**IN THE SUPREME COURT OF FIJI**

**(ORIGINAL JURISDICTION)**

**Miscellaneous Case No 1 of 2025**

**IN THE MATTER** of Sections 91(5) and 98(3)(c) of the Constitution of the Republic of Fiji

**IN THE MATTER** of a reference by Cabinet for an opinion from the Supreme Court on a matter concerning the interpretation and application of sections 159 and 160 of the Constitution of the Republic of Fiji.

**Before** : **The Hon President of the Supreme Court - Mr Chief Justice Salesi Temo**
**And The Hon Judge of the Supreme Court – Mr Justice Terence Arnold**
**And The Hon Judge of the Supreme Court – Madam Justice Lowell Goddard**
**And The Hon Judge of the Supreme Court – Mr Justice William Young**
**And The Hon Judge of the Supreme Court – Mr Justice Robert French**
**And The Hon Judge of the Supreme Court – Mr Justice Isikeli Mataitoga**

**Counsel**: Mr S.D. Turaga A-G, Mr Bret Walker SC, Mr N Kirby and Mr R. Green for the State
Mr S Valenitabua for the People's Alliance Party
Mr J Apted and Mr R.K. Naidu for National Federation Party
Mr J Uludole for SODELPA
Mr K Singh and Ms PO Chand for Hon. Inia Seruiratu
Mr T. Vakalabure and Ms S Devi for Hon. Ioane Naivalurua
Mr J Karunaratne, Mr S Nandan and Ms M Matanisiga for Fiji Labour Party
Ms N Raikaci and Ms L. Bulivou for Unity Fiji Party
Ms A. Vuki and Ms L. Vili for Fiji Human Rights & Anti-Discrimination Commission
Mr Arthur Moses SC, Mr P Keyzer and Mr W Clarke for the Fiji Law Society
Mr A. Butler KC Counsel Assisting

**Dates of Hearing** : 18 - 20 August 2025

**Date of Opinion** : 29 August 2025

## PART 1: INTRODUCTION

### A request for an Opinion

[1] The Supreme Court has been asked by the Cabinet to provide an Opinion on the interpretation and/or application of provisions of the 2013 Constitution of the Republic of Fiji. This is sought under s 91(5) of that Constitution. The jurisdiction of the Court to provide such an Opinion is conferred by s 98(3)(c). This is the Opinion. It has been contributed to by all members of the Court.

[2] The reasons why the Cabinet has sought an Opinion lie in Fiji's turbulent constitutional history.

[3] Fiji was a colony of the United Kingdom between 1874 and 1970. Since independence, there have been four coups (two in 1987, followed by two more in 2000 and 2006) and the country has operated under four constitutions, those of 1970, 1990, 1997 and 2013. The last – the 2013 Constitution – was created by a decree promulgated by an unelected government. Sections 159 and 160 of the 2013 Constitution provide that some of its provisions cannot be amended and for those that can, an amendment procedure is imposed that, on the argument for the State, is so stringent as not to be capable of successful implementation.

[4] In its request for an Opinion, the Cabinet has asked five questions. We set these out later, see [112]. For present purposes, it is sufficient to note that they raise three sets of issues:

(a) An issue going to the Court's jurisdiction: Should the 2013 Constitution be recognised by this Court as the legally effective Constitution of the Republic of Fiji which has superseded the unlawfully abrogated 1997 Constitution?

(b) Issues going to ss 159 and 160 of the 2013 Constitution: Assuming the Court recognises the 2013 Constitution as legally effective, can, and if so should, it qualify that recognition by a remedial interpretation of ss 159 and 160?

(c) In light of the Court's discussion of the first two issues, what are its answers to the questions posed?

[5] In considering these issues, the Court had the benefit of extensive written and oral submissions from the State, nine Interveners and the amicus curiae. They expressed a range of views, some arguing that the 1997 Constitution remained the legitimate Constitution of Fiji and others arguing that it had been superseded by the 2013 Constitution. Among those arguing in support of the 2013 Constitution there were different views as to the meaning and effect of ss 159 and 160 and how the Court should address those provisions. We are grateful to all counsel for their submissions and acknowledge the depth of feeling associated with this matter. We note, however, that in the discussion which follows we do not attempt to address all of the points made in submissions. We do, of course, explain the reasoning behind our views and in light of that reasoning, some of the submissions made fall away.

**A comment on the preliminary jurisdiction issues**

[6] The Court is faced with arguments supporting one or other of the 1997 and 2013 Constitutions.

[7] Our jurisdiction to provide an Opinion on the questions that have been put to us depends on the validity of ss 91(5) and 98(3)(c) of the 2013 Constitution. It follows from this that we have jurisdiction to answer the questions referred to us only if the 2013 Constitution is the legal and effective Constitution of Fiji.

[8] Some of the arguments in support of the view that we must conclude that the 2013 Constitution is legally effective invoked s173(4) and (5) of the 2013 Constitution. We set these provisions out later, see [103]. It is sufficient to note that their apparent effect is that the validity or legality of the Decree by which the 2013 Constitution was promulgated may not be challenged in the courts of Fiji. It was argued that they preclude us addressing whether the 1997 Constitution is still valid. We do not see it that way. Necessarily anterior to the effect, if any, of s 173(4) and (5) is whether we recognise that the 2013 Constitution is legally effective.

[9] The Court must therefore determine, as a preliminary jurisdictional question, whether it recognises the 2013 Constitution as the legally effective Constitution of Fiji.

[10] If the Court does not recognise the 2013 Constitution, the 1997 Constitution may remain in force; in which event the Court can proceed no further. But if it recognises the 2013 Constitution, then the Court:

(a) has, as a corollary, recognised that the 1997 Constitution is no longer legally effective;

(b) must determine the extent of its recognition of the amendment provisions of the 2013 Constitution, namely ss 159 and 160; and

(c) can respond to the questions put by the Cabinet on the basis of the terms on which it recognises, and it interprets the amendment provisions.

**The common law of Fiji and recognition of the Constitution**

[11] In determining which Constitution is operative we apply a rule of recognition which says that the Court will recognise as legally effective the constitution which meets certain criteria, which we discuss later.

[12] The common law of Fiji is the source of this rule which the Court will apply in determining whether the 2013 Constitution is legally effective and, if so, to what extent.

[13] The common law has a history as part of the law of Fiji that is uninterrupted since the time of Cession. It has been present through successive coups and times of constitutional turbulence. The *High Court Act 1875* (which was the Supreme Court Ordinance when enacted) provides that the common law of England as at 2 January 1875 applies in Fiji. The common law is, of course, judge-made law embodying principles developed through countless decisions over hundreds of years. As it has travelled from the United Kingdom to other places — the former colonies of the United Kingdom — it has adapted to their conditions and continued to operate when they have become self-governing and independent.

[14] The common law has brought rules of law relating to contract, tort, property, trusts, equity and statutory interpretation which have become part of the law of Fiji. It can, of course, be changed by legislation and modified to reflect Fijian conditions, so becoming the common law of Fiji.

[15] The common law has been described as the ultimate constitutional foundation in Australia, and it can attract that description in Fiji. It brings with it some essential constitutional principles. They relate to such things as the essential characteristics of courts, their independence from the executive and the legislature and their transparency — reflected in their open hearings and the general requirement that their decisions are publicly explained.

[16] The courts recognise and apply the law of the land in Fiji as in other common law jurisdictions. They apply the law because that is their function at common law. The common law provides a basic rule of recognition of the laws of the land. The common law also supplies the courts with the ultimate rule of recognition for acceptance of a written constitution.

[17] A rule that courts will recognise a written constitution is a silent rule rarely expressed. It becomes visible when a process of coup or revolution purports to establish a new legal order by, for example, overturning one constitution seeking to create a new one. Such action may be unlawful, as the Court of Appeal held in *Republic of Fiji v Prasad.*[1]

[18] But when extra-curial and unconstitutional acts result in the establishment of a new constitution which purports to replace the old, the question arises — what can and should courts, which existed under the old constitution and are continued in the same or substantially the same form under the new, do when it comes to the new constitution?

[19] The role of the Court in determining whether to recognise or not recognise a new post-coup constitution is perhaps the most fundamental decision the Court can make. Although it is a judicial decision, it is one which has political consequences. In truth, it is a decision which requires the Court to say — can we declare that as a matter of common law we recognise the new constitution and will proceed on the basis that the new constitution is the supreme law of the land? Such recognition establishes what might be called a 'reset' of the legal framework in which the court operates.

[20] Such a decision is not lightly to be taken. Too low a threshold for recognition of a purported new constitution may leave the rule of law vulnerable to repeated unlawful action against lawful governments. Under the common law of Fiji, as helpfully discussed by the Court

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1 *Republic of Fiji v Prasad* [2001] FJCA 2.

of Appeal in *Prasad*, the decision to recognise a purported new constitution requires the Court to consider a number of factors as an evaluative exercise. They include matters such as:

(a) the established effective operation of government under the new constitution;

(b) the extent to which the new constitution and laws made under it are obeyed in civil society;

(c) the duration of the constitution at the time of the Court's decision-making;

(d) the conduct of popular elections under the constitution;

(e) the extent to which people have organised their affairs on the basis that the constitution and the laws made under it are binding and effective;

(f) the risk of administrative, legal and civil disorder if the constitution is not recognised.

A key factor is whether the new constitution has been broadly accepted (or at least acquiesced in) and applied.

[21] As will be apparent from the discussion later in this Opinion, we also regard other factors as relevant to recognition. They include:

(a) the internal consistency of the constitution with the democratic values asserted in its Preamble;

(b) the extent to which the constitution protects fundamental rights and freedoms under international conventions to which the State is a party;

(c) the extent to which the constitution can be reviewed and amended by the people and/or their elected representatives.

[22] When a court says that a post-coup constitution is not legally effective, it will ordinarily recognise the continuing binding character of the old constitution. In doing that, it applies the

rule of recognition, which is not to be found within either of the constitutions but is external to them.

**The judicial oath**

[23] Each one of us, "as a judicial officer within the courts of Fiji", has sworn an oath (or affirmation) that:

> I will be faithful and bear true allegiance to the Republic of Fiji, and that I will obey, observe, uphold and maintain the Constitution of the Republic of Fiji and all other laws of Fiji; and I solemnly and sincerely promise that I will defend the rule of law and the rights of the people, and will do justice to all persons without fear, favour or prejudice, in accordance with the Constitution of the Republic of Fiji and the law.

[24] From time to time during the hearing, counsel seeking to maintain that the amendment provisions of the 2013 Constitution are controlling, reminded us of this oath, suggesting, expressly or by implication, that it precluded either a conclusion that the 1997 Constitution is still valid or allowing for any departure from the strictness of the language of ss 159 and 160.[2]

[25] We do not see the situation in quite that way. In the oaths we swore, "the Constitution of the Republic of Fiji" is not just a piece of paper to which literal adherence is required. Rather, and particularly in the context of the full expression, "the Constitution of the Republic of Fiji and all other laws of Fiji", the oath requires us to maintain the 2013 Constitution in accordance with the laws of Fiji. So, we must act in the manner required by, amongst other things, the common law. This requires us to assess the legal effectiveness of the 2013 Constitution in accordance with the approach required by the rule of recognition. This extends to how we interpret (remedially if necessary) ss 159 and 160. The approach we are adopting is in accordance with that obligation.

**The nature of our advisory jurisdiction and the legal effect of our Opinion**

[26] Advisory jurisdictions along the lines of that conferred on us by s 91(5) and s 98(3)(c) are not uncommon. Thus, a broadly similar jurisdiction was provided for in s 123 of the 1997

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[2] Such arguments are not uncommon in cases of this sort. We note in passing that in *Prasad*, judges appointed under the 1997 Constitution were invited to rule that it had been effectively abrogated. They did not see their appointments under that Constitution and the oaths they had sworn as precluding them from adjudicating on the case. As it happened, they concluded that the 1997 Constitution was still in effect.

Constitution. As well, the final courts of Canada,[3] India[4] and Papua New Guinea[5] have jurisdictions of the same general character. In all instances, the empowering provisions use (or used in the case of the 1997 Constitution) language that is at least broadly similar to that in ss 91(5) and 98(3)(c) in that they provide for a 'question' to be put to the court and the court answering with an 'opinion'.

[27] This language invites questions as to the effect of an Opinion, in particular whether it is binding.

[28] The Opinion is binding. This is because the jurisdiction conferred on this Court by s 98(3)(c) is:

> to hear and determine constitutional questions referred under section 91(5).

[29] The use of the word 'determine' means that our answers to the questions that have been put to us are determinative. In other words, our answers to the questions are conclusive as to the law. Further, our Opinion, as a 'decision' is, by reason of s 98(6), binding on all of the courts of the State.[6]

## PART 2: THE CONTEXT

### A short account of Fiji's constitutional history

*Preliminary remarks*

[30] Much that is readily accessible has been published on Fiji's constitutional history. By way of examples only:

(a) Fiji's constitutional arrangements from colonial times up until the mid-1990s, along with the associated tensions, are well reviewed in the 1996 report of the

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3 Section 53, *Supreme Court of Canada Act 1985*.
4 Article 143, Constitution of India Act.
5 Section 19, Constitution of Papua New Guinea.
6 *President of the Republic Islands v Kubuabola (Misc No 1 of 1999)* [1999] FJSC 8, in discussing the effect to be given to an Opinion given under s 123 of the 1997 Constitution, this Court observed, "The opinion of the Supreme Court pronounced in response to a reference by the President is necessarily authoritative as the true interpretation of the law and binding on the President, the Government, the Parliament, the Courts, the Bose Levu Vakaturaga, and on the people of Fiji generally." This conclusion was reached despite the 1997 Constitution not expressly providing that such an Opinion was determinative.

Constitution Review Commission (consisting of Sir Paul Reeves, Tomasi Vakatora, and Brij Lal) ("the Reeves Commission"), *The Fiji Islands – Towards a United Future*.[7]

(b) The turbulent events of 2000 and 2001 are discussed at length in the 1 March 2001 judgment of the Court of Appeal in *Prasad,* the 11 July 2001 judgment of Scott J in *Yabaki v The President of Republic of Fiji*[8] and the 14 February 2003 judgment of the Court of Appeal dismissing as moot an appeal against the judgment of Scott J.[9]

(c) The similarly turbulent events of 2006 and what followed until 2009 are analysed in detail in the 9 April 2009 judgment of the Court of Appeal in *Qarase v Bainimarama*.[10]

Against that background, we can discuss the constitutional history of Fiji from colonial times until now with reasonable brevity.

*The Deed of Cession*

[31] On 10 October 1874, Ratu Seru Epenisa Cakobau and 12 other high ranking chiefs executed a deed transferring sovereignty of the Fiji Islands to Queen Victoria who, in turn promised to protect Fijian rights, particularly as to land ownership and custom. As discussed, this brought the English common law to Fiji, but allowed it to develop to reflect Fijian conditions, so that it became the common law of Fiji. It is the common law of Fiji, which stretches back in an unbroken line to Cession, that the Court applies in this Opinion.

*Colonial period*

[32] Fiji was a colony of the United Kingdom from 1874 until 1970. In November 1879 the Chiefs of Rotuma ceded Rotuma to Queen Victoria from which point it became part of the Colony of Fiji.

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7 Sir Paul Reeves, Tomasi Vakatora, and Brij Lal*, The Fiji Islands – Towards a United Future*: *Report of the Fiji Constitution Review Commission.* Parliamentary paper no 34 of 1996, Parliament of Fiji.

8 *Yabaki v The President of Republic of Fiji* [2001] FJHC 116.

9 *Yabaki v The President of Republic of Fiji* [2003] FJCA 3.

10 *Qarase v Bainimarama* [2009] FJCA 9.

[33] Fiji was administered by a Governor who chaired a Legislative Council comprising the Chief Justice and Members of the Executive Council, official members and unofficial members nominated by the Governor. Written laws were promulgated in Ordinances passed by the Legislative Council and matters of minor detail in Proclamations or Regulations prepared by the Governor with the advice of the Executive Council and laid before the Legislative Council.

[34] At the outset, the Acts of the Parliament of New South Wales, so far as applicable to the circumstances of Fiji, were temporarily adopted as its laws.[11] However, in the Ordinance creating the Supreme Court of Fiji (now the High Court), it was provided that the law of England was to be taken, wherever no other provision had been made by the local law, to be applied in a manner suitable to the circumstances of the Colony.[12] The law of England plainly included the common law.

[35] Between 1879 and 1916, large numbers of people from India travelled to Fiji to work as indentured labourers on sugar cane plantations. As time went by, an increasingly significant proportion of the population were either born in India or had parents or remoter ancestors who had come from India. In the result, the population of Fiji came to be substantially made up of two largely distinct ethnic groups, iTaukei (indigenous) Fijians and Indo-Fijians.[13] Indeed, by the latter part of the colonial period, there were more Indo-Fijians than iTaukei.

[36] In 1965, a Fiji Constitutional Conference was held in London. A Constitution was conferred on Fiji by the Fiji (Constitution) Order 1966, which came into effect on 23 December 1966. It made provision for a majority of elected members in the Legislative Council. The Legislative Council was to consist of not more than four official and 36 elected members. A number of seats were allocated to Fijian, Indian and 'general' members elected on three communal rolls. A further nine members were elected under a system of cross-voting by people of all races voting together. Two Fijians were elected by the Great Council of Chiefs.

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11 Bruce McPherson, *The Reception of English Law Abroad* (2007, Supreme Court of Queensland Library) at p 297.

12 See ss 22 and 24 of the *High Court Act 1875* (formerly the Supreme Court Ordinance).

13 Other ethnic groups include Rotumans (of Polynesian descent, living mainly on the island of Rotuma) and Banabans, of Micronesian descent.

[37] Following discussions in 1969, the Chief Minister, the Hon Ratu Sir Kamisese Mara KBE, and the Leader of the Opposition, the Hon SM Koya, announced that inter-party discussions had led to an agreement that Fiji should proceed to Dominion status.

[38] In early 1970, the British Minister of State for Foreign and Commonwealth Affairs conducted a consultative process in Fiji and produced a report that was adopted by the Legislative Council and provided something of an agenda for a constitutional conference later that year. Representatives of the two major political parties (one largely made up of iTaukei and the other of Indo-Fijians) attended the conference. In the end, a consensus was reached that reflected accommodations as to the status of iTaukei, particularly in relation to political participation and land. This consensus was given effect to by the Fiji Independence Order 1970 which included the Constitution of Fiji (the "1970 Constitution").

*The 1970 Constitution*

[39] Clause 5(5) of Fiji Independence Order provided

> It is hereby declared, for the avoidance of doubt, that, save as otherwise provided either expressly or by necessary implication, nothing in this Order shall be construed as affecting the continued operation of any existing law.

So, the common law of Fiji was continued.

[40] Under the 1970 Constitution, Fiji became a constitutional monarchy, with Queen Elizabeth II as the head of State. She was represented in Fiji by a Governor-General. There was a bicameral legislature consisting of a Senate and House of Representatives. The House of Representatives had 52 members, all of whom were elected on communal rolls. Twenty-two were elected from iTaukei constituencies, 22 from Indo-Fijian constituencies and eight from a general constituency (representing voters who were neither iTaukei nor Indo-Fijians). The Senate had 22 members, all of whom were appointed by the Governor-General, eight on the advice of the Great Council of Chiefs, seven on the advice of the Prime Minister, six on the advice of the Leader of the Opposition and one on the advice of the Council of Rotuma.

[41] Section 67 of the Constitution provided for its amendment, with different procedures and majorities required depending on the provision to be amended. The minimum requirement under s 67(3) was two-thirds support in both the House of Representatives and Senate. There

were more stringent provisions in relation to the amendment of some provisions, three-quarters majorities in both Houses for some and, for others, support of six of the eight Senators appointed on the advice of the Great Council of Chiefs. The majorities in the House and Senate were to be calculated on the basis of all members.

[42] That was the Constitution which remained in place, and under which elections were held, until 1987 when an Interim Military Government assumed power in Fiji.

*1970 – 1987*

[43] There was a political crisis in 1977 when an Indo-Fijian-dominated political party narrowly won the first of two general elections held in that year. It did not assume office, however, because the President dissolved Parliament and called on the ruling party to form an interim government until a further election could be held. The second election later in the same year produced different results.

[44] In April 1987, a coalition grouping won the General Election. The new cabinet was headed by Dr Timoci Bavadra, as Prime Minster. Although Dr Bavadra was iTaukei, a majority of his Cabinet were Indo-Fijian. There followed two military coups, one on 14 May 1987 and the second on 25 September 1987. These were led by Lieutenant-Colonel Sitiveni Rabuka.

[45] Following the first coup, the Governor-General declared a state of emergency, dissolved the House of Representatives and declared the office of Prime Minster to be vacant. He also set up a commission led by Sir John Falvey to review the 1970 Constitution.

[46] Dr Bavadra issued proceedings against the Attorney-General challenging, amongst other things, the dissolution of Parliament and his removal as Prime Minister and seeking orders to the effect that the Governor-General had no residual powers to amend the Constitution or to legislate. The Attorney-General applied to strike the proceedings out. This resulted in a judgment delivered by Rooney J on 14 August 1987 in which some of Dr Bavadra's claims were struck out, but most were left for determination following trial. The judgment did not engage in any detail with the substantive merits of the proceedings.[14]

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[14] *Bavadra v Attorney-General* [1987] SPLR 95.

[47] Had this case gone to trial, the Court would have been required to determine whether the 1970 Constitution should be recognised as still in effect. But, as it happened, both this litigation and the constitutional review process led by Sir John Falvey were interrupted by the second coup.

[48] Decree No 8 of the Interim Military Government, which was formed in the aftermath of the coup, proclaimed that from 7 October 1987 Fiji was a Republic. It foreshadowed the establishment of a new Constitution, whereby:

> the will of the people may be truly set forth and their hopes, aspirations and goals be achieved and thereby enshrined.

The new Constitution would also "reconfirm" that:

> Fiji is a democratic society in which all peoples may, to the full extent of their capacity play some part in the institution and national life and thereby develop and maintain due deference and respect for each other and the rule of law.

That language pointed unmistakeably to popular sovereignty as the continuing source of the authority of the new Constitution.

[49] On 5 December 1987, the Military Government issued Decree No. 25 which dissolved the Fiji Military Government and the Executive Council. It appointed Ratu Sir Penaia Kanatabatu Ganilau, as the first President and Commander in Chief of the Republic of Fiji. Until a Parliament of Fiji was elected in accordance with a constitution yet to be adopted, he would:

> (i) have the power to appoint the Prime Minister by decree;
>
> (ii) have the power to make laws for the peace, order and good government of Fiji by decree, acting in accordance with the advice of the Prime Minister and the Cabinet;
>
> (iii) exercise the executive authority of Fiji which is hereby vested in him.

The decree also provided that:

> save as otherwise provided, that executive authority may be exercised in accordance with the advice of the Cabinet or by any Minister authorised by the Cabinet.

[50] A Draft Constitution was prepared by the Interim Government and publicised in September 1988 for public information and comment. The Interim Government established a

Fiji Constitution Inquiry and Advisory Committee which had a number of functions set out in a Decree. They included scrutiny and consideration of the extent to which the Draft Constitution met the needs of the people of Fiji having regard to the failure of the 1970 Constitution. The Committee was also to facilitate debate throughout Fiji on the terms of the Draft Constitution and to invite and receive to the extent practicable, representations from the people of Fiji as to the provisions of the Draft Constitution and to determine the degree of acceptability of the provisions among them. The Committee was to report to Cabinet.

[51] Public hearings were conducted by the Committee, which received written and oral submissions from individuals and sectors of Fijian civil society. The Committee furnished its report on 30 August 1989 to the President of the Republic. It was considered by the Cabinet and then submitted to the Great Council of Chiefs.

*The 1990 Constitution*

[52] In 1990, a new Constitution (the "1990 Constitution") was proclaimed by the Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990. It provided for a President and a bicameral legislature consisting of:

(a) a House of Representatives of 70 members, elected on communal rolls (with 37 elected by iTaukei voters, 27 by Indo-Fijians, five by general electors and one by Rotumans); and

(b) a Senate of 34 members appointed by the President, 24 of whom were appointed on the advice of the Great Council of Chiefs, one on the advice of the Council of Rotuman and the other nine on the President's own deliberations.

The Prime Minister was required to be iTaukei.

[53] The 1990 Constitution provided that it could be amended under procedures that varied depending on the nature of the amendments. For some amendments, a majority in each House was sufficient. For others, the requirement was a two-thirds majority in each House, supplemented in some instances with an additional requirement for support by a three-quarters majority of the iTaukei members of the Senate. The super-majorities were calculated by reference to all members of the House in question. Additionally, amendments relating to

constituencies could only be effected after a Commission of Inquiry to be appointed by the President had reported following the first General Election held under the 1990 Constitution.

[54] Section 164 (in Chapter XIV) provided for extensive immunities from civil or criminal liability for those who had participated in the 1987 coups. And s 164(5) declared "[t]his section shall not be reviewed or amended by Parliament."

[55] The Constitution was to be reviewed, initially after no more than seven years and subsequently, every 10 years (s 161). Existing laws were to be continued, but subject to "such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution…".[15] As can be seen, the common law which Fiji had inherited at the time of cession continued in effect through the 1970 and 1990 Constitutions.

*The 1997 Constitution*

[56] The Reeves Commission was appointed to conduct the review required by s 161 of the 1990 Constitution. It produced the report, already mentioned. This report followed extensive consultation and research, both in Fiji and overseas.

[57] The constitution it proposed was, with some amendments, approved unanimously by both Houses of Parliament and the Great Council of Chiefs and was thus adopted as the 1997 Constitution.

[58] The Preamble to it commences:

> We, the People of the Fiji Islands … with God as our Witness, give ourselves this Constitution.

This shows that the authority of the 1997 Constitution was intended to be underpinned by the initial and continuing assent of the people of Fiji, that is by popular sovereignty.

[59] Chapter 1 of the Constitution declared the Republic of the Fiji Islands to be "a sovereign democratic state" and the Constitution to be "the supreme law of the State".

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[15] Section 8 of the Decree establishing the 1990 Constitution.

[60] Section 3, relating to the interpretation of provisions of the Constitution, included a requirement that regard must be had to the context in which the Constitution was drafted and to the intention that constitutional interpretation take into account social and cultural developments, especially in the understanding of the content and promotion of particular human rights.

[61] Chapter 2 was entitled 'Compact' and set out principles upon which the conduct of government was to be based. These included respect for the rights of all individuals, communities and groups; the preservation of ownership of Fijian land according to custom; the right of Fijian and Rotuman people to govern through their separate administrative systems; freedom of religion and political choice; effective equality of access to opportunities, amenities or services; and any community differences to be negotiated in good faith by Government with the paramountcy of Fijian interests as a protective principle. These were the principles required to be considered in the interpretation of the Constitution or a law made under it where relevant.

[62] Other features of the 1997 Constitution were that it:

(a) Set out a Bill of Rights binding the legislative, executive and judicial branches of government and all persons performing the functions of any public office.

(b) Vested the legislative power of the State in a parliament consisting of the President, the House of Representatives and the Senate.

(c) Established the House of Representatives as consisting of 71 members.

(d) Created four separate electoral rolls for Fijians, Indians, Rotumans, and voters registered outside these groups. Twenty-five members of the House were to be elected by voters from all communities registered on an open electoral roll. Twenty three were to be elected under the Fijian roll, 19 under the Indian roll, one under the Rotuman roll and three under the roll of voters registered otherwise than as Fijian, Indians or Rotumans.

(e) Created a Senate with 32 members; 14 appointed by the President on the advice of the Bose Levu Vakaturaga (Great Council of Chiefs), 9 appointed by the

President on the advice of the Prime Minister, 8 appointed by the President on the advice of the Leader of the Opposition, and 1 appointed by the President on the advice of the Council of Rotuma.

(f) Conferred an advisory jurisdiction on the Supreme Court as to the effect of a provision in the Constitution.[16]

(g) Provided for amendments to the Constitution by way of Parliamentary processes that required two-thirds majorities in both Houses on the second and third readings of an amendment bill, a gap of at least 60 days between the second and third readings with the third reading not to take place before the relevant standing committee of the House had reported on the Bill,[17] with additional requirements for certain types of amendment.[18]

[63] As to immunities, the Reeves Commission had commented:

> Section 164 of the 1990 Constitution grants criminal and civil immunity to the persons who led or participated in the two military coups ... in 1987. Subsection 164(5) provides that the section shall not be reviewed or amended by Parliament. In view of this provision, we have not reviewed the contents of, and make no proposals for changes to, section 164.

Consistently with this, s 195(2) of the 1997 Constitution preserved the unamendable s 164 immunities by providing that Chapter XIV of the 1990 Constitution "continues in force in accordance with its tenor."

*The events of 1999 - 2000*

[64] In May 1999, the first general election was held under the 1997 Constitution. The Fijian Labour Party emerged from this election as the largest party, and its leader, Mr Mahendra Chaudhry, became Prime Minister.

[65] On 19 May 2000, George Speight and a group of armed men occupied Parliament and held Prime Minister Chaudhry, most Cabinet members and other members of Parliament as

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16 Section 123.
17 Section 191.
18 Section 192.

hostages. On the same day, the President, Ratu Sir Kamisese Mara, declared a state of emergency. Eight days later, on 27 May, the President prorogued Parliament for six months.

[66] On 29 May 2000, Commodore Frank Bainimarama, the Commander of the Republic of Fiji Military Forces, purported to abrogate the 1997 Constitution and establish an interim military government which he headed. With the purported abrogation of the 1997 Constitution, Ratu Sir Kamisese Mara declined to stay on as President and Commodore Bainimarama assumed executive authority as "Commander and Head of the Interim Military Government of Fiji".

[67] On 14 July 2000, the hostages, including Mr Chaudhry, were released. However, Mr Chaudhry was not restored to office. Instead, an Interim Civilian Government was established, which Commodore Bainimarama headed.

[68] In November 2000, there was a mutiny involving members of the armed services which was eventually put down, albeit with some loss of life.

[69] The purported abrogation of the 1997 Constitution was challenged in litigation commenced by Mr Chandrika Prasad. On 15 November 2000, Gates J (sitting in the High Court) upheld this challenge, concluding that the purported abrogation of the 1997 Constitution was of no effect.[19] This meant that Ratu Sir Kamisese Mara was still the President, and Parliament was still in being. Gates J directed that Parliament should be summoned by the President as soon as practicable.

[70] An appeal against this judgment was dismissed by the Court of Appeal on 1 March 2001: see *Republic of Fiji v Prasad.*[20] In its judgment, the Court recognised the 1997 Constitution as still subsisting and declined to recognise the decree that had purported to abrogate it. We discuss this judgment in more detail below.

[71] By this stage, Ratu Sir Kamisese Mara had resigned, and a new President had assumed office. There was at least partial compliance with the decision of the Court of Appeal, but Parliament was not recalled, and Mr Chaudhry was not restored to office as Prime Minister.

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19 *Prasad v Republic of Fiji* [2000] FJHC 121.
20 *Republic of Fiji v Prasad* [2001] FJCA 2.

Instead, the President appointed Mr Laisini Qarase as interim Prime Minister, Parliament was dissolved and writs for a General Election were issued.

[72] This resulted in further litigation, initiated in this instance by Reverend Akuila Yabaki. On 11 July 2001, Scott J issued a judgment in which he held that the President had lawfully dismissed Prime Minister Chaudhry and lawfully appointed Mr Qarase.[21]

[73] Scott J's judgment cleared the way for the General Election to be held on 25 August 2001. At that election, Mr Qarase's party won the largest number of seats, and he was sworn in as Prime Minister. Mr Qarase did not, however, comply with the power-sharing arrangements set out in the 1997 Constitution for a multi-party Cabinet. Mr Chaudhry, as Leader of the Fiji Labour Party, issued proceedings to enforce the Constitution. This led to the decision of this Court in *Qarase v Chaudhry* upholding the constitutional requirement.[22]

[74] On 14 February 2003, the Court of Appeal dismissed the appeal against Scott J's judgment.[23] This was on the basis that the proceedings had been rendered moot by the 2001 General Election.

*The 2006 coup*

[75] Mr Qarase's party was again successful in the next General Election (held in May 2006), and he was re-appointed as Prime Minister of Fiji by the President.

[76] On 5 December 2006 there was another military coup led by Commodore Bainimarama. He assumed office as President (displacing the duly appointed President, Ratu Josefa Iloilo), appointed Dr Rona Senilagakali as Prime Minister and, on his advice, dissolved Parliament. In early January 2007, the Commodore handed executive authority to Ratu Josefa Iloilo, who then appointed him as Prime Minister and ratified the actions that he had earlier taken. From this point until the judgment of the Court of Appeal in the *Qarase* case which we are about to discuss, Fiji was governed on the basis that the President had executive authority and the power to legislate by promulgation. There was, however, no explicit abrogation of the 1997 Constitution.

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21 *Yabaki v The President of Republic of Fiji* [2001] FJHC 116.
22 *Qarase v Chaudhry* [2003] FJSC 1.
23 *Yabaki v The President of Republic of Fiji* [2003] FJCA 3.

[77] Unlike the coups of 1987 and 2000, the 2006 coup was not driven by the desire to advance iTaukei interests. Instead, it was something of a push back against the influence of traditional iTaukei leadership and aspirations.

*The judgment of the Court of Appeal in Qarase v Bainimarama*

[78] Mr Qarase issued proceedings challenging the steps taken by Commodore Bainimarama and the President in late 2006 and early 2007. He was unsuccessful in the High Court[24] but on 9 April 2009, the Court of Appeal upheld his appeal: see *Qarase v Bainimarama*.[25]

[79] In *Qarase v Bainimarama*, the Court of Appeal was required to address the legality of actions taken by the President, in particular dismissing Mr Qarase, in the purported exercise of prerogative powers. No attempt was made to justify those events on the basis that the 1997 Constitution was no longer in effect. Instead, it was argued that what had happened was lawful on the basis of either:

(a) what were claimed to be prerogative powers of the President going beyond those provided in the 1997 Constitution; or

(b) the doctrine of necessity.

[80] These arguments were rejected. The Court of Appeal concluded that the steps taken by Commodore Bainimarama and the President in December 2006 and January 2007 were invalid, that the 1997 Constitution was still in place and that the situation could be regularised by the President appointing a caretaker Prime Minister to advise a dissolution of Parliament and the issue of writs for a general election.

*The response of the Fijian Government*

[81] This judgment was not accepted by the Government. Instead, on 10 April 2009, i.e. the day after the judgment, the President issued:

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24 *Qarase v Bainimarama* [2008] FJHC 241
25 *Qarase v Bainimarama* [2009] FJCA 9.

(a) the Fiji Constitution Amendment Act 1997 Revocation Decree 2009 which purported to abrogate the 1997 Constitution; and

(b) the Revocation of Judicial Appointments Decree 2009 which purported to dissolve the Fijian courts and dismissed the Chief Justice, Justices of Appeal, puisne Judges, Master of the High Court, Chief Magistrate and Magistrates.

[82] A few days later, the court system was restored by the Administration of Justice Decree 2009 (promulgated on 16 April 2009). This was later amended by a Decree promulgated on 12 May 2009.

[83] The Limitation of Liability for Prescribed Political Events Decree 2010 conferred extensive immunities in relation to the events that occurred from May 2000 until April 2009, save in respect of members of the armed forces, police or corrections service who participated in the takeover of Parliament in May 2000 and the mutiny in November that year.

[84] We observe that, despite the considerable care and effort that the Reeves Commission took in taking advice about, consulting on and formulating the 1997 Constitution, and its unanimous approval in both Houses of Parliament and by the Great Council of Chiefs, it was not adhered to and did not produce political stability in Fiji, as the foregoing account amply demonstrates.

*The 2013 Constitution*

[85] In March 2012 the Bainimarama Government announced that a new constitution would be developed by a constitutional commission and debated and approved by a constituent assembly. A decree was promulgated setting up the Commission. A separate decree, the Fiji Constitutional Process (Constituent Assembly and Adoption of Constitution) Decree 2012, set out the procedure that was proposed for the development and adoption of the new Constitution. Section 3 of this Decree provided that the purpose of the Decree was to adopt a Constitution for Fiji that, amongst other things, "results from full, inclusive and fair participation of Fijians". The Commission, headed by Dr Yash Ghai was appointed and commenced work in July 2012. It produced a report and draft constitution in December 2012. The Government, however, rejected the Yash Ghai Commission draft and, as well, did not set up a constituent assembly. Instead, the Government produced its own draft constitution in March 2013. After a

comparatively brief consultation process of around a month, the present Constitution of the Republic of Fiji (the 2013 Constitution) was adopted by Decree on 6 September 2013.

*Subsequent events*

[86] The government of Fiji was led by Mr Bainimarama between 2013 and 2022, as it had been from December 2006.

[87] Three elections were conducted under the 2013 Constitution. Mr Bainimarama's party, FijiFirst, won the 2014 election comfortably and the 2018 election narrowly and Mr Bainimarama retained office as Prime Minister. Following the 2022 General Election, which FijiFirst narrowly lost, there was a peaceful transfer of power to a new government led by Mr Rabuka. We discuss these elections in more detail later in this Opinion.

*The impetus for the Reference – a failed attempt to amend the 2013 Constitution*

[88] In March of this year, the Government tabled a Constitution Amendment Bill which sought to amend the amendment provisions in the 2013 Constitution. The Bill proposed deleting s 159(2)(c) (which seeks to prevent amendment of the amendment provisions), reducing the supermajority for members of Parliament in s 160(2)(b) from three-quarters to two-thirds and eliminating the requirement for a referendum by repealing s 160(3)–(6). This Bill failed narrowly to secure a three-quarters majority in the House on its second reading and was thus defeated.

**A closer look at the 2013 Constitution**

[89] We now turn to discuss in a little more detail the provisions of the 2013 Constitution that are particularly material to what follows. These provisions can be grouped under six headings:

(a) provisions that state, or from which can be inferred, values underlying the 2013 Constitution;

(b) rights of political participation;

(c) the relevance of international law;

(d) the judiciary and courts;

(e) immunity; and

(f) amendment.

*Provisions about values underlying the 2013 Constitution*

[90] This is the Preamble to the 2013 Constitution:

> WE, THE PEOPLE OF FIJI,
>
> > RECOGNISING the indigenous people or the *iTaukei*, their ownership of *iTaukei* lands, their unique culture, customs, traditions and language;
> >
> > RECOGNISING the indigenous people or the Rotuman from the island of Rotuma, their ownership of Rotuman lands, their unique culture, customs, traditions and language;
> >
> > RECOGNISING the descendants of the indentured labourers from British India and the Pacific Islands, their culture, customs, traditions and language; and
> >
> > RECOGNISING the descendants of the settlers and immigrants to Fiji, their culture, customs, traditions and language,
>
> DECLARE that we are all Fijians united by common and equal citizenry;
>
> RECOGNISE the Constitution as the supreme law of our country that provides the framework for the conduct of Government and all Fijians;
>
> COMMIT ourselves to the recognition and protection of human rights, and respect for human dignity;
>
> DECLARE our commitment to justice, national sovereignty and security, social and economic wellbeing, and safeguarding our environment,
>
> HEREBY ESTABLISH THIS CONSTITUTION FOR THE REPUBLIC OF FIJI.

[91] Section 1 of the 2013 Constitution provides:

> The Republic of Fiji is a sovereign democratic State founded on the values of—
>
> (a) common and equal citizenry and national unity;
>
> (b) respect for human rights, freedom and the rule of law;
>
> (c) an independent, impartial, competent and accessible system of justice;

> (d) equality for all and care for the less fortunate based on the values inherent in this section and in the Bill of Rights contained in Chapter 2;
>
> (e) human dignity, respect for the individual, personal integrity and responsibility, civic involvement and mutual support;
>
> (f) good governance, including the limitation and separation of powers;
>
> (g) transparency and accountability; and
>
> (h) a prudent, efficient and sustainable relationship with nature.

[92] Section 3(1) provides:

> Any person interpreting or applying this Constitution must promote the spirit, purpose and objects of this Constitution as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom.

[93] The fact that the Preamble begins with the words "We the people of Fiji" and the reference in s 3(1) to "values that underlie a democratic society" show that democracy is a value that is fundamental to the 2013 Constitution. So too are equality (s 1(a) and (d)), the rule of law (s 1(b)) and an independent court system (s 1(c)). In the present context, we see the values of "civic involvement" (s 1(e)) and "good governance" (s 1(f)) as having particular significance.

*Recognition of rights of political participation*

[94] Chapter 3 of the Constitution contains a 'Bill of Rights'.

[95] Section 7(1)(a), which appears in Chapter 3, provides:

> In addition to complying with section 3, when interpreting and applying this Chapter, a court, tribunal or other authority—
>
> (a) must promote the values that underlie a democratic society based on human dignity, equality and freedom;

[96] Section 23(1) provides that every citizen has the freedom to make political choices. The section then goes on to set out a number of more specific political rights, among which is the right of citizens who have reached 18 to participate in referendums under the Constitution.

*The relevance of international law*

[97] Section 7(1)(b) provides that when interpreting or applying Chapter 3, the Court:

> (b) may, if relevant, consider international law, applicable to the protection of the rights and freedoms in this Chapter.

[98] Ms Vuki for the Human Rights and Anti-Discrimination Commission raised the right to self-determination. Of particular relevance in the period when former colonies were seeking independence, the right has been recognised as a part of customary international law which all countries are expected to accept.[26] In addition, the right is included in Article 1.1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), to each of which Fiji has been a party since 2018. Under Article 1.3 of the ICCPR, States must respect the right and promote its realisation.

[99] While there is continuing debate about its content, the right is commonly said to have both external and internal dimensions. We are concerned with its internal dimension, that is, the internal right of self-determination owed by a State to its people. This dimension of the right has been described as a norm that:[27]

> …promotes an ongoing condition of freedom and equality among and within peoples in relation to the institutions of government under which they live, a condition today substantially defined by precepts of democracy and cultural pluralism.

And:[28]

> …entitles individuals and groups to meaningful participation in episodic procedures leading to the creation of or change in the governing institutional order.

[100] As can be seen from these extracts, the right aligns with the values expressed in the 2013 Constitution, particularly the foundational values referred to in section 1 — for example, human dignity, equality, civic involvement, and good governance.

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26 See, for example, International Court of Justice *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* Advisory Opinion of 25 February 2019, at [144]–[162], albeit in a different context.

27 S Janes Anaya "A Contemporary Definition of the International Norm of Self-Determination" (1993) 3 Transnat'l L & Contemp. Probs. 131 at 156.

28 Ibid at 157.

[101] As will become apparent, we see both the process that preceded the adoption of the 2013 Constitution and its very restrictive amendment provisions as being in tension with the right of self-determination.

*Provisions as to the judiciary and courts*

[102] Section 97(1) and (2) provide:

> (1) The judicial power and authority of the State is vested in the Supreme Court, the Court of Appeal, the High Court, the Magistrates Court, and in such other courts or tribunals as are created by law.
>
> (2) The courts and all judicial officers are independent of the legislative and executive branches of Government and are subject only to this Constitution and the law, which they must apply without fear, favour or prejudice.

[103] As we noted at the outset, there are ouster clauses, which are relevant to our ability to answer all of the questions which the Cabinet has put to us. Section 173(4) and (5) provide:

> (4) Notwithstanding anything contained in this Constitution, no court or tribunal (including any court or tribunal established or continued in existence by the Constitution) shall have the jurisdiction to accept, hear, determine, or in any other way entertain, or to grant any order, relief or remedy, in any proceeding of any nature whatsoever which seeks or purports to challenge or question—
>
> (a) the validity or legality of any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution;
>
> (b) the constitutionality of any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution;
>
> ...
>
> (5) Notwithstanding anything contained in this Constitution, despite the repeal of the Administration of Justice Decree 2009, subsections (3), (4), (5), (6) and (7) of section 5 of the Administration of Justice Decree 2009 shall continue to apply to any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution.

[104] As noted earlier, the apparent effect of s 173(4) is that the legal validity of the Decree by which the 2013 Constitution was promulgated may not be challenged in the courts. This is

also the apparent effect of s 173(5), which continues s 5(5) of the Administration of Justice Decree 2009 (as amended).

[105] As we have already explained, these provisions do not affect the authority and duty of the Court to determine whether it recognises the 2013 Constitution as the legally effective constitution of Fiji. Nor do they affect the question whether the Court can and should qualify that recognition in relation to the amendment provisions.[29]

*Immunities*

[106] The 2013 Constitution confirms immunities from criminal and civil liabilities provided for under both the 1990 Constitution and the Limitation of Liability for Prescribed Political Events Decree 2010. It also confers further immunities in relation to events that occurred between 5 December 2006, and the sitting of the first Parliament elected under the 2013 Constitution. Section 158 provides that such immunities "shall not be reviewed, amended, altered, repealed or revoked".

*Amendment provisions*

[107] The amendment provisions appear in Chapter 11. The first section in that chapter, s 159, is in these terms:

> (1) Subject to subsection (2), this Constitution, or any provision of this Constitution, may be amended in accordance with the procedure prescribed in this Chapter, and may not be amended in any other way.
>
> (2) No amendment to this Constitution may ever—
>
> *(a)* repeal any provision in Chapter 10 of this Constitution or in Part D of Chapter 12 of this Constitution;
>
> *(b)* infringe or diminish the effect of any provision in Chapter 10 of this Constitution or in Part D of Chapter 12 of this Constitution; or
>
> *(c)* repeal, infringe or diminish the effect of this Chapter.

Chapter 10 of the Constitution contains the immunities already referred to. Part D of Chapter 12 contains s 173(4) and (5) to which we have already referred.

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[29] As explained later, at [237] – [239]

[108] To the same effect as s 159(1) is s 2(5):

> This Constitution cannot be abrogated or suspended by any person, and may only be amended in accordance with the procedures prescribed in Chapter 11.

[109] The "prescribed procedure" referred to in s 159(1) and alluded to in s 2(5) is provided for in s 160:[30]

> (1) A Bill for the amendment of this Constitution must be expressed as a Bill for an Act to amend this Constitution.
>
> (2) A Bill for the amendment of this Constitution must be passed by Parliament in accordance with the following procedure—
>
> *(a)* the Bill is read 3 times in Parliament;
>
> *(b)* at the second and third readings, it is supported by the votes of at least three-quarters of the members of Parliament;
>
> *(c)* an interval of at least 30 days elapses between the second and third readings and each of those readings is preceded by full opportunity for debate; and
>
> *(d)* the third reading of the Bill in Parliament does not take place until after the relevant committee of Parliament has reported on the Bill to Parliament.
>
> (3) If a Bill for the amendment of this Constitution is passed by Parliament in accordance with subsection (2), then the Speaker shall notify the President accordingly, who shall then refer the Bill to the Electoral Commission, for the Electoral Commission to conduct a referendum for all registered voters in Fiji to vote on the Bill.
>
> (4) The referendum for the purposes of subsection (3) shall be conducted by the Electoral Commission in such manner as prescribed by written law.
>
> (5) The Electoral Commission shall, immediately after the referendum, notify the President of the outcome and shall publish the outcome of the referendum in the media.
>
> (6) If the outcome of the referendum is that three-quarters of the total number of the registered voters have voted in favour of the Bill, then the President must assent to the Bill, which shall come into force on the date of the Presidential assent or on such other date as prescribed in the Bill.
>
> (7) In this section, the use of the word "*amend*" or "*amendment*" is intended to be understood broadly, so that the section applies to any proposal to repeal, replace, revise, or alter any provision of this Constitution.

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[30] This is stipulated in s 2(5) and s 159(1) of the 2013 Constitution.

[110] In relation to the Parliamentary procedure for amendment, the argument before us focussed mainly on the 75% majority requirement in s 160(2)(b). However, we should note that s 160(2) also sets out procedural requirements for constitutional amendment bills in Parliament, requirements which are now reflected in Order 93 of Parliament's Standing Orders. In particular, the Bill must be identified as one that will amend the 2013 Constitution; there must be a gap of at least 30 days between the second and third readings of the Bill; before each of those readings there must be an opportunity for full debate; and before the third reading, there must be a report from the relevant Parliamentary Committee. Special legislative processes of this type for constitutional amendments are common in democratic countries.

[111] Section 161 provided that the President, with sanction of this Court, could make such amendments to the 2013 Constitution;

> ... necessary to give full effect to the provisions of this Constitution or to rectify any inconsistency or errors in any provision of this Constitution.

The power to make such amendments expired on 31 December 2013.

## PART 3: THE QUESTIONS THE COURT IS INVITED TO ANSWER

[112] The questions identified in the Amended Reference are:

(a) Are the provisions of Chapter 11 and Part D of Chapter 12 of the Constitution of the Republic of Fiji binding on the people of Fiji, the Parliament of Fiji and the Supreme Court with the effect that none of these provisions can ever be amended, regardless of the will of Parliament or of the people voting in a referendum?

(b) May the provisions referred to in [a] be amended following enactment of a Bill in Parliament to do so, in terms thought fit by Parliament?

(c) Is approval of any amendment proposed in accordance with [b] effective only if approved by the people of Fiji at a referendum?

(d) Is any special majority, and if so in what proportion, necessary for an enactment under [b] or approval by a referendum under [c]?

(e) Is the 1997 Constitution still valid and applicable?

[113] As explained earlier, these questions require us to address three issues (or sets of issues):

(a) Should the 2013 Constitution be recognised by this Court as the legally effective Constitution of the Republic of Fiji which has superseded the unlawfully abrogated 1997 Constitution?

(b) Assuming the Court recognises the 2013 Constitution as legally effective, can, and if so should, it qualify that recognition by a remedial interpretation of ss 159 and 160?

(c) In light of the Court's discussion of the first two issues, what are its answers to the questions posed?

## PART 4: SHOULD THE COURT ANSWER THE QUESTIONS?

[114] We heard arguments addressed to whether we should answer the questions.

[115] As will be apparent, we are of the view that we must address, as a preliminary jurisdictional issue, whether the 2013 Constitution should be recognised by this Court as the legally effective Constitution of the Republic of Fiji which has superseded the unlawfully abrogated 1997 Constitution. The way in which this issue is resolved will necessarily provide the answer to question (e).

[116] We think it plain that questions (a)–(d) concern the application or interpretation of the 2013 Constitution and are thus within the jurisdiction conferred by ss 91(5) and 98(3)(c) of the 2013 Constitution and we propose to answer them in light of the extent and terms of our recognition of the Constitution as legally effective.

## PART 5: SHOULD THE 2013 CONSTITUTION BE RECOGNISED BY THIS COURT AS THE LEGALLY EFFECTIVE CONSTITUTION OF THE REPUBLIC OF FIJI WHICH HAS SUPERSEDED THE UNLAWFULLY ABROGATED 1997 CONSTITUTION?

### Preliminary comments

[117] The Court must decide whether the 2013 Constitution is the legally effective constitution of Fiji today. As we have already explained, it is only if the Court recognises the 2013 Constitution as legally effective that we have jurisdiction under that Constitution to consider and answer the questions posed by the Cabinet for the Court's opinion.

[118] If the Court concludes that the 2013 Constitution is legally effective it follows that the 1997 Constitution has been superseded.

[119] Our recognition that the 2013 Constitution is legally effective would not mean that we think the 1997 Constitution was lawfully abrogated. It was not. But events have moved on and we must consider the recognition of the 2013 Constitution in light of those events and the practical operation of that Constitution today.

[120] We emphasise that a recognition decision in favour of the 2013 Constitution would not require this Court to recognise its draconian restrictions on amendment. Those restrictions, if effective, would appear to preclude or drastically limit the ability of the people of Fiji and their elected representatives to determine their own constitutional future in a democratic way. Those restrictions would entrench the democratic deficit resulting from the way in which the Constitution was developed and promulgated.

**The relevant authorities**

[121] Courts in many jurisdictions around the world have had to deal in various ways with the practical consequences of revolutions and coups and unconstitutional actions by governments disregarding democratic constitutions.

[122] In responding to such cases, courts have sometimes given effect to new governmental or legal orders by recognising them as legally effective on the ground that they become integrated into the life of the country and have been broadly accepted by the people. But even if they refuse to recognise new governmental or legal orders in this way, the courts may recognise that particular measures they have taken should be given effect on the ground of necessity. Necessity may arise in relation to the routine business of the state undertaken in the name of the unlawful government, such as recognising marriages, implementing commercial transactions and undertaking ordinary criminal prosecutions. Accordingly, the available responses by the courts to usurper governments and their actions lie on a continuum, from full recognition at one end to recognition of some of their actions at the other.

[123] The techniques used by the courts in these diverse circumstances have included processes of recognition or non-recognition which require them to consider whether the necessity of a challenged measure warrants its recognition as legally effective. In some cases,

necessity did not justify the actions in question. But in other cases, courts have held that a new legal order has been established which, with the passage of time, has demonstrated its efficacy by reference to its acceptance or acquiescence by the people. Many laws may have been made and administrative actions undertaken under a new legal order which indicate that it works. In such a case it is likely that people affected by such laws and administrative actions have organised their affairs in reliance upon their validity. Hence it might be said that efficacy has generated a situation where refusal to recognise the new legal order would lead to great inconvenience.

[124] Each of the cases in which issues of this kind have arisen in the past in other jurisdictions turns to some extent on its own particular circumstances. The variety of circumstances can be demonstrated by reference to some examples. A number of such cases are discussed in a helpful article in the *Cornell International Law Journal* in 1994 from which much of what follows in this section of the Opinion is taken.[31]

*Dosso — Pakistan 1958*

[125] On 7 October 1958, President Iskandar Mirzu proclaimed that the Constitution of Pakistan was abrogated, and the national and provincial assemblies dissolved. The Commander in Chief of the Army was appointed as Chief Martial Law Administrator. All existing laws were to remain in force.

[126] In *State v Dosso*, the Supreme Court of Pakistan considered the legality of the coup and held that having been successful it satisfied the test of efficacy and had become "a basic law creating fact".[32]

[127] It is notable that the Court's decision came only 20 days after the coup and the judgment did not refer to any evidence to support the finding of efficacy.[33] The Court purported to apply a common law approach relying upon the doctrines of Hans Kelsen relating to revolutionary legality. More generally, the judgment set a very low threshold for recognition of extra-constitutional action. Such a low threshold would not be adopted by this Court.

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31 Tayyab Mahmud, 'Jurisprudence of Successful Treason: Coup d'Etat and Common Law' (1994) 27 *Cornell International Law Journal* 49–140.

32 *State v Dosso* PLD 1958 SC 533.

33 Mahmud, above n 31, at 56.

*Matovu — Uganda 1966*

[128] In February 1966, the Prime Minister of Uganda abrogated the 1962 Constitution and suspended the National Assembly. The Assembly was reconvened in April 1966 to approve a new constitution which established an Executive Presidency and a Unitary State. This development was opposed, and martial law was declared in May 1966.

[129] Challenges to the new regime were dealt with in *Uganda v Matovu*.[34] In its judgment, the High Court of Uganda rejected an argument that newly sworn judicial oaths under the new constitution prevented it from inquiring into its validity.[35] It likewise rejected the contention that the making of the constitution was a political act with which the Court could not engage. However, in reliance on *Dosso*, it held that the 1966 Constitution was part of a new legal order that had been effective from its inception in April 1966. In doing so, it relied on evidence as to efficacy and acceptance by the people. The ourt also referred to the recognition of Uganda's government by all foreign countries with whom Uganda had dealings.

*Madzimbamuto v Lardner-Burke — Rhodesia*

[130] In 1965, Rhodesia was a self-governing colony of the United Kingdom operating under a 1961 Constitution. The white minority government unilaterally declared independence and purported to promulgate a new constitution. Mr Madzimbamuto had been detained under a State of Emergency proclaimed and regulations made under the new Constitution. Mr Madzimbamuto's wife challenged his detention in the Rhodesian courts

[131] The General Division of the High Court of Rhodesia accepted the doctrine of revolutionary legality derived from Kelsen and approved *Dosso*.[36] However, it rejected the government's contention its effective control of the country meant that it was the de jure government of Rhodesia. This was because Rhodesia was not a sovereign independent state. Nevertheless, the Court upheld the government's actions essentially on the basis of necessity.

[132] On appeal, the five judges sitting on the Appellate Division of the High Court expressed a variety of views as to the legal effectiveness of the actions of the Government: either

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34 *Uganda v Matovu* [1966] EALR 514

35 The Court thought it plain that, "it is an essential part of the duty of the judges of this court to **satisfy** themselves that the Constitution of Uganda is established according to law and that it is legally valid".

36 *Madzimbamuto v Lardner-Burke* [1966] RLR 715.

according them "internal de jure status", treating them as valid if they could also have been carried out under the 1961 Constitution; or recognising them as effective under the doctrine of necessity providing they did not defeat rights under the 1961 Constitution.[37]

[133] Dissatisfied with the decision of the Appellate Division of the High Court, Mrs Madzimbamuto appealed successfully to the Privy Council.[38]

[134] A critical feature of the case was that the Rhodesian Government's declaration of independence had not been accepted by the United Kingdom and this non-acceptance had been manifested by, amongst other things, the enactment of the *Southern Rhodesia Act 1965* and the promulgation under that Act of the Southern Rhodesia Constitution Order 1965. On the interpretation of the Act and Order adopted by the majority in the Privy Council, the proclamation of the State of Emergency was "void and of no effect" as were the regulations that were challenged. On this approach, a conclusion that the regulations were invalid was inevitable. What are more material for present purposes are more general remarks made by Lord Reid and Lord Pearce.

[135] In giving judgment for the majority, Lord Reid said:[39]

> With regard to the question whether the usurping government can now be regarded as a lawful government much was said about *de facto* and *de jure* governments. Those are conceptions of international law and in their Lordships' view they are quite inappropriate in dealing with the legal position of a usurper within the territory of which he has acquired control … [W]hen a question arises as to the status of a new regime in a foreign country the Court must ascertain the view of Her Majesty's Government and act on it as correct. In practice the Government has regard to certain rules but those are not rules of law. And it happens not infrequently that the Government recognises a usurper as the *de facto* Government of a territory while continuing to recognise the ousted Sovereign as the *de jure* Government. But the position is quite different where a Court sitting in a particular territory has to determine the status of a new regime which has usurped power and acquired control of that territory. It must decide.

[136] Lord Reid was not attracted to *de jure/de facto* terminology. But his remarks did not involve a rejection of the underlying idea that the actions of the usurping government may achieve juridical validity. He acknowledged:[40]

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37 *Madzimbamuto v Lardner-Burke* [1960] 2 SA 284.
38 *Madzimbamuto v Lardner-Burke* [1968] 3 All E.R. 561.
39 *Madzimbamuto* at pp 573–74.
40 *Madzimbamuto* at p 574.

> It is a historical fact that in many countries — and indeed in many countries which are or have been under British sovereignty — there are now regimes which are universally recognised as lawful but which derive their origins from revolutions or *coups de'Etat*. The law must take account of that fact. So there may be a question how or at what stage the new regime became lawful.

He referred to both *Dosso* and *Matovu*, indicating that he agreed with the results arrived at if not necessarily the reasoning.[41]

[137] Lord Reid also referred to the doctrine of necessity:[42]

> The argument is that, when a usurper is in control of a territory, loyal subjects of the lawful Sovereign who reside in that territory should recognise, obey and give effect to commands of the usurper in so far as that is necessary in order to preserve law and order and the fabric of civilised society. Under pressure of necessity, the lawful Sovereign and his forces may be justified in taking action which infringes the ordinary rights of his subjects but that is a different matter. Here the question is whether or how far Her Majesty's subjects and, in particular, Her Majesty's judges in Southern Rhodesia are entitled to recognise or give effect to laws or executive acts or decisions made by the unlawful regime at present in control of Southern Rhodesia.

[138] He saw no basis for resorting to that doctrine. This was primarily on the basis of his interpretation of the United Kingdom legislative response to the Rhodesian Government's declaration of independence.

[139] Lord Pearce, who took a different view of the United Kingdom legislation, disagreed with the generality of Lord Reid's rejection of the efficacy of laws and actions of the Rhodesian regime under the new constitution. He observed:[43]

> I accept the existence of the principle that acts done by those actually in control without lawful validity may be recognised as valid or acted upon by the Courts, with certain limitations, namely:
>
> (a) so far as they are directed to and reasonably required for ordinary orderly running of a State; and
>
> (b) so far as they do not impair the rights of citizens under the lawful … Constitution, and
>
> (c) so far as they are not intended to and do not in fact directly help the usurpation …

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41 *Madzimbamuto* at p 574.
42 *Madzimbamuto* at p 575.
43 *Madzimbamuto* at p 579.

[140] Lord Pearce took a reasonably narrow approach to the three limitations he had identified concluding that the State of Emergency and the regulations under which Mr Madzimbamuto had been detained were legally effective with the result that his detention was lawful.

[141] The judgment illustrates the placement of recognition rules in the common law. It also illustrates the flexibility of their application according to particular circumstances. Their application might result in the actions of a usurping government receiving full legal recognition which is what happened in Uganda and Pakistan. They might also result in a more limited recognition as Lord Pearce's comments illustrate.

*Jilani v Government of Pakistan*

[142] In March 1969 the President of Pakistan resigned and handed over administration of the country to the military. Martial law was proclaimed, and the 1962 Constitution was purportedly abrogated. Following further events which included the military not accepting the result of a general election in 1970 and a civil war that concluded with the breakup of Pakistan and establishment of Bangladesh, the military handed over power to a civilian government. This was made up of those who had won the 1970 election, but who took office as a martial law regime.

[143] In issue in *Jilani* was the validity of the actions taken after the 1969 coup. The outcome of the case is not critical for our purposes. What is significant is that the Supreme Court of Pakistan overruled *Dosso*, holding that the ruling of efficacy had been premature. [44] Kelsen's doctrine was said to be descriptive rather than normative. The validity of an extra-constitutional regime was held to flow from habitual obedience by the citizens.[45] The role of the courts in such a case was described thus:[46]

> [H]owever effective the Government of a usurper may be, it does not within the National Legal Order acquire legitimacy unless the Courts recognize the Government as de jure.

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44 *Jilani v Government of Pakistan* PLD 1972 SC 139.
45 See, for example, the Chief Justice at p 180.
46 *Jilani* per Yaqoob Ali J at p 229.

*Liasi – Cyprus 1975*

[144] A coup d'etat led by Greek military officers in Cyprus took place in 1974. The elected President was forced to flee, and a usurping government took over. It lasted only eight days. During that time some public officials were removed from their jobs and others appointed to replace them. In *Liasi v Attorney General* some of those who had lost their jobs challenged their dismissals.[47] The Court held that the usurpers actions should not be recognised. Their regime had not attracted even tacit popular acceptance.[48]

*Valabhaji v Controller of Taxes– Seychelles 1981*

[145] On becoming independent in 1976, Seychelles had adopted a constitution providing for parliamentary government. A coup d'etat in June 1977 deposed the constitutional government. A proclamation by the coup leaders suspended the Constitution and vested the power to make laws by decree in the ex-Prime Minister who the coup makers installed as President. A further Proclamation revoked the constitution and replaced it with one that eliminated the parliament and transferred unfettered legislative powers to the President. A further constitution was formulated by this regime in 1979. Elections under this constitution in 1979 and 1981 were on a one-party basis.

[146] In the *Valabhaji* case the Seychelles Court of Appeal had to examine the validity of the usurpation because it was connected to the validity of amended assessments of income tax.[49] The appellant argued that the Income Tax Decree of 1978 under which the assessments had been issued and all legislation enacted in Seychelles in 1977 and 1978 by the President were unconstitutional. The Attorney-General relied upon *Dosso* and *Matovu*.

[147] The Court found that the decrees under which the assessments were issued were valid and enforceable. This was because the extra-constitutional regime had acquired legitimacy and validity. Hogan P observed:[50]

> Throughout the decisions and the relevant literature there is an acceptance of the need to preserve the fabric of society … If the State and society are to survive, a gulf cannot be permitted to open between what the executive arm and the judiciary believe to be the legal basis of authority in the country: the 'grund' norm as it has been called.

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47 *Liasi v Attorney General* (1975) CLR 558 (Cyprus)
48 As well, its actions had been repudiated by the lawful government after it resumed power.
49 *Valabhaji v Controller of Taxes Civil Appeal No 11 of 1980* (Seychelles Court of Appeal, 11 August 1981).
50 *Valabhaji* at pp 10–11.

He also commented:[51]

> Whether the term chosen is success or submission, consent or acceptance, efficacy or obedience there appears to be a consensus or at least a strong preponderance of opinion that once the new regime is firmly or irrevocably in control, it becomes a lawful or legitimate government and entitled to the authority that goes with that status.

[148] In that case, the Court was assessing the validity of the new regime after four years during which it was said the new revolutionary regime had enjoyed unchallenged authority and maintained stable and effective government in the Seychelles with little or no interruption in the ordinary life of its citizens. Hogan P took the view that when a regime is firmly established and accepted as legitimate, its legitimation is extended back to cover legislation enacted by the regime from the inception of its control.[52]

*Mitchell — Grenada 1986*

[149] *Mitchell* arose out of events in Grenada between 1979 and 1983. These commenced with the 1979 overthrow of the constitutional government of Grenada and the establishment of a People's Revolutionary Government. The People's Revolutionary Government ran Grenada up until 19 October 1983 when it was itself overthrown. In issue in the case was the effect to be given to People's Laws promulgated by the People's Revolutionary Government.

[150] The relevant People's Laws were held to be effective in the High Court. There was then an appeal to the Grenada Court of Appeal. In giving his judgment on this appeal, Haynes P identified four conditions for recognition of the validity of a revolutionary regime:[53]

> (a) a successful revolution firmly establishing the government administratively with no other rival;
>
> (b) effective rule in that the people largely behaved in conformity with and obeying the mandates of the government;
>
> (c) conformity, acceptance and support and not mere submission to coercion or fear;
>
> (d) it must not appear that the regime was oppressive and undemocratic.

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51 *Valabhaji* at p 13.
52 *Valabhaji* at p 14.
53 *Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 35.

He found that the People's Revolutionary Government met the first two conditions but there was insufficient proof of popular acceptance and support.

*Prasad*

[151] As already explained, the *Prasad* judgment of the Court of Appeal dealt with whether the 1997 Constitution had been effectively abrogated in the aftermath of the George Speight coup. It also addressed the application of the doctrine of necessity in relation to the declaration of a state of emergency on 19 May 2000 and the extent to which the courts should recognise the actions taken by the governments led by Commodore Bainimarama.

[152] The declaration of state of emergency on 19 May 2000 was not in accordance with s 187 of the 1997 Constitution. This required the President to act on the advice of the Cabinet when declaring a state of emergency and the President had not done so. But, as the Court of Appeal pointed out:[54]

> Clearly, the President could not act under this section if almost all the members of the Cabinet were held hostages by the kidnappers. The imperative necessity for prompt action arose out of exceptional circumstances not provided for in the Constitution. These circumstances called for immediate action. There was no other course reasonably available to the President at the time the hostage crisis began. Later on, as the hostages continued to be confined and anarchy was developing, [Commodore Bainimarama] quite properly contemplated executive action by way of martial law to restore and/or maintain law and order. This was appropriate, so long as the extraordinary and frightening situation lasted. The crisis did not end until all the hostages had been released and some calm restored.

[153] After discussing the approach taken in the High Court to necessity, the Court of Appeal continued:[55]

> The doctrine of necessity would have authorised [Commodore Bainimarama] to have taken all necessary steps, whether authorised by the text of the 1997 Constitution or not, to have restored law and order, to have secured the release of the hostages, and then, when the emergency had abated, to have reverted to the Constitution. Had [he] chosen this path, his actions could have been validated by the doctrine of necessity. Instead, he chose a different path, that of constitutional abrogation. The doctrine of necessity does not authorise permanent changes to a written constitution, let alone its complete abrogation.

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54 *Prasad* at p 27.
55 *Prasad* at p 28.

[154] As to the effectiveness of the abrogation of the 1997 Constitution,[56]

> We consider that there was a purported overthrow of the Constitution and its replacement by the establishment, first, of military rule and, secondly, of the Interim Civilian Government.
>
> …
>
> In this case, there was a purported change in the legal order when the Commander decided to abrogate rather than suspend the Constitution on 29 May; he reinforced this change when, he later chose to instal the Interim Civilian Government which has purported to govern ever since. The Interim Civilian Government has clearly shown that it wishes to implement a new or significantly altered constitution by setting up a body to seek submissions on constitutional 'reform'.

[155] The Court then reviewed a number of authorities including *Madzimbamuto* and *Mitchell v Director of Public Prosecutions*. From the latter case, it cited the passage from the judgment of Haynes P set out at [150]. It noted:[57]

> It may be that Haynes P went too far in his condition (d) (i.e. it must not appear that the regime was oppressive and undemocratic) because … the condition goes to the legitimacy of a regime and not its legality.

[156] It also observed:[58]

> There have been cases where Courts have upheld the success of a usurpation on the grounds of control by the new regime and acceptance of control by the populace, despite the regime having some unattractive characteristics.

But it saw the other three conditions as prerequisites to a usurping regime achieving an effective change of legal order and thus de jure status.

[157] The Court noted that the case was unique as:[59]

> … it is the Interim Civilian Government itself that seeks a ruling on the legality of its regime, only some 7 months after it was established.

[158] It then stated what was required to establish that the old legal order has been replaced by a new legal order:[60]

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56 *Prasad* at p 29.
57 *Prasad* at p 38.
58 *Prasad* at p 39.
59 *Prasad* at p 41.
60 *Prasad* at p 41–43.

(a) The burden of proof of efficacy lies on the de facto government seeking to establish that it is firmly in control of the country with the agreement (tacit or express) of the population as a whole.

(b) Such proof must be to a high civil standard because of the importance and seriousness of the claim.

(c) The overthrow of the Constitution must be successful in the sense that the de facto government is established administratively and there is no rival government.

(d) In considering whether a rival government exists, the enquiry is not limited to a rival wishing to eliminate the de facto government by force of arms. It is relevant in this case that the elected government is willing to resume power, should the Constitution be affirmed.

(e) The people must be proved to be behaving in conformity with the dictates of the de facto government. In this context, it is relevant to note that a de facto government (as occurred here) frequently re-affirms many of the laws of the previous constitutional government (e.g. criminal, commercial and family laws) so that the population would notice little difference in many aspects of daily life between the two regimes. It is usually electoral rights and personal freedoms that are targeted. As one of the deponents said, civil servants such as tax and land titles officials worked normally throughout the coup and its aftermath. Their functions were established and needed no ministerial direction. We derive little proof of acquiescence from facts of that nature.

(f) Such conformity and obedience to the new regime by the populace as can be proved by the de facto government must stem from popular acceptance and support as distinct from tacit submission to coercion or fear of force.

(g) The length of time in which the de facto government has been in control is relevant. Obviously, the longer the time, the greater the likelihood of acceptance.

(h) Elections are powerful evidence of efficacy. It follows that a regime where the people have no elected representatives in government and no right to vote is less likely to establish acquiescence.

(i) Efficacy is to be assessed at the time of the hearing by the Court making the decision.

[159] In light of the willingness of the former government to resume office, legal challenges to the abrogation of the 1997 Constitution and the limited and contested evidence of public acceptance of the new regime, the Court held that:[61]

> … the Interim Civilian Government has not discharged the burden of proving acquiescence and has accordingly failed to establish that it is the legal government of Fiji. The purported abrogation of the 1997 Constitution has not been justified, and it remains in place.

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61 *Prasad* at p 47.

[160] As to the validity of "the decrees, executive acts and decisions of the administrations since 19 May 2000" the Court adopted the remarks of Lord Pearce in *Madzimbamuto* which are set out at [139], above.

**Has a new legal order supplanted the 1997 Constitution**

*The criteria*

[161] We apply the approach taken by the Court of Appeal in *Prasad*. The criteria for recognition discussed in *Prasad* come down to:

(a) efficacy;

(b) popular acceptance and support;

(c) length of time in which the government has been in control; and

(d) elections.

We propose to discuss the facts by reference to those criteria along with other factors that were not directly in issue in *Prasad.*

*Efficacy*

[162] By 2009, the 1997 Constitution was, in a practical sense, in abeyance. Governments headed by Commodore Bainimarama had been in effective control of the country since the end of 2006. There was not complete acceptance of this, as Mr Qarase's litigation showed. But, apart from that litigation, there appears to have been no tangible opposition.

[163] There is no evidence indicative of resistance to the regime in the aftermath of the *Qarase* judgment on 9 April 2009. Nor, by this stage was there a rival government waiting in the wings. Rather, life in Fiji continued to operate under the administration of the Bainimarama-led Government and so continued up until the peaceful transfer of power following the 2022 election.

[164] The legal order of which the Bainimarama-led governments were a part included the 2013 Constitution that has provided the framework for the way in which Fiji has been governed for nearly 12 years.

[165] We see no scope for doubt that the efficacy has been established.

*Popular acceptance and support*

[166] A government which has effective control of a country will usually be in a position to command conformity from, and the obedience of, the population. But in *Prasad*, the Court was looking for more than "tacit submission to coercion or fear of force". Rather what must be established is "popular acceptance and support".

[167] A usurping government that has not sought a popular mandate in the form of democratic elections may find it difficult to establish that it had popular acceptance and support. On the other hand, once it is accepted that a usurping government that has seized power following a coup or revolution may satisfy the criteria for legal recognition, it follows that popular acceptance and support is not necessarily dependent on there having been opportunity for the people to have manifested their assent in a fully democratic way.

[168] The way in which Fiji was governed under Mr Bainimarama has been the subject of public comment and criticism. We have some affidavit evidence of thuggish behaviour that was intended to deter opposition, albeit that this evidence relates primarily to events in the aftermath of 9 April 2009. As well, news media were subject to constraints[62] and the government and society operated on a basis that was not conducive to political opposition to his government.[63]

[169] The evidence leaves us in doubt whether such popular acceptance of, and support for, the Bainimarama-led government in the years immediately following the *Qarase* decision was sufficient to warrant recognition of it as the legal government of Fiji. However, as the Court

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62 Under the Media Industry Development Decree 2010. See also, Ricardo Morris, *Watching Our Words; Perceptions of Self-Censorship and Media Freemon Fiji*, 2015-2016 Reuters Institute for the Study of Journalism, University of Oxford.

63 See for instance, Mosmi Bhim, *Stifled Aspirations: the 2014 Election under restrictive laws* (2015) 21 *Pacific Journalism* 108.

in *Prasad* accepted, a lengthy period in control and the holding of elections may support findings of acceptance and acquiescence.

*Length of time in which the government has been in control*

[170] Bainimarama-led governments were in control of Fiji from December 2006 until the 2022 election. The subsequent Rabuka-led government which came into power following the 2022 election has since then run Fiji within the framework created by the 2013 Constitution. This means that nearly 19 years have elapsed since Fiji was last run in accordance with the 1997 Constitution and that for the last 12 years public life in Fiji has been conducted within the legal framework provided by the 2013 Constitution.

[171] Over those 12 years, the 2013 Constitution has been fundamental to the conduct of public affairs in Fiji. Leaving aside elections, which we will discuss separately, it has functioned in a way that one would expect of a constitution operating as the supreme law of a country:

(a) Between 2014 and now, Parliaments elected under the 2013 Constitution have enacted more than 400 statutes.

(b) Parliament has passed legislation to give effect to the Constitution. By way of example only, the *Revised Edition of the Laws (Consequential Amendments) Act 2016* amended numerous Acts to bring them into line with the 2013 Constitution.

(c) This Court has, in at least two cases, directly applied the 2013 Constitution and, in one other case indicated (albeit not following argument) that the 1997 Constitution has been abrogated.[64]

(d) Numerous public officials, including judges, have been appointed under the Constitution, have sworn to uphold it and have exercised powers under it.

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64 See, *Vatuvonu Seventh Day Adventist College v Attorney General* [2023] FJSC 42 and *In the matter of a reference by Cabinet for an opinion from the Supreme Court on matters concerning the interpretation and application of sections 105(2)(b), 114(2), 116(4) and 117(2) of the Constitution of the Republic of Fiji* [2024] FJSC 3. The indication that the 1997 Constitution has been abrogated came in *Balaggan v State* [2023] FJSC 3 at [16]–[17].

[172] Given the periods of time to which we have referred and what has happened, we see no escape from the conclusion that the Bainimarama-led government and its 2013 Constitution have attracted sufficient popular acceptance and support to justify the conclusion that a new legal order (which includes the 2013 Constitution) has been established.

*Elections*

[173] In the 2014 general election:

(a) Turnout was 84.6%;

(b) FijiFirst received 59.17% of the votes;

(c) The next highest polling party was SODELPA with 28.18%.

[174] SODELPA had campaigned on a policy of reinstating the 1997 Constitution. That FijiFirst achieved twice as much support as SODELPA might be thought to be something of an endorsement of the 2013 Constitution. As well, as Mr Moses pointed out in argument, in the absence of a requirement to vote, the very high turnout (over 84%) itself indicates public acceptance of the 2013 Constitution.

[175] The Multi-National Observer Group that monitored this election concluded:[65]

> The [Fiji Elections Office] and election workers were competent, professional and committed in performing their duties, sometimes under challenging circumstances. Despite compressed timeframes, a complex voting system and some restrictions in the electoral environment, the conditions were in place for Fijians to exercise their right to vote freely.
>
> While the [Multinational Observer Group] notes areas for improvement of Fiji's electoral process, it deems this a credible election. The [Multinational Observer Group] believes the election broadly represented the will of the Fijian voters. The [Multinational Observer Group] congratulates the people of Fiji on taking this important step in their return to democracy.

[176] We conclude that from this point at least, if not before, the Bainimarama-led government, now under the FijiFirst banner, along with the 2013 Constitution, had attracted

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[65] "2014 Fijian Elections" Final Report of the Multinational Observer Group at p 32 available at https://www.parliament.gov.fj/wp-content/uploads/2017/02/2014-General-Elections-Final-Report-of-the-Multinational- Observer-Group-1.pdf

sufficient support to be recognised as legal and effective. This conclusion is reinforced by what happened in the 2018 and 2022 general elections.

[177] In the 2018 general election:

(a) Turnout was 71.9%;

(b) FijiFirst received 50.02% of the votes;

(c) The next highest polling party was SODELPA with 39.85% of the votes.

SODELPA had campaigned on policies that included reinstating the 1997 Constitution.

[178] The Multi-National Observer Group that monitored this election concluded:[66]

> The 2018 process was transparent and credible overall and the outcome broadly represented the will of Fijian voters. A voter turnout of 72.5% attests to voter commitment.

[179] In the 2022 general election:

(a) Turnout was 68.30%

(b) FijiFirst received 42.55% of the votes. of the votes;

(c) The next highest polling party was Peoples Alliance with 35.82%% of the votes.

[180] The Multi-National Observer Group that monitored this election concluded:[67]

> The MOG observed a well-run general election process, without significant irregularities or impediments during pre-polling, postal voting or Election Day voting. The MOG assessed that Fijian voters were able to exercise their right to vote freely and the outcome the General Election broadly reflected their will. Voting took place in a calm, peaceful environment.

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66 The report is attached to the Joint Report of the Electoral Commission and the Supervisor of Elections on the 2018 General Election.

67 Multinational Observer Group 2022 Fiji Election, Final Report, March 2023 at p 5.

[181] All of this leaves no scope for doubt that the 2013 Constitution must be recognised as the lawful and effective constitution of Fiji.

*Other factors*

[182] There are other factors that may also be relevant. They are the negative consequences of failing to recognise a constitution that has formed the basis on which people have organised their lives or public life has been conducted over a lengthy period of time. To some extent, they are corollaries (in the sense of being the other side of the coin) to the criteria already discussed. But they emphasise the dangers of an abrupt overthrowing of legal understandings that have formed the basis on which society has been based for many years. These dangers include the uncertainties and disruption that is likely to result from uncertainty as to the legal effect of the actions of a government that was in power for so long.

## PART 6: ASSUMING THE COURT RECOGNISES THE 2013 CONSTITUTION AS LEGALLY EFFECTIVE, CAN, AND IF SO, SHOULD, IT QUALIFY THAT RECOGNITION BY A REMEDIAL INTERPRETATION OF SS 159 AND 160

### Overview of what follows

[183] The discussion that follows is organised under the following headings:

(a) What do ss 159 and 160 of the 2013 Constitution mean?

(b) The approach proposed by the State.

(c) Does recognition of the 2013 Constitution preclude non-recognition of the amendment provisions?

(d) Should we recognise the provisions that preclude amendment of the immunities?

(e) Should we recognise the amendment procedure provided by ss 159 and 160?

(f) What is the effect of ss 159 and160 when remedially interpreted?

(g) What about the ouster of jurisdiction provisions?

**What do ss 159 and 160 of the 2013 Constitution mean?**

*How should the super-majority requirements be calculated?*

[184] Two possible meanings were proffered. On one, the 75% majorities required are of all those entitled to vote. This would mean:

(a) All Members of Parliament, whether present in Parliament for the vote or not and whether voting or abstaining. This has the effect of treating absences and abstentions as 'no' votes. On the present numbers, this meaning would require 42 of 55 MPs voting in favour; and

(b) For the referendum, all registered voters, whether they vote or not.

The second proffered meaning treats the majorities as being of those MPs and registered voters *who actually voted*.

[185] While we agree that the second meaning is an arguable one, the language points more strongly to the first meaning. And in relation to the super-majority required in Parliament, it is the first meaning which accords with prior constitutional practice in Fiji. We also are inclined to the view that this meaning accords more closely with the underlying purpose of the requirements, which we think was to impose amendment procedures of such stringency as to preclude the practical possibility of amendment.

[186] As it turns out, the result we arrive at is the same whatever approach to meaning is adopted. For this reason, we do not seek to determine this issue in a definitive way.

*How restrictive is s 159(2)(c)?*

[187] Mr Moses SC, counsel for the Fiji Law Society argued that this subsection should be read as permitting amendment of s 160 providing that the amendment is not so extensive as to diminish its 'effect'. To put this in more concrete terms, the interpretation he favoured would permit amendment of the super-majorities from three-quarters to two-thirds on the basis that this would preserve the overall scheme of s 160 and merely vary the details.

[188] Even if right, this argument would still leave the postulated amendment of s 160 to be in accordance with the terms of s 160. But in any event, we do not regard this as a workable interpretation of s 159(2)(c).

**The approach proposed by the State**

[189] Mr Walker's argument for the State was that the 2013 Constitution can be amended by an ordinary Act of Parliament supported by a simple majority in the House. The argument proceeded on the basis that the amendment provisions are inconsistent with the foundational significance that the 2013 Constitution gives to democracy, equality and the rule of law and that this inconsistency can be resolved by a simple, if perhaps brutal, process of excision.

[190] The excision process he proposed may seem akin to what we call non-recognition. It is, however, differently premised. His proposed excisions rest on what he maintains are inconsistencies that are internal to the 2013 Constitution. Our approach to recognition and selective non-recognition derives from the common law as we have developed it to meet the circumstances of this case; albeit that we draw some assistance from the values that the 2013 Constitution espouses.

[191] Mr Walker's argument was primarily focussed on s 159(2)(c), which he said should be excised as inconsistent with the 2013 Constitution's values of democracy, equality and the rule of law.

[192] He maintained that because s 159(2)(c) purports to render s 160 unamendable, s 159(1) could not be construed as applying its amendment procedures to s 160 itself; that is, s 160 applies only to amendments of a kind not referred to in s 159(2). This remained the position even if s 159(2)(c) was excised as he maintained it should be. He said that in that event the amendment process in s 160 would obviously not apply to amendments to s 160 itself. The lacuna as to amendment of s 160 would then have to be filled by allowing it to be amended by a simple Act of Parliament.

[193] We disagree. If the bar on amendment of Chapter 11 imposed by s 159(2)(c) were to be lifted, one way or another as Mr Walker maintained it should be, s 160 would operate according to the terms of s 160(7) and cover amendment to itself.

[194] Section 160, properly construed, sets out a procedure for amendment to the Constitution which applies, by virtue of s 160(7), "to any proposal to repeal, replace, revise, or alter any provision of this Constitution". We read that subsection as imposing the amendment procedures set out in s 160 on all provisions of the Constitution which can be amended. If this Court were to determine that s 159(2)(c) should be excised, then s 160 becomes amendable and the procedures it prescribes would apply to s 160 itself, i.e., the amendment procedures could be used to amend the amendment requirements.

[195] To cover the possibility that we might not accept his s 159(2)(c) argument, Mr Walker had a fall-back position which assumed a wider-range of excisions which, if implemented, would take out all restrictions leaving the 2013 Constitution without amendment provisions, with the result that, as with all other laws, it could be amended by an ordinary Act of Parliament passed by a simple majority.

[196] The whole argument rested on the very doubtful proposition that the general invocations of democracy, equality and the rule of law in the 2013 Constitution create an inconsistency with very specific amendment provisions which can be resolved by simple excision of the latter. It is a proposition that, at least on its own logic, could have been rendered inapplicable by a simple provision in the 2013 Constitution giving the amendment provisions priority over any provisions to the contrary. As well, it produces a result (amendment by ordinary Act of Parliament) that cannot be reconciled with the purposes of the 2013 Constitution.

[197] For these reasons we prefer the common law approach which qualifies recognition of the amendment provisions.

**Does recognition of the 2013 Constitution preclude non-recognition of the amendment provisions?**

*An all or nothing approach?*

[198] Mr Moses contended strongly that recognition of a new legal order in the form of a new constitution is on an 'all or nothing' basis. This view was supported by counsel for some of the other intervenors (particularly for the Fiji Labour Party) and, to some extent, by Mr Butler. On this approach, recognition of the validity of the 2013 Constitution precludes withholding

recognition from particular provisions. The arguments emphasised that withholding recognition would involve the Court in a constitutional rewriting exercise that lies outside the judicial function.

[199] We must respect the limits of the judicial role which preclude a general merits review and rewriting of the 2013 Constitution. We accept that if the amendment procedures provide a workable mechanism for democratic change, any unsatisfactory elements of the 2013 Constitution could be resolved over time and in a democratic way, leaving no occasion for judicial involvement.

[200] But what if the amendment procedures do not provide a workable mechanism for democratic change? Do we have to treat them as effective?

*The importance of amendment provisions*

[201] Amendment processes are an important component of a workable constitution. In 2010, the European Commission for Democracy through Law (known as the Venice Commission) published a report on constitutional amendment.[68] The paper began by emphasising the importance of amendment procedures:

> 5. The question of constitutional amendment lies at the heart of constitutional theory and practice. Constitutionalism implies that the fundamental rules for the effective exercise of state power and the protection of individual human rights should be stable and predictable, and not subject to easy change. This is crucial to the legitimacy of the constitutional system. At the same time, even quite fundamental constitutional change is sometimes necessary in order to improve democratic governance or adjust to political, economical and social transformations. To the extent that a society is formed by its written constitution, the procedure for changing this document becomes in itself an issue of great importance. The amending power is not a legal technicality but a norm-set the details of which may heavily influence or determine fundamental political processes.
>
> 6. It is a fundamental feature of all written constitutions (unlike ordinary statutes) that they contain provisions for amending themselves. In almost all constitutions such change is more difficult than with ordinary legislation, and typically requires either a qualified parliamentary majority, multiple decisions, special time delays or a combination of such factors. Sometimes ratification by popular referendum is required, and in federal systems sometimes ratification by the entities.

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[68] European Commission for Democracy through Law (Venice Commission), 'Report on Constitutional Amendment adopted by the Venice Commission at its 81st Plenary Session', Document CDL-AD (2010)001e, 19 January 2010.

[202] The Commission went on to note the need to strike a balance between rigidity and flexibility in relation to amendment powers,[69] a point reiterated by several counsel in their submissions. Rigidity is required for predictability, to protect fundamental features of the constitution and for the protection of minorities; flexibility is required to accommodate changes that occur in social or other conditions, to improve protections or enhance democratic institutions, or simply to rectify provisions that have proved to be unworkable.[70]

[203] Ideally, the amendment process should allow the constitution to be changed in the public interest when, after careful consideration, change is seen as necessary and is supported by a sufficient consensus; but it should seek to prevent changes that are driven by self-interest or by partisan or short-term motivations.

[204] Two other points:

(a) The Venice Commission considered that having stronger procedures for constitutional amendment than for ordinary legislation was "an important principle of democratic constitutionalism", which fostered "political stability, legitimacy, efficiency and quality of decision-making and the protection of non-majority rights and interests".[71]

(b) The Commission considered that constitutions that were originally adopted by undemocratic regimes "should be open to democratic debate, reassessment and relatively flexible amendment".[72]

*Is it relevant that ss 159 and 160 were imposed undemocratically and restrict the possibilities of democratically driven change?*

[205] The 2013 Constitution contains provisions that, taken as a whole, would not be expected in a democratically developed constitution. In particular, it contains stringent amendment provisions that

(a) prevent amendment of some provisions (most relevantly, as to immunities); and

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69 Ibid at [8] and following

70 International Institute for Democracy and Legislative Assistance (IDEA) *Constitutional Amendment Procedures* (2nd ed, 2017) at pp 4–5

71 Report on Constitutional Amendment at [238].

72 Ibid at [247].

(b) restrict amendment of all other provisions so severely as to make such amendment extremely difficult and perhaps impossible.

These are manifestations of the 2013 Constitution's unhappy provenance: in a decree promulgated after only cursory public engagement by a government that had come to power unlawfully and was in the habit of acting autocratically.

[206] What has happened in relation to the amendment provisions in the 2013 Constitution may be part of a trend. An interesting recent article noted:[73]

> We find ... that constitutions created in the aftermath of a coup are particularly difficult to amend.

[207] We start from the point that there is no absolute requirement that provisions that severely restrict democratic amendment of the 2103 Constitution warrant the same level of unqualified recognition as if they were provisions of a constitution created by a democratic process.

*The relevance of the right of self-determination*

[208] It will be recalled that the right of self-determination is part of customary international law and that Article 1.1 of the ICCPR provides:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

As well, Article 1.3 provides:

> The States Parties to the present Covenant ... shall promote the realization of the right of self-determination ...

In addition, the internal right of self-determination is reflected in the values set out in the Constitution itself.

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[73] C Bjornskov and S Voig - Coups and Constitutional Change (2024) Public Choice published online 29 June 2025

[209] We have no hesitation in holding that the right to self-determination of the people of Fiji, as supported by these sources, includes the right to shape their own constitution as they see fit from time to time. A provision of their constitution which would make amendment an impossible dream is not consistent with that right.

*The role of remedial interpretation?*

[210] Remedial interpretation is a familiar concept particularly in the area of constitutional law and human rights legislation. For example, a statute which on its ordinary interpretation would exceed the constitutional power of the legislature which enacted it, may be read to conform with the law-making power. That may simply involve a choice, from competing available constructions, of that construction which is within power. If no such construction is available on ordinary principles of interpretation, then there may be a reading down of the statute to bring it within the power.

[211] This is sometimes referred to as a severance process, exemplified in Australia by provisions of Interpretation Acts, such as s 15A of the *Acts Interpretation Act 1901* (Cth), which provides that:

> Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

[212] Gageler J observed in *Tajjour v New South Wales*:[74]

> That a severance clause operates only as a rule of construction, … is no impediment to its application to read down a provision expressed in general words so as to have no application within an area in which legislative power is subject to a clear and constitutional limitation.

That kind of severance is not limited to a choice between available constructions but may take a law whose application exceeds legislative power and interpret its application sufficiently narrowly to bring it within power.

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[74] (2014) 254 CLR 508, [171] (footnote omitted).

[213] In Canada, reading down of a statute to bring it within constitutional power is an accepted interpretive technique. In *R v Appulonappa,*[75] the Court restricted the range of persons to whom an impugned provision was applicable in order to render that provision compatible with the Charter of Human Rights under the Canadian Constitution.

[214] In the setting of statutes challenged in constitutional litigation in the United States, a distinction has been drawn between a construction of a statute which is chosen from available constructions in order to ensure that the statute is within power and a remedial rewriting of the statute to bring it within power.[76]

[215] One comprehensive analysis of the avoidance of constitutional invalidity in the United States by reinterpretation or remedial interpretation explained the latter concept as follows:[77]

> Judges will consider remedial reinterpretation alongside other possible remedies, such as invalidating all or part of the statute's text, invalidating an application of the statute, or expanding the statute to fix unconstitutional discrimination. They will then choose which of these remedies to apply in the particular case. By contrast, if constitutional avoidance is treated only as a matter of statutory interpretation, then any possible avoidance reading must be rejected *before* the remedial options are considered. If the statute is constitutional, after all, then there is nothing to remedy in the first place. Treating avoidance as a remedy thus gives judges the flexibility to decide whether they want to reinterpret the statute or fix the constitutional violation in some other way.

[216] In *Ghaidan v Godin-Mendoza*[78] the House of Lords applied a remedial interpretation to a provision of the *Rent Act 1977* (UK). It extended its tenancy protections to the same sex spouse of a deceased tenant by its interpretation of the words 'surviving spouse' in the Act. This interpretation was made pursuant to s 3 of the *Human Rights Act 1968* (UK). The approach adopted by the Court was not limited to a choice from available constructions but a remedial interpretation of the provision to ensure that it accorded with the rights and freedoms protected by the *Human Rights Act 1968*.

[217] Finally, we note that this Court adopted a remedial interpretation in an earlier Reference involving interpretation of ss 105(2)(b), 114(2), 116(4) and 117(2) of the 2013 Constitution.[79] In that case, one of the sections which the Court was required to consider when giving its

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75 [2015] 3 SCR 754, [85].
76 Eric Fish, 'Constitutional Avoidance as Interpretation and as Remedy' (2016) 114 *Michigan Law Review* 1275.
77 Fish at p 1309.
78 [2004] 2 AC 557.
79 [2024] FJSC 20.

Opinion did not make literal sense. The Court considered that it should be given a meaning that was as consistent as possible with proportionality, which it identified as an important value in the 2013 Constitution.[80]

[218] These examples are cited to indicate that the concept of remedial interpretation is not foreign to the judicial function. The Court can give effect to qualified recognition of the 2013 Constitution by refusing recognition of s 159(2)(c) and recognise the majority requirements in s 160(2) and (6) subject to remedial interpretation of the super-majority requirements.

*Applying a remedial interpretation approach to ss 159 and 160*

[219] In applying the rule of recognition along with remedial interpretation, we take the view that any condition on its recognition of the 2013 Constitution should respect the current structure so far as possible, subject to reading it so that the people and their elected representatives have a realistic and workable mechanism in place to effect change to the Constitution and to repair the democratic deficit incurred in the way in which it came into being.

[220] We recognise the limits of our judicial role. But we also have an obligation to decide issues in proceedings that are properly placed before us, as this Reference is. We cannot responsibly decline to do so just because the issues are both unusual and difficult. Instead, we see ourselves as duty bound to determine them and to do so in accordance with the law, which in this case is the common law of Fiji.

[221] We can both recognise the limits of our judicial role and also discharge our duty by:

(a) limiting the scope for partial non-recognition of the provisions in this non-democratically imposed constitution to those which impose unworkable mechanisms for democratic change;

(b) assessing whether they provide a workable mechanism for democratic change by reference to the right of self-determination recognised by customary international law and in Article 1.1 of the ICCPR and to the foundational values

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80 At [86].

> set out in section 1 of the 2013 Constitution, including those of civic involvement (set out in s 1(e)) and of good governance (set out in s 1(f)).

[222] In doing so, we have to accept the obvious: that constitutions tend to be difficult to amend and sometimes contain provisions that are unamendable as a result of deliberate and rational choices. It follows that such factors do not in themselves breach Article 1.1 of the ICCPR.

**Should we recognise the provisions that preclude amendment of the immunities?**

[223] As will be apparent from our account of Fiji's constitutional history, unamendable immunities were features of the 1990 and 1997 Constitutions. They were amongst the non-negotiable requirements imposed by decree in the lead-up to the 2013 Constitution and, unsurprisingly therefore, are provided for in that Constitution.

[224] While no rationale for these provisions has been offered, we infer that it was threefold: first, to protect members of the then government from liability for any offences or civil wrongs associated with the events of 2000–2010; secondly, to ensure that a similar protection remains in place for those involved in earlier coups; and thirdly, to mitigate the risk of further coup attempts by those who might lose their current protections were the immunity provisions to be taken out of the 2013 Constitution by amendment.

[225] As Professor Richard Albert has noted, unamendable immunity provisions are found in a number of constitutions. As he put it:[81]

> Recognizing the need to put an end to the conflict—that is, to reconcile the previously disputing or fighting blocs— the framers of a constitution will entrench a provision absolving members of those factions of all prior wrongdoing, whether criminal or civil, and forever extinguishing claims against them. The most common manifestation of reconciliatory entrenchment is a constitutional clause granting blanket amnesty or immunity.

He went on to say:

> … to pass a law or executive order giving someone the benefit of amnesty protection is qualitatively different from inserting that amnesty provision into the text of a constitution, as is or has been the case in Colombia, the Congo, Côte d'Ivoire, Liberia

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[81] R Albert, 'Constitutional Handcuffs' (2010) 42 *Ariz St L J* 663, at 693 and 694 (footnotes omitted).

> and the Solomon Islands. And enshrining amnesty or immunity in a constitution is itself wholly distinguishable from making that amnesty or immunity unamendable.
>
> Although it happens much less so, countries have indeed entrenched amnesty provisions with sufficient frequency so as to make it more than a simple idiosyncrasy that can be passed off as a constitutional anomaly peculiar to outlier states.

[226] As the tone of the second passage just cited suggests, Professor Albert did not support entrenched or unamendable immunities. But that did not preclude his recognition that unamendable immunities have, from time to time, formed part of the resolution (sometimes only temporary) of internal strife and discord.

[227] Immunity provisions can be seen to detract from the rule of law. They insulate from what would otherwise be the legal consequences of their actions. They also sit uneasily with the concept of equality before the law. As well, such provisions may create. in the minds of those contemplating a coup, expectations of future immunities and, in this way, might increase the risks of extra-constitutional action. These issues are compounded when immunities are not able to be amended.

[228] On the other hand, unamendable immunities may be — as they probably were in 2012 and 2013 — preconditions to a peaceful transition from military government to democracy. In this way they can be seen to promote democratic values. As well, non-recognition of the unamendable immunities would understandably be regarded by those affected as a departure from understandings that have formed the basis of the way Fiji has been run over the last 35 years (that is, since the 1990 Constitution came into effect). The 1997 Constitution shows that unamendable immunities can result from a democratic process and for this reason are not necessarily a breach of the right of self-determination

[229] Given that unamendable immunities have now been a feature of Fiji's constitutional history for the last 35 years and are not inconsistent with international practice and, very importantly, the particular Fijian context, it would not be right to withhold recognition of them in this case.

**Should we recognise the amendment procedure provided by ss 159 and 160?**

[230] We recognise that most constitutions provide for amendment of constitutional provisions to be more difficult than ordinary law changes. Such restrictions serve useful purposes and are not in themselves objectionable. On the other hand:

(a) The 2013 Constitution was imposed without significant input by the people of Fiji and by an undemocratic government. Those responsible for the 2013 Constitution set out to impose amendment requirements in the form of Parliamentary processes and referendums that are far beyond anything that they were prepared to submit themselves to when formulating the 2013 Constitution. Stringent limitations on amendment contained in a constitution imposed in this way raise recognition issues that do not arise in relation to constitutions resulting from a democratic process.

(b) It is also necessary to bear in mind that restrictions on amendment may be counter-productive. As the Venice Commission pointed out:

> 81. ... there are ... arguments against strict constitutional confinement. First, it is a historical and empirical observation that constitutional binding is sometimes simply not possible. If the forces calling for political reform are strong enough, then changes will be made, regardless of the formal constitutional rules. In such cases, it will normally be highly preferable for the changes to be done through formal constitutional amendment rather than by revolution and upheaval, breaking the too-strict formal constitutional chains at huge cost to society.

(c) There is scope for doubt whether the purpose of the framers of the 2013 Constitution was to provide a power of amendment that was capable of successful exercise. An Explanatory Note of uncertain provenance that was produced in evidence suggests that there was a very late and unexplained change in the drafting process from two-thirds to three-quarters majority requirements. On the literal meaning of the referendum requirement, the three-quarters requirement is not capable of being achieved. There is nothing to suggest that those who framed the 2013 Constitution had tested the practicalities of achieving such a majority. Nor did they do anything to facilitate it, for instance by providing for compulsory voting. Indeed, as it happened, the electoral laws

were not amended to provide for a referendum, as s 160(4) contemplated would occur. All of this leaves it well open to inference that the purpose of the very restrictive amendment provisions was not to facilitate, but rather to preclude, amendment.

[231] Against those considerations and our earlier discussion, this aspect of the case turns on whether the restrictions on amendment are contrary to the right to self-determination of the people of Fiji and, if so, in what respects. In addressing this we propose proceeding on a basis that focuses on the extent to which restrictions on amendment exceed those that are commonplace in democratically imposed constitutions. In other words, we are not setting out to redesign the amendment provisions. Rather we are taking as our starting point what is in the 2013 Constitution and will withhold recognition of them only to the extent that those provisions do not conform to Article 1.1 of the ICCPR, customary international law and to the values expressed in the 2013 Constitution.

[232] As to the three-quarters majority in Parliament:

(a) The requirement that an amendment be supported by a three-quarters majority in Parliament imposes a high hurdle when assessed against past constitutional practice in Fiji and international practice. And this stringency is all the more notable as it applies not just to core provisions but rather to all provisions that are not declared to be unamendable.

(b) If effective, the requirement means that a 26% minority in Parliament could block an amendment.

(c) In the context of a constitution imposed by decree, such a blocking mechanism is an unacceptable fetter on the right of self-determination.

[233] By contrast, a requirement for a 66% majority, although still a reasonably high hurdle to overcome, particularly in relation to an undemocratically imposed constitution, is not similarly objectionable. This is because many of the provisions in the 2013 Constitution are drawn from previous constitutions which were entrenched and those earlier constitutions generally required majorities of 66% for amendments. In addition, although there is no

international 'standard' in this respect, many constitutions internationally utilise super-majority percentages in the region of 60%–66%.[82]

[234] Turning to the referendum requirement, it is not uncommon for constitutions in the Pacific region and more generally to provide for referendums for at least some constitutional amendments.[83] Obviously, in any democratic society, mechanisms for public engagement in constitutional amendment processes are, in principle, desirable. However:

(a) No previous constitution in Fiji has imposed referendum requirements on amendments.

(b) The only constitution of which we are aware that imposes more stringent restrictions (in terms of super-majority requirements in relation to Parliament and a referendum) is the Mauritius Constitution that was in issue in *State v Khoyratty (Mauritius)*.[84] But those requirements apply only in relation to core features of that Constitution. This is in contradistinction to the 2013 Constitution, as the amendment procedures in s 160 are not confined to particular central features of the 2013 Constitution. As well, the Mauritius Constitution, unlike the 2013 Constitution, was adopted following an appropriate democratic process.

(c) If construed literally, the 75% of all registered voters requirement renders amendment effectively impossible. And even on the alternative meaning of 75% of those actually voting, it imposes a very high hurdle, as it would enable 26% of those who vote to block amendment of this undemocratically imposed constitution. This means that a provision that has its origins in a decision made by the handful of people who formulated the 2013 Constitution and opposed by 74% of those who voted in a referendum addressed to amending would remain in force. Unsurprisingly, no counsel who appeared sought to reconcile this with Article 1.1 of the ICCPR. Nor did anyone seek to explain how we could

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82 Venice Commission, above n 68, at [91] – two-thirds is most widely used in Europe – and IDEA, above n 70, at p 6 – most common super-majorities internationally are three-fifths and two-thirds.

83 Approximately 40% of current constitutions provide for referendums for at least some constitutional amendments: see IDEA, above n 70, at p 8.

84 *State v Khoyratty (Mauritius) Rev* 1 [2006] UKPC 13, (26 March 2006).

responsibly recognise such a limit on amendment given the State's, and thus our, duty under Article 1.3 of the ICCPR and along with the values that the 2013 Constitution is based on.

(d) It follows that the 75% super-majority is an unacceptable fetter on the right of self-determination.

(e) In the context of the undemocratically-imposed constitution, a requirement of more than a simple majority raises an obstacle to the exercise of the right to self-determination and application of the asserted democratic values of the Constitution.

[235] It follows that, having regard to the right to self-determination of the people of Fiji and the democratic values asserted in the 2013 Constitution, the Court is not prepared to recognise those provisions of ss 159 and 160 which it regards as standing in the way of the enjoyment of that right and as inconsistent with those values.

**What is the effect of ss 159 and 160 when remedially interpreted?**

[236] We are satisfied that we can adapt the wording of ss 159 and 160 so that they provide a mechanism for amendment that is capable of successful implementation. This is what we propose to do by holding that ss 159 and 160 must be applied as meaning:

(a) In the case of s 159:

> (1) Subject to subsection (2), this Constitution, or any provision of this Constitution, may be amended in accordance with the procedure prescribed in this Chapter, and may not be amended in any other way.
>
> (2) No amendment to this Constitution may ever—
>
> (a) repeal any provision in Chapter 10 of this Constitution or in Part D of Chapter 12 of this Constitution; or
>
> (b) infringe or diminish the effect of any provision in Chapter 10 of this Constitution or in Part D of Chapter 12 of this Constitution.

(b) In the case of s 160:

> (1) A Bill for the amendment of this Constitution must be expressed as a Bill for an Act to amend this Constitution.
>
> (2) A Bill for the amendment of this Constitution must be passed by Parliament in accordance with the following procedure—
>
> (a) the Bill is read 3 times in Parliament;
>
> (b) at the second and third readings, it is supported by the votes of at least two-thirds of the members of Parliament;
>
> (c) an interval of at least 30 days elapses between the second and third readings and each of those readings is preceded by full opportunity for debate; and
>
> (d) the third reading of the Bill in Parliament does not take place until after the relevant committee of Parliament has reported on the Bill to Parliament.
>
> (3) If a Bill for the amendment of this Constitution is passed by Parliament in accordance with subsection (2), then the Speaker shall notify the President accordingly, who shall then refer the Bill to the Electoral Commission, for the Electoral Commission to conduct a referendum for all registered voters in Fiji to vote on the Bill.
>
> (4) The referendum for the purposes of subsection (3) shall be conducted by the Electoral Commission in such manner as prescribed by written law.
>
> (5) The Electoral Commission shall, immediately after the referendum, notify the President of the outcome and shall publish the outcome of the referendum in the media.
>
> (6) If the outcome of the referendum is that more than half of those who voted were in favour of the Bill, then the President must assent to the Bill, which shall come into force on the date of the Presidential assent or on such other date as prescribed in the Bill.
>
> (7) In this section, the use of the word "amend" or "amendment" is intended to be understood broadly, so that the section applies to any proposal to repeal, replace, revise, or alter any provision of this Constitution

**What about the ouster of jurisdiction provisions?**

[237] Our exercise has produced a result that, by remedial interpretation, gives effect to ss 159 and 160 to the greatest extent that is compatible with Articles 1.1 and 1.3 of the ICCPR.

[238] The corollary of our conclusion that the rule of recognition permits us to withhold recognition of the amendment provision in the 2013 Constitution is that the same rule, applied consistently with Article 1.3 of the ICCPR, requires us to decline to recognise and/or remedially interpret s 173(4) and (5) to the extent necessary to give effect to the result we have arrived at.

[239] As the result we have arrived at is by way of interpretation of ss 159 and 160, we do not see it as inconsistent with s 173(4) and (5). It is right to say, however, that if we were of the view that the ouster provisions might have precluded our inquiry into the provisions as to amendment, we would not have recognised them.

**PART 7: IN LIGHT OF THE COURTS' DISCUSSION OF THE FIRST TWO ISSUES, WHAT IS THE EFFECT OF THE COURT'S CONCLUSIONS (INCLUDING ANSWERS TO THE QUESTIONS POSED)?**

[240] As a consequence of our determination of the preliminary jurisdictional issue, we make the following declarations:

1. Subject to Declaration 2, the Court recognises the 2013 Constitution as the legally effective Constitution of the Republic of Fiji.

2. In relation to Chapter 11, the recognition of the 2013 Constitution of the Republic of Fiji as legally effective is limited as follows:

   2.1 Recognition does **not** extend to s 159(2)(c).

   2.2 Section 160(2)(b) is recognised, but subject to the reading down of the words "three quarters" to "two thirds".

   2.3 Section 160(6) is recognised, but subject to the reading down of the words "three quarters of the total number of registered voters" to "a majority of those registered voters who vote in the referendum".

   In all other respects, ss 159 and 160 are recognised.

3. By reason of its recognition of the 2013 Constitution as set out in the preceding Declarations, the Supreme Court has the jurisdiction conferred upon it by s 98(3)(c) read with s 91(5).

[241] In the exercise of its jurisdiction under s 98(3)(c) of the 2013 Constitution, the Court expresses its opinion on the questions referred to it by Cabinet by way of the following answers.

**Question (a):** Are the provisions of Chapter 11 and of Part D of Chapter 12 of the Constitution of the Republic of Fiji binding on the people of Fiji, the Parliament of Fiji and the Supreme Court with the effect that none of those provisions can ever be amended, regardless of the will of Parliament or of the people voting in a referendum?

**Opinion:** The provisions referred to are binding to the extent that they have been declared by this Court to be legally effective.

**Question (b):** May the provisions referred to in [Question] (a) be amended following enactment of a Bill in Parliament to do so, in terms thought fit by Parliament?

**Opinion:** Amendment of the provisions of Chapter 11 recognised by the Court may be commenced by enactment of a Bill in accordance with the procedures set out in s 160(2) and supported at the second and third readings by the votes of at least two-thirds of all members of Parliament.

**Question (c)**: Is approval of any amendment proposed in accordance with [Question] (b) effective only if approved by the people of Fiji at a referendum?

**Opinion:** Approval of any amendment to the Constitution by a majority of the registered voters voting in a referendum is necessary to make any amendment legally effective.

**Question (d**): Is any special majority, and if so in what proportion, necessary for an enactment under [Question] (b) or approval by referendum under [Question] (c)?

**Opinion:** Two-thirds of *all* members of Parliament must support an amending Bill at the second and third readings and a majority of voters voting in a referendum in relation to the proposed amendment(s) must vote in favour of the amendment(s).

**Question (e):** Is the 1997 Constitution still valid and applicable?

**Opinion:** No.

**The Hon Mr Justice Salesi Temo**
PRESIDENT OF THE SUPREME COURT

**The Hon Mr Justice Terence Arnold**
JUDGE OF THE SUPREME COURT

SUPREME COURT FIJI

**The Hon Madam Justice Lowell Goddard**
JUDGE OF THE SUPREME COURT

**The Hon Mr Justice William Young**
JUDGE OF THE SUPREME COURT

**The Hon Mr Justice Robert French**
JUDGE OF THE SUPREME COURT

**The Hon Mr Justice Isikeli Mataitoga**
JUDGE OF THE SUPREME COURT