constitution?

The Constitution itself seems to represent a negative answer. It is a structure of rules controlling in a fairly detailed way (of which section 99 is but an example) how governments

56 An involvement first constitutionally entrenched, in fact, by the 1997 Constitution.

57 Indeed, remarkably – but again raising issues too large for treatment here – the 1997 Constitution almost ignores customary law; the only recognition is an indirect incorporation. See Jennifer Corrin Care, *The Status of Customary Law in the Fiji Islands After the Constitution Amendment Act 1997* (2000) 4 *Journal of South Pacific Law* (published at http://www.vanuatu.usp.ac.fj/journal_splaw/articles/Corrin1.html). Brij Lal, one of the three Reeves Commissioners, writing (after the coup) of Chaudhry’s errors in government, points out that ‘astute political leadership in Fiji would have understood that Parliamentary mandate is one among several mandates in Fiji’: Lal, *Making History, Becoming History: Reflections on the Alleged Failure of the Fiji Constitution* [2001] 5 *Newcastle Law Review* 82, at 95.

58 The SDL has been blunt enough about this. The party secretary, Jale Baba, put it concisely: ‘The two races can work together if they let the Fijians rule’ (‘Governing Party Secretary Baba warns Labour to back off’, *Fiji Times*, 25 April 2002, commenting upon the High Court ruling making the declarations sought in *Chaudhry v Qarase*). Qarase himself has expressed similar views, saying that the racial ‘gulf’ can only narrow if Fijians run the country and the Indians ‘accept things as they are’ (with nationhood being distinguished from citizenship): ‘loss of leadership to Fijians represents to them a danger to their heritage as the indigenous community ... Indo-Fijians feel that to aspire [to] national leadership and to control government is their democratic birthright’ (‘Race divide wider than ever: Qarase’, *Fiji Daily Post*, 20 August 2002).

should carry on their business; the rules are fairly exact – parties entitled to a Cabinet invitation, e.g., are those with 10% of the seats, not those which seem ‘important’, or would together constitute a ‘cross-section of Fiji’s communal interests’, or some such phrase. Such precision is appropriate to judicial enforcement. This amounts to a choice of ways rules can develop: set in advance and in the abstract, by legislators (and experts), rather than developed by authorities faced with a particular application of the rules. It is the choice embodied in written constitutions generally.

The section 99 saga illustrates an argument that this approach is not well-suited to Fiji.⁵⁹ On the one hand, as the Court of Appeal pointed out with some asperity, every legislative organ approved the section 99 innovations (on notice, formally, of their significance). On the other hand, there seems to be almost no one, now, among the politicians and chiefs who made those votes, who actually approves of section 99, and Chaudhry’s invocation of it seemed to take the political elite generally by surprise. Can the tradition of working issues out as they develop in some concrete context, the tradition shared by custom and the common law, be so ingrained that when an abstract rule is being proposed, unlikely or unwelcome outcomes simply do not register?⁶⁰ There was no debate, on the record, before those unanimous votes. Do those votes represent the sort of committed agreement appropriate to a parliamentary enactment, or do they represent the consensus of indigenous traditional decision-making, whose validity may change with circumstance?

Related to those further questions, is Fiji ready to decide what abstract rules to make, even if it is ready to confine its future governance to abstract rules? It would seem that ‘power-sharing’ was acceptable as long as the political agents of the communities sharing power were the SVT and the NFP, whereas it is not when the latter is replaced by Labour (and perhaps when the former, led by Rabuka with his reputation for being moderated by experience, is replaced by leaders less accustomed to political responsibility). Being compelled to reach agreement on what explicit rules to follow, in advance and with constitutional status, is not always possible for societies nonetheless capable of functioning

59 One can approach such an issue the other way round. Brij Lal (whose Reeves Commission draft constitution did not include section 99 itself) put his considered opinion, post-coup, thus: ‘I am unconvinced that the Constitution has failed the people of Fiji. More to the point, the people of Fiji failed the Constitution.’: Lal, *supra* n. 55, at 83 (and again at 94). This suggests a curious degree of aspiration, as an approach to constitution-making – one certainly deeply out of sympathy with Westminster, and with custom. Lal criticises Fijian leadership for trying to use their power to pull the country back – ‘The Fijian powers that be may wish to turn the hands of the clock back, but it would not do the clock any good’, *id.* at 98 – but turning the hands ahead does not render a clock of much use either.

60 Or, the significance registering, too many leaders are unwilling to debate their reservations openly. Lal, *id.* at 86, says: ‘It is true that many provincial councils had rejected the [Reeves] Commission’s report at the instigation of its [sic: their] leaders, who opposed the review process. But, the same people were also members of Parliament, indeed members of the Joint Parliamentary Select Committee, all who had approved the Constitution, as well as the GCC ... [T]he people who worked against the Constitution were not ordinary, unlettered Fijians, but members of Parliament who understood the document and had voted for it’. Or, it is once again the spectre of disorder as perceived in Fijian custom – more specifically, disunity. Could the leaders be unwilling to disagree,

on ‘conventions’ and makeshift understandings.⁶¹ Whether South Pacific countries have been well-served by the advance-rules choice is not evident.⁶²

But an Israeli-like, muddling through, dynamic ‘constitution’ does not seem to be on offer in Fiji. Since the coup, the government in its various incarnations has indeed been eager to amend the Constitution – but there has been no suggestion of changing the form.⁶³ Foreseeably, the terms will change, the ‘power-sharing’ substance will likely change, but the form will remain as a set of justiciable rules exhaustively describing the structure of government. That brings up the second of the questions beginning this paper: can such a constitution found a rule of law in Fiji?

On the politicians’ side, there has been at least one development which suggests constitutional flexibility, even to the extent of a convention arising. In June and July of 2002 – that is, after *Chaudhry v Qarase* in the CA but before *Qarase v Chaudhry* in the Supreme Court – the two leaders, with small teams of political associates, met to discuss the issues preoccupying the government. The discussions covered, most notably, reforms to agricultural land tenure, probably the most contentious issue in Fijian politics, and law reform, for both the indigenous and the Indian populations. This was done outside the constitutional structure, and outside any Westminster-based model; the framework was rather a ‘talanoa’. That is an institution of indigenous Fijian custom, a meeting with formalities in the sense of courtesies and ritual but informal as regards agenda-setting, decisions and the qualifications

or question authority, when such disagreement or doubt must be expressed openly? Silent reluctance is more effective in a system demanding consensus than in one, like Parliament, which only counts votes.

- 61 The minor example of that is of course the common law, the intimate partner of the Westminster political system. It still lacks codifications of basic rules in fields from criminal responsibility to general contract, despite a century or more of reform proposals and the examples in Europe of such codes. This seems to be a matter, ultimately, of cultural preference (English ‘muddling through’). The major example, a matter of genuinely intractable differences, is Israel, the only country apart from the UK and New Zealand to lack a written constitution. The 1948 Declaration of Independence called for one to be completed by the following October. But political Israel has always been an awkward blend of liberalism and ethnic nationalism, and of secularism and authoritarian religion; it was not until 1956 that the Knesset could even agree on a ‘Basic Law’ to found the Knesset itself – and that Law, like the others that make up the written portion of the Israeli Constitution, is not entrenched. The issue may be coming to a head: see ‘Israel Ponders Constitution With Head Throbbing’, *New York Times*, 17 September 2000.
- 62 See Ian Fraser, *The Law That Failed: Fiji’s May Events* (2000) 4 *Journal of South Pacific Law* (Special Interest: Fiji Crisis), for a discussion of the 2000 coup in this light (at http://www.vanuatu.usp.ac.fj/journal_splaw/Special_Interest/Fiji_2000/Fiji_Fraser1.html).
- 63 A Constitutional Review Commission (CRC) has been flickering in and out of existence, due to the illegal status of the appointing government, since early in the ICG. Its report was then to be completed by March 2001, with a view to a new constitution by the end of that year. But a High Court ruling in January 2001 ordered the CRC to stop work (‘Gates rules on CRC to disband’, *Daily Post*, 18 January 2001), which it did (‘CRC stops work’, *Daily Post*, 19 February 2001: ‘In an unprecedented move, the CRC has decided to abide by the High Court ruling’). When the ICG reconstituted itself after the CA *Prasad* decision, President Ratu Josefa Iloilo immediately ordered the CRC to resume its deliberations (‘CRC given mandate to resume task’, *Daily Post*, 16 March 2001). The High Court again ordered a stop, *Prasad’s* ‘necessity’ doctrine not justifying such

of participants. Qarase did not have to acknowledge Chaudhry's leadership of an 'Opposition'; Chaudhry did not have to recognise the legitimacy of Qarase's government. Their decisions do not bind anyone.

These discussions inevitably represent what would be Cabinet discussions, were Chaudhry in the Cabinet. The 'talanoa' sessions could constitute a kind of extra-parliamentary, conventional organ of executive government – one which might go some way to reducing the unbalanced nature of Qarase's formal Cabinet.⁶⁴ To that extent, it manifests a tendency to develop the means of governance without formal amendment, or litigation, of the Constitution's terms.

There is one sign of a similar tendency in the judiciary. In *Kubuabola* the Supreme Court had to answer a question concerning actions of the President, amounting to whether the President had a personal obligation to follow advice he thought contrary to the Constitution.⁶⁵ In responding in the negative, the Court made it clear that the Presidency is no different in this regard from any other constitutional office:

The President, like all others, must act in accordance with the Constitution. ... But the body or authority tendering the advice [when the President is required to act on advice] is itself bound by the Constitution. If the advice does not conform to a constitutional imperative such as section 64(2) [concerning appointments to the Senate], the purported tendering of advice neither compels nor authorises the President to act in accordance with its terms. The President's power to make an appointment under section 64(1)(c) is conditioned by the receipt of advice from the Leader of the Opposition, given in accordance with section 64(2). The President is entitled, before acting on that advice, to be satisfied that it accords with that provision.⁶⁶

In contrast, the CA in *Chaudhry v Qarase* is careful to avoid any appearance of evaluating the legality of the President's acts:

The first and third respondents [Qarase and the Attorney-General] opposed the declarations and orders sought by the plaintiff, while the second respondent (the President) properly advised

'reformist projects', on a petition by Labour: *Koroi et al v Ravuvu et al*, unreported, Civil Action No. HBC 131 2001L. After the 2001 elections the Commission resumed. By September it issued a report covering the reasons for reviewing the Constitution, which included the 'priority [of] maintaining and effecting Fijian leadership in this country, and within a time frame to allow others to be culturally assimilated and accepted as Fijians', as well as the desirability of a new Constitutional Court ('Review after review', *Daily Post*, 17 September 2001). Yet seven months later, Qarase was still planning ways to develop terms of reference for a 'new' constitutional review ('Review starts in July', *Daily Post*, 20 April 2002).

64 The model – for analysis, not as what the participants have in mind – could be the American 'kitchen cabinet', a coterie of old friends and colleagues from previous offices of an American President; it could be the institution in Canada of 'inter-governmental' (federal-provincial) conferences. Each came to be recognised by political scientists as part of 'government', without acquiring any legal status.

65 Question C2: 'Whether the President is required to appoint Senators on the advice of the Leader of the Opposition under section 64(1)(c), if he is of the opinion that the advice does not comply with the relevant provision of the Constitution Amendment Act 1997.'

66 *Supra*, n. 17, under 'Presidential Advice'.

that he would abide by the decision of the Court and took no part in the arguments. Reference in this judgment to the respondents' submissions or arguments is a reference to those advanced by the first and third respondents... Appropriately, no criticism was made of the President. He had acted as required, on the advice of the Prime Minister. Nonetheless the point was made that if the advice given was invalid because the Constitution had not been observed, the whole process was thereby flawed.⁶⁷

What the CA calls a 'flawed process' leads to advice that, according to the Supreme Court, 'neither compels nor authorises' the President to act. On the higher court's view, the President was properly a respondent to Chaudhry's complaint, having acted contrary to Chaudhry's (and the court's) interpretation of the Constitution in following prime ministerial advice formed in defiance of section 99. He was no more authorised by the Constitution to appoint that Cabinet than Qarase was to advise its appointment. Yet on the CA's view, the Presidency is somehow above, or at least detached from, the Constitution. As though the legality of the President's official conduct was based on something other than compliance with the terms of the Constitution, the President 'properly' and 'appropriately' takes no part in litigation concerning his own acts.

In *Kubuabola* the Presidency appears as an office like others created by the Constitution. In *Chaudhry v Qarase* it seems, rather, something like a Crown, recognised by the Constitution but above, except nominally, the infighting concerning the Constitution's application, juridically part of the style of cause but not really party to the litigation. It must be noted that the Supreme Court was responding to a reference (by the President), whereas the CA was adjudicating a civil suit; nonetheless, a difference in the judicial regard for the role is apparent.

It must be noted, too, that the difference in approaches may lie in the judges. Scott J's readiness, at trial level, to adapt plain meanings to social and practical considerations has been noted.⁶⁸ When the issue of Presidential responsibility to comply with the Constitution was put to the Supreme Court directly, as a referred question in *In re Sections 64 and 99*,⁶⁹ that court maintained the approach evident in *Kubuabola*. Where the President is to act on advice (here, appointing Senators), and is unsure whether the advice he has received complies with the Constitution, the Supreme Court repeated its ruling that he is 'neither compelled nor authorised' to follow such advice. It built on this:

[W]here the President is required to act on advice he cannot act at all, in the absence of valid advice. If not satisfied that the advice is in accord with the Constitution, he cannot act in

67 *Supra*, n. 7, under 'Introduction' and 'Plaintiff's submissions'.

68 In *Yabaki*, *supra* n. 32. .

69 *In re Reference by President on Sections 64 and 99 of the Constitution, Chaudhry v Singh* (unreported; Supreme Court of Fiji, 15 March 2002; Misc. Case 1/2002) (Tuivaga P, Tikaram, Eichelbaum, Amet, Sapolu JJ) (published by the University of the South Pacific http://www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/Volume_G/In_re_Constitution,_President's_Reference.html). Singh is named as Interested Party (like Chaudhry), as Leader of the Opposition when the reference was made; he actually took no part in the hearing, having previously lost his seat in the Court of Disputed Returns.

some different way, even though his personal advice, or inclination, may be that such alternative course is constitutionally appropriate.⁷⁰

Essentially the same question was put more pointedly as well, as whether this President had acted improperly in proceeding to appoint Senators on advice he did consider possibly unconstitutional, while preparing a reference on the issue. The Court declined to answer, as this was ‘water under the bridge’. But it did say, in terms less rigorous than the above:

If the President considers the advice is not in accord with the Constitution he ought not to act on it. [But] that does not appear to have been the situation here. If the President considers the advice is consistent with the requirements of Constitution, but it is apparent that such view is open to challenge, there are risks either way. ... The decision must be one for the President to make.⁷¹

On the main issue, the application of section 64 concerning Senate appointments when there is only one party qualified to nominate the Senators whom the Leader of the Opposition advises the President to appoint, and that party is not that Leader’s, the Supreme Court majority was satisfied that the section’s terms were plain enough. It added that even if interpretation did require some ‘construction’, it would have ‘work[ed] out a practical interpretation appearing to accord best with the general intention of Parliament’, citing a New Zealand case on statutory construction.⁷² In other words the Court was not prepared to assume a role beyond that of the ordinary common law court ‘applying’ legislation.

There is thus little more than the CA’s deference to the President to complement the political leaders’ resort to ‘talanoa’ as plausible signs of a readiness in Fijian constitutional law, as it is practised, to go beyond the Constitution’s terms. Like the ‘talanoa’, the obvious inspiration for such deference is (indigenous) Fijian custom. It is perhaps something of a stretch, but one might read into these observations a notion of law – constitutional law – which is more than the interpretation of the text of constitutional enactment. To that extent, perhaps some Fijian authorities, political and legal, are ready to constitute a rule of law founded on more than a document; but the Supreme Court appears to be a bulwark of the written constitution model.

To see so much in a judicial opinion raises the third of my preliminary questions: whether Fijian governance can integrate the authority of law as personified by appellate judges, leaders of a type without customary model.

On this, the outstanding feature of *Chaudhry v Qarase* is the ruling central to the parties’ issue. The court refused to enter into a judgment of the ‘reasonableness’ of Qarase’s acts. It construed section 99 as unambiguous – by, in turn, construing *Kubuabola* as forbidding conditions upon a section 99 invitation. Neither construction is compelling, as argued above;

70 *Id.*, under ‘Question 2’; this ruling was made 4-1, Amet J dissenting.

71 *Id.*, under ‘Question 5’, unanimously.

72 *Id.*, under ‘Question 3’ (citing *Northland Milk Vendors Association v Northern Milk* [1988] 1 NZLR 530 (CA)). Amet J dissented sharply on this point, as discussed *infra*.

but they fulfill the court's announced object of maintaining a stance of disinterested application of the positive law. The court will adopt from custom at least the deference to a paramount leader, but in its central role it clings to a positivist legitimacy in keeping with the country's British legal heritage.

In this it is complemented by the previous Court of Appeal in *Prasad*. There too the judges avoided reliance on an independent judgment of what the law should be – on any evaluation of wisdom, reasonableness, or propriety, made and justified in the decision. Unable to base themselves on positive law, since the suspension of the supreme positive law was the issue, they found the legitimacy of their decision in precedent.⁷³ This too, of course, is in keeping with the British heritage (indeed the hierarchy of laws it implies is the British: the common law is constitutional).

Moreover, the decision *In re Sections 64 and 99* reinforces this feature. As mentioned, Amet J (Chief Justice of Papua New Guinea) dissented on the main issue; he did so precisely on the point of the courts' role in implementing a constitution. On the majority's construction of section 64, all the 'Opposition' Senators would be nominated by Labour, since there was no other party besides the Prime Minister's 'qualified' under section 99 (incorporated into section 64). A problem arose only because Chaudhry refused appointment as Opposition Leader – believing Labour entitled to participation in Cabinet – so the Leader appointed was of a minor, 'unqualified' party.⁷⁴ He advised appointments of minor party Senators as well as Labour ones. The majority's reading of section 64 is indeed the obvious one. But Amet J preferred guidance from the Constitution's 'spirit, objective and pattern': power-sharing. The majority's interpretation, he held,

could conceivably result in only parties who are part of Cabinet dominating Senate and thus government ... [the opposing interpretation] accords with the general spirit of the Constitution that government power is to be shared by as wide a cross-section of political parties as possible and in the case of the Senate, indeed, as wide a cross-section of the community as possible.⁷⁵

Amet J's willingness to reason from first principles rather than the constitutional text, as though the issue were one of common law or a vaguely worded constitutional right, highlights the majority's fidelity to the distinction between law and politics. The Constitution, for the majority, is most essentially a statute. Where Amet J would use his power as judge to render the Constitution 'capable of being ... understood by lay people' (a reason to support the President's interpretation),⁷⁶ the majority confines constitutional meaning to the canons of law.

73 *Supra*, at n. 25.

74 A very minor party, by 2001: the National Federation Party. Until even his seat was lost (*supra* n. 67), the 'Opposition Leader', Prem Singh, was in fact the only NFP member of the House.

75 *Reference re ss. 64 and 99, supra* n. 67, under 'Question 4'. (The Senate reflects the wider community in that any person entitled to vote may be appointed Senator.)

76 *Ibid.*

C *Popping the question*

Fiji is more than a site of two 'races' clashing while being compelled to live together. It can as well be seen as two visions of law and politics, or two ways of governance. One, currently represented by Qarase, sees race, or 'nation', as indeed the landscape's dominant feature, and would have government guided by the fate of the Fijian nation. The other, currently represented by Chaudhry, sees an undulating landscape of individual opportunities and social relations, unshadowed by the mountain of ethnic identity; it would have government devoted to levelling social inequalities and opening up economic opportunity. But neither of these can efface the other; the Fijian state cannot, now, become the mere vehicle of half its population's 'national' mission, nor the inspiration of a pure liberalism. Its law can become neither the voice of a people on such a mission nor the enforcer of such a liberalism.

A different analogy might be of assistance at this point. The visions, or ways, now live together, and must continue to do so. This can be a 'common law' relationship or a formalised marriage. Westminster (with Israel) represents the former: a political and legal arrangement made without explicit, exhaustive, and justiciable rules – rather like a couple working out the implicit rules by which to organise their common life. The written constitution model, with a document containing precisely such rules, is like a marriage. It makes applicable to the couple's potentially dynamic arrangements a fixed set of rules to be interpreted, in extremis, not by them but by a neutral authority.

Of course the contrast is not as stark as marriage may appear to a couple; it is a matter of emphasis, but it is real. Do the distinct visions, or ways, of Fiji offer signs of the commitment to be governed by legal marriage – or signs of the imagination and empathy required of a 'common law' couple? The rule of law, as an ideal, will wax or wane with the effective force of the constitutional model chosen. Like any given couple's love and solidarity, the rule of law may thrive on flexibility, or it may require a settled framework. Perhaps a custom marriage, subject at least in principle to informal change, would suit this couple.

The corresponding constitutional regime, the common law Westminster model of 'conventions', cannot of course be created now. It probably cannot be created at all. But perhaps a Court less aloof in constitutional interpretation could assist in promoting the necessary flexible fidelity. The arrangement that seems least likely to suit is the pattern of divorce and remarriage that Fiji has seen in fact since the first coups in 1987, constitutions enacted then replaced, 'supreme laws' written as though definitive, judicially interpreted as though definite – yet shattered, like a dinnerplate thrown against a wall, when politics suffers a crisis.