SILIMAIBAU and Anor v MINISTER FOR SUGAR INDUSTRY and 2 Ors

HIGH COURT — CIVIL JURISDICTION

GATES J

6 June, 19 July 2001, 17 July 2003

[2003] FJHC 338

Constitutional law — Fiji — appointments — President's prerogative powers — necessity doctrine — Minister for Sugar invalidly appointed — amending decree invalid — minister no power to nominate — Constitution ss 41, 99(2), 99(3), 99(4), 120(2), 120(4) — High Court (Constitutional Redress) Rules 1998 — Sugar Industry Act s 33 — Sugar Industry (Amendment) Decree 1992.

Plaintiffs challenged the nomination by the Caretaker Minister for Sugar of eight persons to membership in the Sugar Cane Growers Council. The appointment was made by the Minister for Foreign Affairs, External Trade and Sugar. It was said that the minister's appointment was unconstitutional. The President's prerogative powers, necessity doctrine and decree's invalidity were also alleged. Plaintiffs then sought declaratory orders and an interlocutory injunction to stay the minister's appointment of the eight members.

Held — The minister had been granted unfettered discretion under the decree. There was no dire necessity to veer off the Constitution, to dismiss a Prime Minister and Cabinet unlawfully, to appoint another to dissolve the parliament that the people had democratically elected. There was no constitutional impasse or paralysis. The Minister for Sugar was also invalidly appointed. The amending decree was to be struck down. The elections were to be carried out in accordance with legislation passed by Parliament. The Minister had no powers to nominate since he was himself invalidly appointed seeking to act under invalid legislation.

Declaratory orders made.

Cases referred to

Adegbenro v Akintola [1963] AC 614; *Akuila Yabaki v President* Civ Action No HBC 119 of 2001S (unreported); *Clayton v Heffron* [1961] 105 CLR 214; [1961] ALR 368; *Republic of Fiji v Prasad* [2001] 2 LRC 743; [2001] NZAR 385; *Simpson v Attorney-General* [1955] NZLR 271; *Tropik Wood Industries Ltd v Apenisa Balewakula* Civ Action No HBC 158 of 1997L; *William Rosa Junior v State* Misc Act No HAM 6 of 2003, considered.

Horn v Lockhart (1873) 17 Wallace 570 (84 US) (US SC); *Koroi v Commissioner of Inland Revenue* [2003] NZAR 18; *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645; *Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 35; *Prasad v Republic of Fiji* [2001] 1 LRC 665; [2001] NZAR 21; *State v Viliame Savu* Crim Act No HAC 10 of 2002S (unreported), cited.

Anu Patel and *Neil Shivam* for the 1st and 2nd Plaintiffs.

Sunil Kumar for the 1st and 2nd Defendants.

Ram Krishna for the 3rd Defendant.

Gates J.

Introduction

[1] The plaintiffs seek to challenge the nomination by the Caretaker Minister for Sugar of eight persons to membership of the Sugar Cane Growers Council [the council].

[2] The appointment was made on 8 May 2001 by the minister, Mr Kaliopate Tavola, who was the Minister for Foreign Affairs, External Trade and Sugar. It is said his appointment as a minister was unconstitutional as he was not a member of the House of Representatives [s 99(2) of the Constitution] nor was he part of a lawful cabinet constituted in accordance with the multi-party cabinet provisions of s 99(3) and (4).

[3] It is claimed that the concept of prerogative powers in the president cannot come to the rescue of the invalid appointment of the minister. Further it is said the amendment to the Sugar Act Cap 206 made by decree, the Sugar Industry (Amendment) Decree 1992 was also invalid. The decree purported to lessen the democratic composition of the council to one whereby the minister could nominate one member from each of the eight districts of a mill area. Under the decree eight members could be nominated by the minister and 38 were to be elected, one from each of the 38 sectors.

[4] It is also urged that the doctrine of necessity could not be used to legitimise the position of de facto minister, more so if he makes appointments as here under invalid legislation. In addition the council could have continued to function with its 38 elected members. There was no pressing necessity for the minister to make the appointment of eight more members.

The proceedings

[5] These proceedings commenced initially by way of originating summons of 30 May 2001, which sought declaratory orders and an interlocutory injunction. The injunction sought a stay on the minister's appointment of the eight members. Two affidavits were filed in support.

[6] At first call, leave was given to file an amended document initiating the proceedings. On 14 June 2001 a notice of motion was filed pursuant to the High Court (Constitutional Redress) Rules 1998. The motion also sought declaratory relief that the purported appointments of the Minister of Sugar and the Acting Minister of Sugar were null and void being made contrary to the 1997 Constitution. The motion also sought declarations that the actions and exercise of powers by the minister were void from inception, and were of no legal effect.

[7] Mr Kaliopate Tavola swore an affidavit which was filed on behalf of himself as the substantive Minister for the Sugar Industry [1st Defendant] and of the Attorney-General [2nd Defendant].

The background and evidence

[8] The 1st Plaintiff, Mr Marika Vuki Silimaibau, was an unsuccessful candidate in the 2001 Sugar Cane Growers Council Elections. The 2nd Plaintiff is the National Farmers Union [NFU], of which the 1st Plaintiff is a member. The NFU represents approximately 12,000 sugar cane growers.

[9] Mr Silimaibau previously served for 9 years as a council member, and as chairman for 3 years between 1995–98.

[10] The results of the 2001 Sugar Cane Growers Council Triennial Elections was that the NFU gained 21 seats, the Sugar Cane Growers Association [the Growers Association] 16 seats, and one seat went to an Independent candidate.

[11] The Acting Minister for the Sugar Industry announced the nominations of eight persons to the council pursuant to powers under the decree. It is not disputed that three of the eight were unsuccessful candidates from the Growers Association, the rival organisation to the NFU. I have not been informed as to the

allegiances of the remaining five ministerial nominees, so I conclude that they were independent or at least not associated with either the NFU or the Growers Association groups.

[12] In his affidavit Mr Tavola explains why he made the nominations. He says they "were fair because they were made with a view to achieve balance to the representation in the Council". As substantive minister responsible for Sugar he it was that decided upon the nomination.

[13] In his absence, Mr Vuetilovoni as acting minister was the minister who issued the nomination in a media release which was published in the Daily Post of 9 May 2001. It may have been thought that the nomination bore his signature, and technically therefore that the nomination was his. As will be seen the arguments are the same whether the nomination was that of Mr Tavola or of Mr Vuetilovoni.

Objections to minister's nominations

[14] Both affidavits on behalf of the plaintiffs refer to reasons why they consider the minister was in error in making these nominations. They refer to irrelevant matters that they claim he took into consideration. They say he only appointed nominees from the ranks of defeated candidates from the Growers Association and none from the NFU. The minister failed to consult the NFU or to invite submissions from the Union, they claimed.

[15] These allegations would apply to three only of the eight nominees. Five must be regarded as independent. The decree does not state how the minister should approach his task of nomination. Under the main Act he must ensure potential nominees are not disqualified from becoming members [s 33 of the Sugar Industry Act]. But apart from that no direction or guidance is given to a minister on his method of arriving at nominations.

[16] I conclude the minister has been granted an unfettered discretion by the decree. No doubt he would seek to act in the general good interests of the Sugar Industry overall, bearing in mind its various stakeholders. Nothing obliged him to discuss nominations with any group, nor was he bound to allow or to receive submissions.

[17] Both of the plaintiffs deponents allege that the minister should have maintained the balance of the election result when nominating from the ranks of the two groups. In effect he should not have interfered with the mandate expressed by the voters, nor should he have undermined the position of the majority thrown up by that election.

High Court (Constitutional Redress) Rules

[18] The High Court has original jurisdiction in any matter arising under the Constitution or involving its interpretation [s 120(2) of the Constitution]. Though the Plaintiffs argument did touch upon the right to equality and thus the freedom from unfair discrimination this case deals mainly with Constitutional issues outside of the Bill of Rights.

[19] Strictly speaking the originating summons procedure is to be preferred and the High Court (Constitutional Redress) Rules procedure is more suited to applications concerning Bill of Rights matters [s 41] and referrals from subordinate courts on interpretation matters [s 120(4)].

[20] The form of approach to the court is of little moment, and would cause no discomfort to those defending this action. As I had occasion to say in *William Rosa Junior v State* (unreported, Misc Action, HAM 006.03, 11 July 2003) another Constitutional Redress application (at para 25):

> [25] The jurisdiction then would be to do justice within the Bill of Rights and the law, and it is the judicial role to avoid the absurdities of unwarranted duplications.

Appointment of the Sugar Minister

[21] Originally the portfolio of the Sugar Industry came under the responsibility of the Minister for Primary Industries. It is not disputed that the Sugar portfolio under the caretaker cabinet appointed by the president on 16 March 2001 came under Mr Tavola along with the assigned business of Foreign Affairs and External Trade.

[22] The appointment was made following the decision by the Court of Appeal in *Republic of Fiji v Prasad* [2001] 2 LRC 743; [2001] NZAR 385. That court declared that the 1997 Constitution remained the supreme law of the land and had not been abrogated. It also declared that parliament had not been dissolved, but that on 27 May 2000 it had been prorogued for 6 months. Finally the court declared that the office of president had become vacant when the resignation of Ratu Sir Kamisese Mara took effect on 15 December 2000.

[23] As a result the present incumbent was appointed as president, and it was he who made the ministerial appointments to a caretaker cabinet. These appointments were published in an Extraordinary Edition of the Republic of Fiji Gazette [No 23 of 16 March 2001].

[24] Most of the facts preceding the appointments of the ministers in that cabinet are either notorious or have been referred to in other published judgments. Indeed they have largely been set out in the submission proffered by Mr Kumar for the first and second defendants.

[25] The first General Election under the 1997 Constitution was contested in May 1999. It saw the formation of the Peoples Coalition Government. Mr Mahendra Chaudhary was appointed Prime Minister by the president.

[26] An extra-constitutional event took place in May 2000 in which the Fiji Military Forces under Commodore Bainimarama assumed temporary control. This assumption of power was necessitated by a hostage crisis in which 56 parliamentarians were held in the parliamentary complex by the George Speight Group. The Commodore appointed a military cabinet, and later a caretaker administration.

[27] However upon the restoration of the 1997 Constitution with the courts declaratory orders in *Prasad*, the country was left with a prorogued parliament awaiting its recall. Neither the prime minister, nor the members of cabinet had thereby lost office, nor would any have suffered such under a prorogation.

[28] Instead of recalling parliament, the president did the following:

(a) dismissed Mr Chaudhary as prime minister on 14 March 2001;

(b) appointed Ratu Tevita Momoedonu the same day as Caretaker Prime Minister;

(c) dissolved parliament on the advice of the new Prime Minister on 15 March 2001;

(d) Ratu Tevita then resigned and Mr Laisenia Qarase was appointed to succeed him as Prime Minister;

(e) the president appointed caretaker ministers on the advice of the Prime Minister on 15 March 2001 and succeeding days.

[29] These actions by H E. The president were clearly unlawful. They were contrary to the 1997 Constitution which had just been confirmed a matter of days earlier in the judgment of the Court of Appeal in *Prasad*, which in turn had confirmed the earlier decision of the High Court made on 15 November 2000: *Prasad v Republic of Fiji* [2001] 1 LRC 665; [2001] NZAR 21.

[30] The president could only have dismissed Mr Chaudhary as Prime Minister if he had acted in accordance with s 109(1) of the Constitution. There was no evidence the government had failed to get, or had lost, the confidence of the House of Representatives. Nor did Mr Chaudhary resign, nor was parliament dissolved at that stage. The underpinning foundation for dismissing Mr Chaudhary under the Constitution was not available. The evidence appropriate for such a draconian move by a Head of State would have to be very little different from a vote on the floor of the House. The requirements of s 109(1) in Fiji are more strict than those that faced the governor in *Adegbenro v Akintola* [1963] AC 614 at 628. There the Governor of Western Nigeria was precluded from removing the Premier from office "unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly". Section 109 in Fiji's Constitution would appear to demand an objective test for that loss of support or confidence.

[31] The confidence referred to in this chapter of the Constitution Part 3 — Cabinet Government does not refer to a general confidence such as one might place in the Headmaster of a suitable school for one's children. It means the confidence that will be shown when members of the House are called upon to express or not express confidence by showing their assent or dissent to a motion or bill when called upon to do so by the Speaker.

[32] A president must needs be slow to rely upon informal evidence gathered outside of the proceedings of the House for arriving at a firm conclusion that a Prime Minister or Government has lost the confidence of the members and would, if put to it, lose the vote before the House. Similar cautions were urged by the Privy Council upon the governor, and persons similarly burdened, in *Adegbenro* (above at 628). In that case the governor chose to act on a letter signed by 66 out of a chamber composed of 124 members stating that they no longer supported the Premier.

[33] The risk for the governor (as also for the president in Fiji) is that: (at 630)

> … he would run the risk of placing the constitutional sovereign power, whose representative he is, in conflict with the will of the elected House of Representatives whose majority is for the time being expressed in the person of the Premier.

The dismissal by the Governor General of Mr Whitlam as Prime Minister is still felt keenly in Australia today. It remains a source of lingering controversy [see *Philip Joseph* (above) at 687 et seq].

[34] At any rate, no evidence of the requisite loss of Parliamentary confidence having been brought to the attention of the president has been made available to this or to any other court. If anything the letter to the president seeking restoration of the Peoples Coalition Government with an attached petition signed by 46 members of the 71 member House of Representatives, calling on the president to summon parliament as a matter of urgency, would seem to point

incontrovertibly to a continued parliamentary confidence in Mr Chaudhary as Prime Minister: See *Akuila Yabaki v President* (unreported, Suva High Court, HBC119.01S, 11 July 2001).

[35] The ministers serving in the Chaudhary Cabinet would still have been entitled to continue in office until the next appointment of a Prime Minister, even though they had ceased to be members of parliament upon the expiry or dissolution of that parliament [s 105(3)].

[36] Ratu Tevita Momoedonu's membership of the House of Representatives qualified him for appointment as Prime Minister [s 98]. But since the dismissal of Mr Chaudhary was unlawful, the appointment of a replacement would similarly have been unlawful. The parliament being prorogued at that stage, it would have been necessary for the president to ensure that any successor had the confidence of the prorogued House. There is no evidence that members were canvassed for their opinions on this matter either.

[37] Section 68 relevantly provides:

> 68. (1) After a general election of members of the House of Representatives, the Parliament is summoned to meet by the President on the advice of the Prime Minister not later than 30 days after the last day of polling.
>
> Other sessions of the Parliament commence on a date appointed by the President on the advice of the Prime Minister but no longer than 6 months must elapse between the end of one session and the start of another.

In such matters the president acts only on the advice of the Prime Minister [see too s 96].

[38] In *Akuila Yabaki* Scott J said (at 12):

> … I am satisfied that no deviation from the requirements of the Sections can be justified on the grounds of necessity since, for the reason already given, the person charged by the Constitution with deciding whether Parliament should or should not be recalled is the Prime Minister and not the President.

He went on:

> I am satisfied that the March 1 letter from Mr Chaudhry to the President amounted in effect to an advice to recall Parliament and that the President knew that his Prime Minister wanted Parliament recalled. The fact that a substantial number of other members of the House also wanted recall is relevant but not decisive to the issue calling for ruling.

[39] His Lordship therefore granted the first declaratory order sought which was:

> … that the First Respondent, His Excellency the President of the Republic of the Fiji Islands (hereinafter "the President") acted in a manner inconsistent with the Constitution when he failed to summon Parliament after its prorogation on 27 May 2000.

[40] Towards the conclusion of my judgment in *Prasad* at 692 I had said:

> … The Constitution provides for a multi-party Cabinet, sometimes referred to as a Government of National Unity (GNU). After the events which we have gone through in the last six months, all participants in the political process need to act unselfishly and wisely, and the GNU option may fruitfully be examined. That however is a political question for the parties concerned and not a matter for the court.

[41] The fifth order of the declaratory orders stated:

> (5) Meanwhile, owing to uncertainty over the status of the government, it will remain for the President to appoint as soon as possible as Prime Minister, the member of the House of Representatives who in the President's opinion can form a government that has the confidence of the House of Representatives pursuant to ss 47 and 98 of the Constitution, and that government shall be the government of Fiji.

[42] I accept now that in making that order I was wrong. Order No 5 was incorrectly worded. Mr Chaudhary could only have been forced to leave office as Prime Minister pursuant to s 109 of the Constitution, unless he himself chose to resign [ss 105, 107]. He could have offered to have stood down to allow for a neutral figure to have headed a Government of National Unity, made up of Parliamentarians. That was a matter for him. But his removal could not have been effected simply by the president calling on another member of the House of Representatives who in the president's opinion could form a government that had the confidence of the House. To that extent Declaratory Order No 5 was incorrect. If the Constitution had never been abrogated by the military takeover, and the parliament had never been dissolved, then the Prime Minister and cabinet of the day were never put out of lawful office.

[43] It follows the dismissal of Mr Chaudhary as Prime Minister was unlawful, and that the appointment of Ratu Tevita Momoedonu as the new Prime Minister, the dissolution of parliament, the appointment of Mr Qarase as Caretaker Prime Minister, and the appointment of all the Caretaker Ministers including the Minister for Sugar were all unlawful steps. This was the view initially reached by Scott J in *Akuila Yabaki*. His Lordship concluded by finding that these steps were however saved by the doctrine of necessity.

[44] In *Akuila Yabaki*, Scott J said (at 15):

> A literal interpretation of the sections under consideration would, in my view lead to paralysis.

However If Mr Chaudhary had indicated he was willing to resign, the president would have had 70 remaining members of parliament from whom to select a member who would enjoy the confidence of the House. There were several lawful constitutional paths which might have been usefully explored in order to get the Government of Fiji "back on the rails" without resorting to significant contravention of the Constitution. This issue will be considered further on under the doctrine of necessity.

[45] In addition, Mr Qarase's appointment may have been constitutionally flawed since it did not comply with section 98, in that he was not a member of the House of Representatives. The scheme of Pt 3 Cabinet Government of the Constitution is of appointment to the cabinet from the ranks of members of the House of Representatives or the Senate, save where otherwise specifically stated. The exceptions are the Prime Minister and the Attorney-General. The Attorney-General may sit in both Houses though he is to be a member of one House only. The Prime Minister must be a member of the House of Representatives [s 98]. For s 109(2) to be construed as intending "person" (whom the president may appoint as a Caretaker Prime Minister to advise a dissolution of the parliament) to mean "any person" that is, not a member of the House, it would have been necessary for words of qualification to have been included.

They are absent. The scheme of the chapter is that "person" is to be construed as "a member of the House of Representatives" as in s 98. But this reading is not determinative.

[46] In the New Zealand Electoral Act there was a provision that the Governor-General was by warrant under his hand to direct the Clerk of the Writs to proceed with the elections. Section 101(1) stated that this direction was to be made "not later than seven days after the dissolution or expiry of the then last Parliament". The warrant was issued 17 days afterwards. Barrowclough CJ in *Simpson v Attorney-General* [1955] NZLR 271, at first instance, held the provisions of section 101 relating to the times within which the warrant and writs should be issued to be directory and not mandatory.

[47] This decision was upheld by the Court of Appeal. The court held that the provision did not purport to impose any limitations, restrictions, or conditions upon the exercise of the prerogative. At 280 the court said:

> … What it does purport to do is to place a duty on the Governor-General in aid of the summoning of Parliament. We respectfully agree with the view expressed by the learned Chief Justice that the main object of the section is to sustain and, not to destroy the House of Representatives …

[48] Similarly to have kept to the restored parliament, to the Prime Minister and cabinet who enjoyed the confidence of the House would have been to have sustained democracy, to have buttressed the House that had suffered unlawful invasion and a hostage taking and to have kept within the bounds of the Constitution. Adherence to the constitutional provisions when getting back onto the rails would have reflected a greater respect for the democratic principles underpinning that Constitution. Whatever may have been the adverse opinions held of the Government of the day, they did not represent opinions held in a "Glorious Revolution" as found in the *Pakistan Petition Case* [2000] per I H Khan CJ. It was for the electorate to express approval or disapproval in the ballot box, and the electorate can be read to have changed its position in the General Elections of 2001.

[49] In Simpson, the Court was able to approve the giving of a Royal assent to a Bill by the Governor-General one day late on the basis that the provision for giving the assent within a certain time was directory rather than mandatory. The dismissal of Mr Chaudhary and the democratically emplaced Peoples Coalition Government could not be so categorized.

[50] In *Clayton v Heffron* (1960) 105 CLR 214 the High Court found that the abolition of the Legislative Council of New South Wales by the Legislative Assembly had been done relying upon full constituent powers. The Assembly had, through the governor, convened a joint sitting to deliberate the relevant bill. The fact that many of the members of the council did not attend did not invalidate the procedures followed. The council had been given a democratic opportunity to take part in the debate, and the overall adherence to democratic principles had been maintained.

The doctrine of necessity

[51] Although not strictly lawful, were the president's actions nonetheless saved by the doctrine of necessity? If they were, then the appointment of a Caretaker Prime Minister and cabinet were lawful and the Minister for Sugar was properly empowered to make the nominations to the council.

[52] Professor Philip Joseph said of the doctrine: "The doctrine is brazenly Machiavellian — the ends justify the means. Its purposes are to avoid legal chaos from a vacuum arising within the constitutional order and to provide for the continuing orderly conduct of the State". [Constitutional and Administrative Law, 2nd ed, 2001].

[53] The evidence in the *Akuila Yabaki* case was that (at 14):

> … On 7 March 2001 Mr Chaudhary wrote to the President (Exhibit AY 20 to the supporting affidavit of Akuila Yabaki filed on 23 March 01) in the following terms:
>
> > "there have been calls from some quarters for a fresh general election, so that, after many months of upheaval and uncertainty, the people can deliver fresh mandate for leadership. Having carefully considered this matter and consulted widely, I support this call."
>
> Accordingly, subject to the matters I set forth below, I am prepared, if required, to advise you in terms of Section 59(2) of the Constitution that the House of Representatives should be dissolved to make way for fresh elections in accordance with our Constitution.
>
> I am also sensitive to the call by several indigenous groups that the current method of voting set forth in Section 54 of the Constitution and the Electoral Act should be changed from the current "alternative vote" system to the "first past the post" system of old. This will necessitate a change to the Constitution.
>
> On this matter my party would be prepared to accept the guidance of the BLV (the GCC) if in its view those changes ought to be effected prior to the elections. I am, in those circumstances prepared to delay my advice accordingly to accommodate these amendments.

[54] There was evidence of letters forwarded to the president, but no evidence of any replies or of the extant Prime Minister being summonsed to Government House for any oral advice to be tendered or for an exchange of views with the president to enable the president to consider which steps he might take. If this were the true state of affairs, it was odd.

[55] Mr Chaudhary's letter appeared to be opening the door to a fundamental accommodation of indigenous views on the Constitution and the Electoral Act. Keeping within the Constitution, the lawful option was available therefore of re-forming a Government with the "deposed" Government's consent, either with or without Mr Chaudhary, but drawn lawfully from members of parliament. This could have been a Government as broadly based as possible including members from all sides, from all parties represented in parliament.

[56] I conclude there was no dire necessity therefore to veer off the Constitution, to dismiss a Prime Minister and cabinet unlawfully, to appoint another to dissolve the parliament that the people had democratically elected. If the interests of all of the voters were to be considered why were the deposed ministers not included in the caretaker arrangements?

[57] In considering whether necessity can give rise to the court's approval of unlawful action, it is essential that so far as possible the principles of democracy, to which Fiji had adhered in its three Constitutions, should be respected. The High Court of Australia found this to have been the clear aim in *Clayton v Heffron* (above); and there was no lack of democratic respect either in *Simpson v A-G* (above).

[58] In *Clayton v Heffron* the council was given an opportunity to attend the joint meeting of the Houses and largely declined the opportunity. But the democratic principle was followed by those seeking to obtain approval under the

necessity doctrine. In Fiji's situation, the Peoples Coalition Government members were simply not part of the solution decided upon. This exclusion was undemocratic. It took away the rights of the voters who had elected them as members and whose members held a Parliamentary majority. In doing so it offended two of the cardinal preconditions for the application of the doctrine.

[59] First, it impaired "the just rights of citizens under the Constitution": *Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 35 at 88 at seq (Grenada CA); *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 at 732 PC. It should be remembered that when the time eventually came for a fresh poll, though Chaudhary's party was in popular usage defeated, his party still comprised a substantial group of members in the House, the opposition in all but name.

[60] The exclusion of the deposed government broke the second principle which was that by doing so, such a step was to be regarded as consolidating or strengthening the usurpation of democratic power. The bank robbers were intercepted, if not entirely brought to justice, but the money bags were never returned to the bank.

[61] I dealt with the doctrine along with these same steps in *Koroi v Commissioner of Inland Revenue* [2003] NZAR 18 at 33–6. At 35 I concluded:

> … There is a danger in allowing the doctrine of necessity to degenerate into a doctrine of convenience, a doctrine to avoid awkward or embarrassing situations. That is not the doctrine of necessity.

[62] I find there was no constitutional impasse or paralysis. The situation facing the president was difficult, awkward and embarrassing. If carefully canvassed there would have been several lawful ways out of the problem without veering off the Constitution and away from democracy. I find the Minister for Sugar was therefore invalidly appointed.

The validity of the decrees

[63] If the governing legislation was invalid, it would not have been possible, as had been suggested in argument, for a group of citizens to waive their rights, apparently lost under such legislation.

[64] Even if the Minister was invalidly appointed, his acts or as here his nominations to the council, could still prove effective if found to be legitimate as being routine and necessary for the well-being of the populace. Arrangements made for the continuation of water supplies or for the registration of land titles would fall into this category: *Horn v Lockhart* [1873] 17 Wallace 570 (84 US) (US SC); *Madzimbamuto* (above).

[65] If the amending legislation is itself lawful, the nomination of members to such a body as the Sugar Cane Growers Council to carry out the council's functions for the sugar industry would seem without further examination, unremarkeable, routine, and essential.

[66] To date Fiji has been subject to three Constitutions. All three have stated that Fiji is to be governed by a system of democratic parliamentary rule. The 1997 Constitution stated it was "an Act to alter the Constitution of the Sovereign Democratic Republic of Fiji".

[67] Laws emanate from parliament. The doctrine of necessity will allow a limited life to other legislative vehicles such as the decree. But with the return of Parliamentary democracy, as was said in Mitchell, "the right constitutional steps must be taken forthwith, that is, within a reasonable time". The decrees must, to survive, be ratified.

[68] In *Koroi* (above at 38) I said:

> Ideally Parliament should correct Acts, Decrees, and the like, not the Courts. The separation of powers as between the arms of the State is an important concept for good governance.

Shameem J in *Audie Pickering* at 22–3 said:

> The judiciary has a traditional deference to Parliament. It is for Parliament to pass laws, and for the judiciary to give effect to them. Most legislation will have a valid constitutional purpose because it would have been passed after much research, discussion and debate. A recommendation for legislative change normally comes from a group or department after a need for the change has been acknowledged. A Minister, having discussed the matter with his/her own Ministry will then present a Cabinet paper. The matter will be discussed in Cabinet before it is prepared in Bill form. Once in Bill form, it is published so that the public and concerned parties can discuss it and make representations to their Member of Parliament. The Bill, if it is not channelled to a Sector Committee for Parliament to hear further representation from the public and from government, will be debated in Parliament, both in the Lower and Upper House. It is only after this process that a Bill might become law. The law when passed by Parliament, and assented to by the President, has the status of a law passed through a democratic process. There is an assumption that Parliament speaks for the people and passes laws with the assent of the people. This is the essence of democracy. It is a powerful reason why the judiciary should defer to the will of Parliament. Legislation passed by Parliament reflects in principle, the will of the people.
>
> However, as counsel for the Human Rights Commission submitted, the mandatory minimum sentence under the Drugs Act was not imposed by the legislature. It was imposed by an executive act. It was passed by decree. There was no public discussion, no Parliamentary debate, and no opposition.
>
> In the context of a decree, not only is it more difficult to ascertain a legislative purpose, but the customary deference to legislation must surely give way to a very close scrutiny of the constitutional effect of what is an executive act, albeit acknowledged and saved by s 195 of the Constitution.
>
> In the circumstances, it is essential that the incoming Parliament review all of the Decrees made since 1987 and subject them to the normal processes of a Bill. Only then will Parliament be true to its constitutional pact with the people of Fiji. A reference tucked away at the end of the Constitution [s 195(1)] to all written laws continuing in force, does not amount to a parliamentary process complying with such a pact. Parliament should seek to complete such a process within as short a time as possible, perhaps 12 months. Parliament, setting its own procedure, will no doubt extend that time as it thinks fit. But it is desirable to maintain constitutionality in Fiji's public life, and to restore its rolling stock to the tracks as soon as possible.

[69] In *Tropik Wood Industries Ltd v Apenisa Balewakula* (unreported, Lautoka High Court, Civil Action, HBC158.97L, 4 October 2002), Byrne J said:

> … any Judge considering a decree which purports to cut down the right of an ordinary individual should give effect to such a law only after the most serious consideration.

I had reviewed the status of decrees also in *State v Viliame Savu* (unreported, Suva High Court, Action, HAC010.02S, 22 November 2002).

[70] The decree here changed the composition of the council. By reducing the number of democratically elected representatives and introducing non-democratically elected nominations to be made by the minister, the rights of citizens concerned in the sugar growing industry were reduced. Indeed it will be remembered the minister said he made the nominations "to achieve balance to the representation in the Council". This would of course change the ratio thrown up by the election. Originally the Board selected by the council was able to make nominations.

[71] The decree has not been ratified. It changes the democratic provisions by reducing the rights of the growers. It is not therefore a routine piece of legislation merely oiling the wheels, keeping things moving. It seeks reform without mandate.

[72] I find the amending decree is to be struck down. The elections are to be carried out in accordance with legislation passed by parliament. I find the minister had no powers to nominate since he was himself invalidly appointed seeking to act under invalid legislation.

[73] I make therefore the following declaratory orders:

(1) The purported appointments of the Minister for Sugar and the Acting Minister for Sugar are null and void and contrary to the provisions of the 1997 Constitution.

(2) The Sugar Industry (Amendment) Decree 1992 is invalid and of no legal effect.

(3) The exercise of powers by the purported Minister for Sugar in nominating eight members to the Sugar Cane Growers Council is null and void and of no legal effect.

Declaratory orders made.