

# **<sup>i</sup>MELANESIAN COUPS AND MELANESIAN COURTS, 1990 - 2009**

## **PART I: NO EXIT IN VANUATU AND THE SOLOMON ISLANDS**

**IAN FRASER<sup>1</sup>**

### **INTRODUCTION**

#### **A Pacific Relationship of Politicians and Courts**

Coups d'état are not peculiar to the insular South Pacific, nor is its colonial constitutional heritage. But there is a peculiar relationship, in its governmental tradition, between political power and the courts of law. It is sometimes tense but always close. When men attempt to take powers denied them by their written constitutions, the courts react, and, until recently, the men have complied.

Like the generally peaceful nature of social interactions, this relationship is peculiar to the region – and most clearly evident in Fiji and its closest Melanesian neighbours, Vanuatu and the Solomon Islands. It rewards close examination, both of the traditional Pacific but fraught relationship and of the Fijian rupture of it.

For the twenty years before that Fijian rupture, in the definitive coup of Easter, 2009, Melanesian courts faced legal challenges by Heads of State, or their purported replacements, to the limitations on executive powers imposed by their Westminster-based constitutions. This is the primary topic of the paper.

In Vanuatu and the Solomon Islands the courts, with some hesitation, resisted arguments for the existence of executive powers whose sources are not in constitutional text – while leaving the door slightly ajar to the possibility of such powers. In the Fiji Islands, where political events pressed much harder on that door, the courts swung it open – first only as widely as 'necessary', then for circumstances related to necessity, then, finally, right back on its hinges. That last move was only in Fiji's trial court; the higher court's subsequent slam shut is what provoked the Easter coup.

In so doing, these courts have proceeded without reference to each other's decisions, except within each jurisdiction (despite significant overlap in the personnel of their benches). This paper's secondary topic is to see what illumination there may be in *making* those connections. The paper will explore which steps have been shared, and which not followed, in the various approaches taken by the three judicial systems.

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<sup>1</sup> Ian Fraser (BA, BCL, LLB, LLM) taught at the USP School of Law live from 1999 to 2009, in Port Vila, and online from 2012 to 2015, from Nova Scotia, Canada.

This paper tracks the record of litigation in Vanuatu, the Solomon Islands, and Fiji, up to the latter's 2009 coup, concerning attempts to find legal recognition for executive powers beyond the Constitution. It is published in three Parts, one on Vanuatu and the Solomon Islands and two on Fiji. The smaller jurisdictions' stories do extend into the 21<sup>st</sup> century, but in this century it is Fiji where the struggle heightens.

Faced with a lawsuit concerning an executive appropriating governmental power beyond its written constitutional limits, a court can defer to the political power, co-operate with it in some compromise, or insist on its interpretation of the constitution being followed. South Pacific courts did not simply defer to political power: hence the fraught relationship. There are lines to this relationship, albeit fuzzy ones. Cooperation shades into co-option; a stance on principle shades into mere positivism. It will become apparent that the first term in these distinctions promotes the rule of law. And the fuzziness of these lines is not just the nature of social interaction. It is fostered by the Westminster heritage of law, even constitutional law, being 'unwritten'. That heritage is alive in the English-speaking South Pacific, despite the universal adoption of written (and fairly detailed) constitutions at independence.

This paper is an account of how this relationship played out in three jurisdictions during a formative period: the roles played by these courts in the rule of constitutional law. It is a juridical theme, not a generally political one – a study of judicial reaction, not political action.

This Part, Part I, *No Exit in Vanuatu and the Solomon Islands*, discusses the smaller Melanesian countries. The courts sometimes follow, sometimes lead the political powers across the lines, in both directions, then assume a definitive position on the rule of law side.

Part II, *Crossed Roads in Fiji*, turns to Fiji, and follows the evolution of a relationship between judges and politicians there after the 2000-2001 coups. Because of the coups, and more deeply because Fiji differs from the smaller jurisdictions in the nature of its politics (and the presence of an Army), the Fijian story is more complex and contingent. But it is the same lines being crossed and re-crossed.

Part III, *The Royal Way: The Coups to End All Coups*, explores how, ultimately, and after coping with succeeding crises, that relationship collapsed into one among men rather than among legal roles, in the litigation following the 2006 coup. The lines finally split the judiciary itself: the local bench rejecting the relationship for deference, while the external bench (in the form of a one-off Court of Appeal) insists on constitutionality and is itself rejected upon the definitive 2009 coup.

### **Westminster at Sea**

As the British Westminster constitution was the model for its Dominions in the Pacific, Australia and New Zealand, so it was for the former possessions of Britain, Australia, and New Zealand in the Pacific – with a crucial modification. Those three former metropolitan powers have never committed the basic arrangement and rules of their governments to paper, in a single document one could call 'The Constitution'.<sup>2</sup> This famous 'unwritten' quality,

almost unique in the world, makes 'the Westminster model' of government a matter of interpretation (requiring repeated quotation marks). By its nature it could not be a model actually reproducible, or a text a former colony could literally copy.

The common law, another British legacy in the Pacific, also features this quality. In the British tradition the basic principles and rules of law are decided, not legislated: decided by courts of law, as issues arise, and so 'unwritten' too, in the sense of not being authoritatively stated in single documents. The seamless fabric of custom, practice, rules, and rule-applications is the stuff of the English way of law. Indeed no sharp law/politics distinction can be made between the common law and the Westminster constitution, whether in Britain or in the former Dominions. We will see that this joinder of institutional tradition is what provides the metaphorical 'door' to unwritten executive powers in the former colonies.

For the common law was not just a model for Vanuatu, the Solomon Islands, and Fiji; at independence it was adopted by each.<sup>3</sup> Just as in the Dominions, and indeed the entire Commonwealth, the common law of each jurisdiction is shared with all others. Courts use each other's decisions as 'persuasive' guides to what their common law should be, not only in matters not covered by national legislation, but even in how that legislation is to be interpreted. Judicial precedent conditions all, from contract enforcement to the application of statutes. Every Commonwealth court's decisions are available as such sources. But in practice it is English courts to which the Pacific courts look first, as much today as before independence.

As the British Empire ebbed in the Pacific, it left behind that common law more or less as the law had flowed in. But the Westminster constitutional model was not left behind; it was deposited, as the last imperial act, the granting of independence.<sup>4</sup> And it was deposited without its most distinctive feature. For every new country began its sovereign existence with a *written* constitution.

And these written constitutions, although they took the British model for their content, took the *form* of legislation. They were special legislation, to be sure, but like other acts of

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<sup>2</sup> Of course there is a written Constitution of Australia, but it omits prescriptive detail of how executive government is to operate and how it relates to the legislative branch (the same is true of its cousin constitution in Canada, also largely dedicated to rules of federalism).

The High Court of Australia has used the Constitution's foundation of Parliament, and its reference to the model of British government, to require radical adjustment to the received common law on defamation in political contexts, for the purpose of protecting democratic process: *Theophanous v Herald Weekly Times Ltd* (1994) 182 CLR 104; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. That such expansive flexibility is plausible illustrates how unprescriptive the Constitution is on political matters beyond federalism.

<sup>3</sup> By s.95(2) of the Constitution of the Republic of Vanuatu, "British and French laws" continue to apply after independence. Although expressed as a "transitional" provision, s.95(2) has not been replaced or amended. By s.76 of the Constitution of Solomon Islands, with section 2 of Schedule 3, common law continues to apply, except insofar as "inapplicable or inappropriate in the circumstances" or inconsistent with custom. The much earlier first Constitution of Fiji, in 1970, did not include such detail; the Independence Order proclaiming it simply provided for the continuation of "existing laws".

<sup>4</sup> As remarked in Peter Larmour, *Westminster in the Pacific: A 'Policy Transfer' Approach*, State, Society, & Governance in Melanesia Discussion Paper 01/1 (ANU Research School of Pacific and Asian Studies, 2001).

parliaments they were 'justiciable'. The courts were to be their definitive interpreters, and any disputes in their applications were to be amenable to litigation and final resolution by judges.

Written rules of how executive sovereign power is to be exercised, after all, can be applied in just the ways courts apply written rules of how land titles are to be recognised, or the sales of goods regulated. 'Westminster' in Britain, and Australia and New Zealand, remained beyond the reach of judges. 'Westminster' as adapted, in the Pacific island countries, has been subject to considerable judicial management.

Vanuatu might have featured the most remarkable such judgment – adjudicating a dispute over whether a Speaker of Parliament may retain the keys to the Parliament building.<sup>5</sup> But built on written foundations as they are, every Melanesian jurisdiction has seen basic issues of constitutional government brought to court.

One of those issues is the topic here: the extent of powers, if any, to be allowed the Head of State beyond the literal sense of the Constitutional text.

### **No Exit in Vanuatu and the Solomon Islands**

The first Constitution of an independent Fiji was enacted in 1970. Five years later the Constitution of Papua New Guinea (PNG), the second Melanesian country granted independence, was enacted. Five years after that there were two other independent Melanesian states, the Solomon Islands in 1978 and Vanuatu in 1980.

Like PNG and Fiji, the Solomon Islands retained the notional connection to Westminster, with a Governor-General to embody executive power. Vanuatu, which unlike the others did not have a purely common-law colonial heritage, chose to emerge as a Republic, with a President in a role roughly equivalent to a Governor-General.<sup>6</sup> But like Fiji, both the Solomon Islands and Vanuatu took on a Westminster-based but written constitution as the pattern of their new sovereign dress.

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<sup>5</sup> He could not, but appeal; when the CA refused to adjourn the appeal hearing for six months as Speaker Tari requested, he dropped the appeal: *Ren Tari v Natapei et al* [2001] VUCA 1 (25 April 2001). Although it might be suggested that the deportation of a Chief Justice is the most unlikely case in these records (*d'Imecourt v Manatawai* [1998] VUSC 59 (25 September 1998), that case merely raised ordinary legal issues in a surprisingly political context. The struggle in *Ren Tari*, in contrast, is more clearly a political issue dropped into a surprising legal context.

<sup>6</sup> Vanuatu experienced colonial rule as a 'Condominium', a joint rule by two metropolitan powers, Britain and France. Becoming a 'State' formally under Her Majesty's sovereignty was not as obvious a step as it was for her neighbours, for whom sovereignty meant leaving the rule of Britain (Fiji, Solomons) or Australia (PNG). See generally Howard Van Trease, ed., *Melanesian Politics: Stael Blong Vanuatu* (Macmillan Brown Centre for Pacific Studies, University of Canterbury, and Institute of Pacific Studies, University of the South Pacific, 1995).

Another consequence of the Condominium was the constitutional entrenchment of both English common law and the 'civil law' of France as the country's residual law, as mentioned above (n.2). The blend is unworkable. French law has been ignored in practice: thus the Vanuatu constitutional cases discussed below proceeded on the same common-law basis as those of the Solomon Islands and Fiji.

Neither the Solomon Islands' political problems nor Vanuatu's political problems included a simple binary ethnic competition, like that between indigenous Fijians and Indo-Fijians in Fiji. Vanuatu's inherited language division sometimes approximated this, giving content to a form of Westminster's two-party system for the first decade; but this division never swamped the underlying divisions grown from island and native-language origins. Likewise, the dominance of two islands in the Solomon Islands, Guadalcanal (where the capital and only big town, Honiara, lay) and Malaita (favoured by colonial-era labour patterns) certainly affected politics, but until the turn of the century, not to the extent of swamping the same kind of indigenous division.

So in these countries, unlike Fiji, struggles over executive power were not evidently representative of a racial struggle. They were more intelligibly the struggles of individuals and particular groups, of politicians, competing for a prize. Such rivalry was familiar from the 'big-man' heritage, even if the prize of access to sovereign wealth was relatively novel.

### **A. Invisible Powers in Vanuatu**

One of the political problems troubling Vanuatu and the Solomon Islands (and PNG) is the fluidity of political parties. (Fiji's parties largely reflected the stable racial bifurcation of its society, until the first Bainimarama coup in 2000, as will be discussed in Parts II and III later.) Melanesian political 'parties' are generally more cliques than parties in the modern Westminster sense – that is, parties indeed, but parties in the 18<sup>th</sup>-century Westminster sense. They make the conduct of Parliament and Cabinet government difficult, sometimes opaque, and never stable, as performed under the 20<sup>th</sup>-century Westminster-model constitutions.

#### **1. The Trial of President Sokomanu: Coups are Criminal**

Vanuatu made an early start on stabilising party politics through regulation, by enacting a statute that expelled MPs from Parliament if they resigned from the party under whose name they were elected.<sup>7</sup> The party that led the independence movement in Vanuatu, Father Walter Lini's Vanua'aku Party, or VP, was still in power in 1988. That year, motivated partly by ambition (Lini was very ill) and partly by disputes about how to compensate custom owners of the land on which Port Vila was built, a VP faction of five MPs led by Barak Sope moved a non-confidence vote against the VP government. The Opposition supported them by boycotting Parliament, so they lost their seats too (after missing three sittings). By-elections were held, for those seats, but boycotted by the Opposition and the VP faction (now a distinct party). As a result, no actual opposition being present, the new Parliament was disproportionately dominated by Lini's VP.

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<sup>7</sup> *MPs (Vacation of Seats) Act 1984*, s.2(f). This provision was subsequently declared unconstitutional, in one of the resorts to the court made during the events described below: *Sope v Attorney-General No 4* [1988] VUCA 6 (21 October 1988).

To the President, Ati George Sokomanu, that did not seem right.<sup>8</sup> So in his speech opening Parliament, Friday morning the 16<sup>th</sup> of December 1988, he declared that due to his “concerns” about its composition, and about the PM and Cabinet, he was dissolving Parliament and would appoint an interim government. He was doing as President what Colonel Sitiveni Rabuka had done by force in Fiji the year before: Vanuatu was the scene of the South Seas’ second coup d’etat.

Yet the government did not submit. Prime Minister Lini spoke immediately after the President had left the House, defying the dissolution, and Parliament sat through the day and Saturday. The Speaker filed an application to the Supreme Court for a declaration that the supposed dissolution was null.

In the meantime President Sokomanu wrote to the Police commander Friday afternoon, inviting him and the commander of the Vanuatu Mobile Force (a paramilitary body) to his office. Neither replied, and no-one came. On Sunday morning the President invited Sope, with the Leader and the Deputy Leader of the opposition party UMP (Union of Moderate Parties), and two ex-politicians to his house, and swore the five men in as his ‘interim government’. (He made his nephew Sope the Prime Minister.) In the afternoon the President drafted a ‘circular’ addressed to Police officers and VMF members, announcing that he had formed a new government to take the country to fresh elections, and that support of the Lini government was now illegal. Officers who failed to heed this could be “dismissed” – and if he received no answer within 24 hours, he would seek foreign military assistance to “dismantle” both Forces. Sokomanu’s Private Secretary distributed the circular at the central police station, but when he approached the VMF camp soldiers chased him down and arrested him.

On Monday the Supreme Court heard the Speaker’s application.<sup>9</sup> In a brief (two-page) judgment Cooke CJ proceeded in the simplest way possible. He cited the powers granted by the Constitution to the President: a discretion to dissolve Parliament on the advice of the Council of Ministers; the pardon, commutation, or reduction of criminal sentences; and a discretion to refer bills and regulations to the Supreme Court.<sup>10</sup>

“[I]t can be seen that the powers of the President are specific and limited. These are the only powers the President possesses. He, the President, cannot assume powers [n]or can he contend he has implied powers in so far as his powers are so clearly set out in the Articles mentioned.”

The claim of reserve powers raised no legal issue at all. It was just “difficult to understand”:

“Why the President assumed a power not given to him under the Constitution is difficult to understand. In my opinion it is abundantly clear to anyone from the

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<sup>8</sup> He had participated to some extent in the dispute between Sope and Lini, and indeed had been very critical of Lini on several occasions through the 1980s. See Van Trease, *Years of Turmoil: 1987-91*, pp.73-118 of Van Trease, ed., *Stael Blong Vanuatu*, supra n.5 (in particular at pp.86-88).

<sup>9</sup> *In re the Constitution, Application by the Speaker of Parliament* [1988] VUSC (19 December 1988).

<sup>10</sup> Constitution ss.26; 36; 16(4) and 37(3). Vanuatu dispensed with the Westminster tradition of Ministers being appointed by the Head of State: the PM is elected by the House, and he or she appoints and dismisses Ministers personally.

provisions of the Constitution that the President did not possess the power to dissolve Parliament as he purported to do 16 December.”

The order was granted. The attempted dissolution was declared unlawful and void.

By mid-week all the members of the interim government, including the President, were under arrest for sedition. The coup was over. Vanuatu’s first fully argued and considered judicial reaction to an executive attempt to reach for power beyond the Constitution was a criminal trial of the President who made the reach.<sup>11</sup>

To Ward J the issue of the trial was whether the accused had had the requisite intention for criminal guilt (*mens rea*). There was no question about their acts. But the accused insisted on another defence beside denying that intention. They claimed that the acts were not criminal to begin with, because the President *did* have the powers he had purported to exercise.

That issue had been decided when the Speaker’s declaration was granted. If that might be thought less than definitive, Ward J made his own ruling. He too, however, found this question a simple one. Section 26 provided the Presidential power to dissolve Parliament, and it required that he act on the advice of cabinet (the ‘Council of Ministers’). Sections 42 and 43, which covered the situation following a dissolution, made no provision for an ‘interim government’. Plainly, then, the accused men’s actions could not be justified by the Constitution’s text. Could there be any other source of Presidential power?

Yes, argued the defence:

“[Defence counsel], and also [President] Sokomanu, claimed that the President had some unspecified and undefined, inherent discretion to act as he did. [Counsel] urged this point more than once during the trial persuasively and at considerable length undaunted to the end by the lack of authority in his favour and blithely ignoring the provisions to the contrary.”

Those Constitutional provisions, and the lack of authorities, sufficed. Ward J continued:

“I have no doubt at all that the President had no such power...”<sup>12</sup>

He did not mention one remarkable feature of the Vanuatu Constitution. The President is not vested with ‘executive’ power, or authority. Like Fiji’s President under the 1997

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<sup>11</sup> *Public Prosecutor v Sokomanu, Sope, Carlot, Jimmy, Naupa, Spooner, and Kalotit* [1988] VUSC 1 (1 January 1988)[sic: the decision was issued 1 January 1989]. Maxime Carlot, also known as Korman, led the UMP, and Willie Jimmy was his Deputy. Like Barak Sope these men remain prominent in politics, Sope and Korman becoming Prime Ministers; Jimmy was eventually defeated, in the 2008 elections, but was later named Ambassador to China. John Naupa was an ex-MP who had been on the Constitutional Committee, drafting the Constitution. Dr Frank Spooner was a medical practitioner and had little involvement in politics, having run for Parliament twice. John Kalotit was the President’s Private Secretary, charged only with incitement to mutiny. The others faced that charge plus seditious conspiracy and taking an unlawful oath Sunday morning.

<sup>12</sup> *Sokomanu*, just before discussion of President Sokomanu’s case (the report is in unnumbered paragraphs, without headings).

Constitution, he “symbolise[s] the unity of the nation” (Vanuatu Constitution s.33) – but unlike the arrangement in Fiji, or the Solomon Islands, the *cabinet* is the executive:

39. (1) The executive power of the people of the Republic of Vanuatu is vested in the Prime Minister and Council of Ministers and shall be exercised as provided by the Constitution or a law.

Unnoticed judicially though this provision was here,<sup>13</sup> it makes arguments in Vanuatu for Presidential powers based on monarchy-based Commonwealth precedents even less plausible than in the other Melanesian jurisdictions.

So much, in any event, for the direct constitutional issue. What remained was the indirectly constitutional issue: whether the court was prepared to find the President, and his prominent allies, guilty of sedition.

But Ward J made his position clear at the outset of the judgment:

“It has been suggested by [defence counsel] that this is a political trial. I am not sure exactly what that means but if they are suggesting that, in some way, these men are being prosecuted for improper political reasons and the trial, as a result, is different from other trials in this court, then they are wrong.

Of course, by the very nature of the charges, the background to the case as a whole and the people charged, there is a political content to the evidence. It was a political act by the accused but the result was, according to the prosecution case, the commission of a series of criminal offences. As a result, the accused face normal criminal charges that are being tried under the normal rules of criminal law and procedure.”

No law provided for the accused’s actions. But mistake is a defence in criminal law: mistake about the facts, and mistake about the legal context apart from the criminal law itself. In other words, if the accused honestly believed that what they were doing was, under constitutional law, permitted, then they lacked the ‘intention’ necessary for a criminal conviction on charges concerning the defiance of the Constitution. The accused all insisted they did so believe. So the trial came down to a question of evidence: would the court accept that they had that belief, or would it rule that their insistence was prevarication?

Ward J did not rely on his impressions of the accused’s honesty on the witness stand (all accused testified). He made his findings based on the credibility of the claim – honest belief, at the relevant time, that the President first had the legal power to dismiss a Prime Minister supported by Parliament, and secondly the power to appoint an interim government, made up of non-MPs, to replace the Council of Ministers.

He proceeded to consider each man in turn. President Sokomanu, like the other politicians, had been in public office since – indeed before – Independence. He was, in 1988, the only President the new republic had had. He served on the Constitutional Committee that drafted the Constitution, and was sometimes referred to as its “co-author”. And his fluency in

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<sup>13</sup> In cases concerning the President’s possible reserve powers, it seems that only Gibbs J’s judgment concerning pardons has taken this notice of s.39(1): *AG v President*, below n.18.

discussing Constitutional provisions in his testimony made it impossible he could be this deeply ignorant of the President's powers under the Constitution.

The President was guilty, on all counts.

The veteran politicians fared similarly, for similar reasons. Sope and Korman, also Constitutional drafters, could not have failed to realise the President was exceeding his powers. Jimmy must have known enough to realise the venture was legally dubious, yet he deliberately avoided asking questions; such recklessness as to illegality, in law, was equivalent to knowledge of illegality. Naupa, also of the Constitutional Committee, indicated some resistance by making his oath to the new government subject to the Supreme Court ruling; there was doubt enough to acquit him. Dr Spooner, who was not in politics and had trusted the President as a high chief, also deserved acquittal. The Secretary, Kalotiti, must have wondered at his superior's actions, but this was not proof beyond a reasonable doubt of knowing the actions were unconstitutional; he too was acquitted.

The convicted politicians applied for bail, as they had before the trial. They were refused, Cooke CJ approving the Senior Magistrate's refusal, on the ground that this was not a normal criminal case:

"I am dealing with an extremely serious case of persons who allegedly attempted to overthrow the elected government of the country...this case is so grave and touches the very foundation of the lawful Government of the country...  
[Sedition] is one of the possible three really serious [offences in criminal law]."<sup>14</sup>

## **2. The Appeal of *Sokomanu*: Coups in *Bad Faith* are Criminal**

There is one appellate level court in Vanuatu, the Court of Appeal. The convicted veterans took their case there. They kept the issue of Presidential powers alive, appealing not only the findings as to their intentions, but also Ward J's logically prior ruling against their claim of Presidential reserve powers.<sup>15</sup>

The powers alleged were "reserve" powers for dealing with emergencies:

"[The defence says the President] must have reserve powers...where circumstances justify it. [Counsel] pointed to circumstances of Parliamentary deadlock; or some disaster which might wipe out Parliament."

In *Sokomanu, Sope, Carlot, and Jimmy v Public Prosecutor*,<sup>16</sup> the Court of Appeal did not hesitate to accept some of this.

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<sup>14</sup> *Public Prosecutor v Sope et al (No.2)* [1989] VUSC 2 (4 January 1989). The earlier applications, also heard and denied by Cooke CJ (affirming magistrate decisions), are *Public Prosecutor v Sokomanu* (unreported, CrC 10/88) and *Public Prosecutor v Sope et al (No.1)* [1988] VUSC 19 (21 December 1988).

<sup>15</sup> Their perseverance might be taken as in itself evidence of their sincerity at the time of the offences.

<sup>16</sup> [1989] VUCA 3 (14 April 1989). The judges were Amet, Martin, and Goldsborough JJA.

"We would not go so far as the learned trial judge and state that in no circumstances may the President exercise a power not specifically given to him by the Constitution. Exceptional needs may require exceptional remedies.

Constitutional law has long recognised that such actions may be justified on the grounds of necessity....But the necessity must be proportionate to the problem faced. Such a doctrine can only apply in very rare circumstances.

The matters over which Mr Sokomanu expressed concern fell far short of the exceptional circumstances which must exist before powers of necessity could be invoked."

There is a way, then, in Vanuatu, beyond the Constitution. The first, basic step is made: that the President is not always restricted by 'the supreme law'.<sup>17</sup> The basis for this is "constitutional law" – that is, a *law of constitutions*, a law greater than the particular Constitution of Vanuatu. The intention must be that this law is the common law; there cannot be a *legislated* law greater than or superior to a constitution.

But this way is open only in an emergency, the gravity or nature of which the Court does not describe – except that the circumstances in December 1988 did not come close to it.

So the convictions would remain? No. The remaining issue on the seditious conspiracy charge was what the accused had believed at the time, which was a question of fact, of the sort usually left intact by a court on appeal. But the Court of Appeal found two errors in how Ward J made his findings of fact, and *how* factual findings are made is a matter of law, a matter courts of appeal may review.

The first point was a subtle one. Ward J had instructed the assessors and himself in terms the Court of Appeal found erroneous:

"[I]f [the assessors] did not believe what the appellants said about [believing the President could lawfully act as he was acting], they could take their disbelief as positive evidence to the contrary; so that they could conclude, without any other evidence on the point, that the appellants did not believe that they were acting lawfully [when they acted]."<sup>18</sup>

In other words, Ward J said that if the assessors, and he, decided that the accused were lying when they claimed on the witness stand to believe in these powers, that would be proof that they did not believe in the powers, back at the relevant time, when they acted the previous December.

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(As the report lacks headings and paragraph numbering, quotations are not further cited here.)

<sup>17</sup> Vanuatu's Constitution has the orthodox s.2: "The Constitution is the supreme law of the Republic of Vanuatu."

<sup>18</sup> (Emphasis added by the CA). 'Assessors' are laypeople who hear the trial with the judge, and make findings of fact. The findings are provisional, however, in that the judge may overrule them; juries do not sit in the Melanesian jurisdictions.

The Court of Appeal cited case law to the effect that if an accused testifies, and the jury decide he has no credibility, that does not prove that he did what he is accused of doing. Therefore, they held, this direction by Ward J was bad law.

Secondly, and less subtly, the court below had not based its findings on the other evidence. If the findings were based only on the record and circumstances of each individual accused, the Court of Appeal would not reverse them. But this was not so, they held. For the records of political achievement should have counted in the accused's favour, as well as against them.

Moreover, Ward J did not deal with the blithely open way the accused had operated. The President's speech to Parliament was public. The Sunday morning oaths were made before an Australian TV crew who happened to be in Port Vila (several of the accused gave interviews, although at trial they all testified that they had forgotten what they said in the interviews). Moreover, the President's 'circular' mentioned that if the displaced politicians had a complaint, they could go to court. Together these points suggested sincerity, however objectively incredible the claimed belief might seem.

Given the faulty direction, and the lack of consideration for the positive aspect of these politicians' records, and the disregard of the way they allowed publicity of their actions at the time, the findings of fact were not reliable. There was "a very real doubt". The conviction was set aside. Not only that: all the accused were acquitted, rather than exposed to a new trial run according to the Court of Appeal's corrections – for "[t]here is no question of ordering a new trial in these circumstances".

It is an intriguing judgment. Of course, deciding that a testifying accused is generally not a credible witness, when the accused's past acts are in question, is not the same as deciding that an accused is lying when he testifies to his current beliefs, when the question is whether he held those very beliefs a few weeks before. And of course the record of political involvement cannot *be* evidence both for honest belief *and* against it. And, on the record, Ward J's findings of intention *were* made on the basis of the accused's record and circumstances, whatever his direction to the assessors.

But the Court of Appeal was not prepared to pursue legal rigour "in these circumstances". Notably, they took the evidence of the mass of Constitutional provisions that Sokomanu had violated – evidence to Ward J that Sokomanu could not have believed what he was doing was lawful – as evidence that he *did* believe in the lawfulness of his acts:

"If he believed that he could override the Constitution at all, even in one respect, he would believe that could override it in all respects."

Now, the basis for the supposed 'reserve' powers put forward by the President was 'necessity'. And that was the only basis of extra-Constitutional powers acknowledged in the judgment by the Court of Appeal. Even Sokomanu's counsel had not argued that the President could simply "override" Constitutional provisions at will. The case was about (belief in) a special power limited by circumstances of necessity. So the point made by the Court of Appeal, that power to override any provision would be power to override them all, simply does not fit – the idea of such an imperial executive power would not be judicially entertained, even in argument, until the constitutional cases in Fiji twenty years later.

In the above discussion, ‘the Court of Appeal’ means the majority of the Court of Appeal. Only Amet J and Martin J wrote that judgment. The opinion of the third judge on the CA panel suggests the legally tenuous nature of their ruling. Goldsborough J’s view was put very briefly – not by himself but by the majority. He agreed with the majority’s view of Ward J’s misdirections, but he did not think these errors would have affected the verdict. In other words, he dissented. He disagreed with the other two judges: he thought that the guilty verdict should stand. But –

“[Goldsborough J] does not wish to give a dissenting judgment.”

There was no explanation. Perhaps he understood that this was “a political trial”, if in a sense different from that taken by Ward J. Perhaps that was the “circumstance” in which there could be no question of a retrial, despite the gravity of the charges highlighted by Cooke CJ, and despite the clarity of the issues. Perhaps that was how there could be a “very real” doubt whether the President had the first idea of what a parliamentary constitution was.

In the trial rulings in Sokomanu’s case, the people of the country were told that their Constitution was their law, binding in its terms even on the very highest levels of political leadership. But the Vanuatu Court of Appeal told the people of Vanuatu – if not overseas – that a President could lawfully override the Constitution in some circumstances, *and* that it was possible, in practice, for him generally to override it outside those circumstances, in good faith. Moreover, the Court of Appeal taught, acting publicly was to be taken as a sign of that good faith.

### **3. The President, the Court of Appeal, and Mercy**

Several years later the nature of the President’s powers arose in a different context – the exercise of a Constitutional power known to Westminster as a prerogative, but that of ‘mercy’, not a power to seize government. Section 38 of the Constitution creates the power:

“The President of the Republic may pardon, commute or reduce a sentence imposed on a person convicted of an offence. Parliament may provide for a committee to advise the President in the exercise of this function.”

By 1994 Parliament had not provided for that committee, and President Jean-Marie Leye – after consulting an *ad hoc* committee struck by him – wrote to the Prime Minister to say that 26 named prisoners “are released”, and the sentences of 50 others “are reduced”, some by half, some by a third. (The occasion was Independence Day, 30 July.)

The Attorney-General objected, and applied to the Supreme Court for orders quashing the ‘pardons’ and declaring how the mercy prerogative could be properly exercised. In *AG v President*, Gibbs J declared merely that the letter was not a ‘pardon’; but he took the opportunity to clarify the nature of Presidential powers.<sup>19</sup>

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<sup>19</sup> *AG v President of the Republic of Vanuatu* [1994] VUSC 2 (1 January 1995). The *Interpretation Act* required that a pardon, as a ‘Constitutional Order’, be published in the Gazette. The letter or its contents were never published. (The Prime Minister and the Acting Commissioner of Prisons had acted on the President’s letter as though it were a formal pardon anyway.)

Again there was doubt as to whether the President was aware of what the law required, but Gibbs J held that this was irrelevant; the validity of pardons is to be gauged objectively.

First, however, Gibbs J had to deal with the President's preliminary objections to the case even being heard. The President (or his counsel) proposed that he was immune from suit in the courts – despite his predecessor's conviction just a few years before – *and* that he could not be sued by the Attorney General in particular, because the Attorney General represented just one element of the government personified as a whole by himself, the President.

The first objection seemed based on an equivalence between the Presidency and the British Crown. Gibbs J dealt with that by pointing out that s.95(2) of the Constitution made the analogy incoherent: it provides that Vanuatu's common law is to be grounded on the law of both Britain and France. Furthermore –

“[t]he nature of the powers and position of the President of Vanuatu can be determined only by a consideration of the Constitution itself...

The Constitution is the supreme law of Vanuatu...and there is nothing in the Constitution to support the notion that the President...is above the law.”

As for the second objection, based on the Constitution's s.33 – “[the President] shall symbolise the unity of the nation” – Gibbs J was content to say it was “unsustainable.”

The real question, he held, was whether the President's exercise of his s.38 power could be reviewed in a court of law. That was a real question, but it did not require an answer in this case, since the power had not been exercised. The letter was not a formal pardon; it was not an exercise of a pardoning power. And if the power were reviewable in the way ordinary administrative decisions may be reviewed, and if it had been exercised in this case, there was no evidence before the court to support a challenge to it.

Ten years later there was still no s.38 committee. A tradition of releasing prisoners at the discretion of the President had developed (including the pardon of Barak Sope, for ‘health reasons’, three months into a 3-year sentence for forgery). But it was not the Attorney General who brought the issue to court again. Rather, the Court of Appeal took up the point on its own motion, on the occasion of a regular appeal against sentence in an ordinary criminal case, in *Public Prosecutor v Willie*.<sup>20</sup>

The connection between an appealed sentence and the President's prisoner releases was one at a fundamental level: the role of the courts in a criminal justice system governed by the rule of law. Here the court was sitting to review a particular sentence, in the light of all the circumstances of the crime and the policies and values the court thought applicable, from the principle of treating like cases alike to a local policy of emphasising deterrence in domestic sexual offences.<sup>21</sup> This was the province of the judiciary, under the rule of law: meting out

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<sup>20</sup> *Public Prosecutor v Atis Willie* [2004] VUCA 4 (9 June 2004). Lunabek CJ presided, with Robertson, von Doussa, Fatiaki, Saksak, and Treston JJA on the bench. The judgment was unanimous.

<sup>21</sup> Atis Willie had been convicted of unlawful sexual intercourse with a girl under his protection, on two counts, and sentenced to 12 months imprisonment. The Court of Appeal pointed out that the facts

justice in the form of criminal penalty, upon articulated reasons through which the community could appreciate its own justice system.

The Constitution itself, of course, assigns this responsibility to the judiciary, one of Vanuatu's branches of government power.<sup>22</sup> Yet it also provides, with s.38, for intervention in the judiciary's decisions by the President – and:

“[g]reat damage is done to the administration of justice if after sentence has been passed there is executive intervention (especially in a way where it is not immediately apparent what principle has been applied) which radically and randomly alters the outcome.”

(Note the reference to the President as “the executive”, despite the court's care in mentioning Vanuatu's distinctive separation of powers.)

The Court of Appeal referred to the recent record of prisoner releases under the s.38 power, as well as others effected by the Minister responsible for prisons under s.30 of the *Prison (Administration) Act*. It noted, in particular, radical reductions in sentences for rape, indecent assault, and unlawful sexual intercourse, such that prisoners sentenced to years of prison served a few months, and careful distinctions among offenders were swept away by blanket releases. All the releases were made subject to conditions, concerning prisoner behavior, which – being on their face indefinite without regard to the sentence period – were “probably invalid and unenforceable”. Many releases were made without the legally required publication in the Gazette. Moreover, there was no evidence of consultation with victims or anyone outside government, and the reasons for release were not available to the public. In sum, the judiciary's sentencing policies and decisions were being subverted by the government, particularly by the President.

This was not what s.38 or the *Prison (Administration) Act's* s.30 contemplated. The Court of Appeal answers the real question posed by Gibbs J: such powers, expressed in “bald and general discretionary terms” though they be, “can only be used in a way which is rational and reasonable.” Instead of that, the President's casual approach, heedless of the judiciary's attention to public knowledge and interests, and concern for principle and consistency, was

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“provid[ing] another level of appeal without formal process or comprehensive hearings...This has the potential to totally undermine the Court in its duty of delivering justice equally to all citizens...”

This development of a distinctive Vanuatu sentencing system, employing a free Presidential discretion without Constitutional or even legislative mandate, far exceeded the President's

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would have justified the much more serious charge of rape. Given policies previously declared in that Court, decisions from 1996 to 2003, for the sake of protecting women, the sentence imposed was “wholly inadequate” (and the greater charge should have been laid to begin with). They ordered 12 months for each of the counts, two years in total.

<sup>22</sup> Here the Court of Appeal is careful to describe the ‘separation of powers’ in Vanuatu as involving “the Parliament, [the] National Council of Chiefs, the Head of State, the Executive, and the Judiciary” – *not* the orthodox common-law conception of executive, legislative, and judicial powers.

“special or residuary position in the criminal justice system”. This was toxic to the rule of law. This was –

“justice according to men and not justice according to law.”

That system must end, the Court of Appeal held. In concluding the judgment it recognised that whether Mr Atis actually served his sentence was up to “the Executive.” The justices seem, again, to have meant the President, and he, they say, must learn to act in a way that embodies the judicial ideals proper to a task that, normally, was a judicial task.

“However, if early release is to occur, for the reasons given in this judgment, the release to be lawful and in accordance with the principles of the rule of law, must be pursuant to a universal scheme that operates with transparency and integrity, and ensures equality of treatment for all across the whole prison population.”

## **B. Unreserved Powers in the Solomon Islands**

### **1. *In re Nori*: A Reserve for the Queen?**

A few months after the Sokomanu case in 1988, Ward J found himself dealing with reserve powers again, this time as Chief Justice of the Solomon Islands – and with the Queen as the executive alleged to have those powers.

*In re Nori*<sup>23</sup> arose from another problem for Melanesian politics, beside party fluidity: politics is the only remunerative career option for most of the politicians. Salary is crucial even for the well-intentioned, and even for a post like Governor-General. In the late 1980s the Department of Finance of the Solomon Islands Government and the Attorney-General were developing a way to provide a pension for the office of Governor General, to “provide further incentive”. So when a Permanent Secretary ran for election as Governor General in June 1988, his application for leave from the civil service was delayed while the two Departments decided how to proceed. By the Constitution, however, Her Majesty could only appoint a person to be her Governor General who was qualified to be a Member of Parliament; and to be a Member of Parliament, a civil servant had to be on unpaid leave of absence.

The Permanent Secretary, George Lepping, won the Parliamentary vote that triggered appointment by the Queen – while his leave had not yet been officially granted. After general elections in February of 1989 it was to him that the winner, Solomon Mamaloni, reported. Andrew Nori had been a Minister in the government Mamaloni replaced. He did not obtain a place in the new government (although he kept his seat). He applied to the High Court for a declaration that the Governor General was in office unlawfully, and that therefore the new

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<sup>23</sup> *In re the Constitution; In re Application by the Hon. Andrew Nori* [1989] SBHC 26 (29 May 1989). (As the report lacks headings and paragraph numbering, quotations are not further cited here.)

government, whose portfolios had been assigned by the Governor General, must be unlawful as well.<sup>24</sup>

On behalf of the Government, the Attorney General argued that the Governor General's appointment was still valid even if it had not followed the constitutional procedure – as an exercise of the Queen's "prerogative" power. Ward J had two answers to that.

First the principle. Citing a basic text in the field, Ward J observed that it was the structure of the Westminster system that made it necessary, in English law, to ascribe 'prerogative' powers to the monarch. The government, acting through the Crown, simply needs powers which are not to be found in the statute books – legislation does not cover everything, in a system with no written constitution. So when the government acts in ways which, by consensus, seem reasonable, yet are not grounded in statute, they are held – by consensus – to be grounded in the common law. In the absence of a definitive constitutional document, the only alternative would be to abandon the principle that the government was subject to the rule of law.<sup>25</sup>

But the Solomon Islands does have that definitive document. The implication is that this country does not need the notion of prerogative powers. Nonetheless Ward J does not rule them out:

"How much true prerogative is left is a matter I do not need to decide for this purpose."

Second, the precedent. Invoking a Privy Council decision, Ward J notes that even where prerogative does exist, if a statute covers the same powers, the statute's terms prevail. He quotes Lord Atkinson in that case, in terms that could have haunted Fijian constitutional litigation then still in the future:

"It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the Legislature (in the absence of compelling words) an intention so absurd."<sup>26</sup>

These points settle the issue of the appointment's validity:

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<sup>24</sup> Although the Solomons PM is directly elected by Parliament, a departure shared with Vanuatu and PNG from the Westminster model, the GG formally assigns him and the other Ministers "responsibility...for any business of the Government" – on the PM's advice: Solomons Constitution s.37. (In *Prime Minister v Governor-General*, below n.28, the CA attributed this departure to the correctly anticipated lack of a "developed" political party system: the composition of Parliament would not always suggest, even to a professional observer, which member would attract majority support.)

<sup>25</sup> *In re Nori*, referring to Wade & Bradley, *Constitutional and Administrative Law* (5<sup>th</sup> ed.).

<sup>26</sup> *In re Nori*, quoting *AG v De Keyser's Royal Hotel* [1920] AC 508 (House of Lords).

"I take that as good authority that, as the powers of the Head of State in the Solomon Islands are defined and covered by the Constitution, they are subject to the Constitution."

This is a reading as plain and loyal to the concept of a written constitution as the Vanuatu judgments of Cooke CJ and Ward J himself.

The case was not determined by this ruling, however. Finding that neither Parliament nor the Queen had realised that Lepping was unqualified, Ward J held that, "for peace and good order...and [to avoid] an impossible situation", the appropriate decision would be to recognise the acts of the Governor General, to date, as valid, despite the defect in his appointment. This is the application of a common-law rule, the '*de facto* doctrine', intended to preserve order, and to protect people who rely in good faith on public officers apparently holding office lawfully.

Nori resisted the application of the doctrine. Ward J found it in "long settled law in many jurisdictions". Nori argued that only the Solomon Islands' own Constitution should rule – taking the concept of fidelity to written rules even further than Ward J would.

Ward J maintained that the doctrine's effect would not be to allow a Governor General to act outside the Constitution, for the doctrine only operated to the point when the defect in his position was generally known or declared by a court of law. It only validated acts done while all the parties involved were ignorant of the defect.

And that meant the Prime Minister and Cabinet remained the government. In conclusion, Ward J "would humbly suggest" that Her Majesty be asked to make the appointment again, once the Governor General's leave was processed properly.

## **2. The *Hilly* Cases**

In October 1994 the Solomon Islands Prime Minister, Francis Billy Hilly, found himself in the position dreaded by leaders of Melanesian governments. Brought to power by a typically narrow majority (24 to 23), he and everyone knew that he had lost the support of several Members of Parliament since then. But Parliament was not sitting. There could be no vote displacing him until it did sit, and by the Constitution's s.72 it is the Prime Minister who decides when to advise the Governor General to convene Parliament. Hilly, discussing government business with the Governor General (as required by s.32 of the Constitution), told him openly that he had lost his majority, but planned to put off a Parliamentary meeting "indefinitely", in the hope of somehow winning over some Members of Parliament. In the meantime no *Appropriations Act* had been passed for the year (Parliament had not sat since January), so the government was spending money in violation of the Constitution.

The Governor-General, Sir Moses Pitakaka, disapproved. He purported to dismiss Hilly as Prime Minister, and to convene Parliament for 31 October to elect a new Prime Minister.

Hilly challenged his power to do so before the High Court. There Palmer J referred the issue to the Court of Appeal. In *Hilly v Pitakaka* the Court of Appeal backed the GG.<sup>27</sup>

The crucial point, they held, was that Prime Minister Hilly had acknowledged his lack of majority support in the House. This was crucial not because of any particular provision in the Constitution, but because of its significance to a basic “principle” of the Constitution: majority rule. To allow a Prime Minister in these circumstances deliberately to dodge the majority of MPs must violate that principle. The Governor General’s convening of Parliament, blocking that dodge, was therefore lawful.

The majority on the Court of Appeal, Connelly P and Los JA, left it at that. But the third judge, Williams JA, although agreeing with them, wrote separately to invoke something more specific. He described the circumstances as “a crisis”, and held that this released the “reserve powers” of the Governor General to deal with it, justifying calling Parliament. What to the majority was a principle, not in the Constitution but somehow still of it, as a whole, was to him an attribute specifically of Her Majesty’s representative.

That ruling did not address the dismissal of the Prime Minister, so days later Hilly was back, repeating the question already decided, and seeking a declaration whether he remained Prime Minister. Palmer J in the High Court repeated the Court of Appeal’s ruling, that the Governor General had lawfully ordered Parliament convened, then ruled that yes, Hilly was still the Prime Minister despite the Governor General’s order.

In the appeal from Palmer J’s ruling, *Governor General v Hilly*, the Court of Appeal explained that it had deliberately declined to answer the application about dismissing the Prime Minister – and “[w]e should have thought it obvious why”: Parliament was about to sit, on 31 October, and it would decide who was Prime Minister.<sup>28</sup>

The Governor General argued that he had a “prerogative or reserve power”, and had used it in dismissing Hilly. The Court of Appeal refused to settle the point, effectively declaring it moot because awaiting the parliamentary vote was the “workable and practical solution”. Whatever the status of the alleged powers, the vote would certainly be constitutional, and it was due in two days.

So they made no ruling, merely setting aside the High Court declaration. But that unsettled issue was carefully left as an open issue:

"It is a very strong step for us to decide, although it may possibly be correct, that the Constitution of this country is not a full statement of the constitutional position and there exist in reserve powers in the Governor-General to do things which ordinarily he has no authority to do whatever...

"So we do not say that there is no such thing as reserve or prerogative powers in the Solomon Islands....it is not wise to decide it until the occasion for deciding it strictly arises and there is no other sensible solution."

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<sup>27</sup> *Hilly v Pitakaka* [1994] SBCA 1 (22 October 1994). The bench was Connelly P and Los and Williams JJA.

<sup>28</sup> *Governor-General v Hilly* [1994] SBCA 12 (29 October 1994). The bench this time was Connolly P, Muria CJ, and McPherson JA.

### 3. *Prime Minister v Governor General* : Head to Head

An issue left open in court may open a road in politics. When judges decline to rule out a possible course of action as unlawful, the action will appear politically convenient sooner or later.

Four years later another Solomon Islands Prime Minister, Bart Ulufa'alu, was in a position similar to that of his predecessor, Billy Hilly. In power for a year, he was rumoured to have lost six of his Parliamentary supporters (including three Ministers). He had advised the Governor General to convene Parliament on 12 October 1998. During August of that year, however, the Opposition petitioned the Governor General to call a special meeting of Parliament before then. The substantive Governor General, Sir John Lapli, was overseas; the Acting Governor General refused the petition after consulting Prime Minister, Ulufa'alu.

When the Governor General returned in mid-August he met with the Prime Minister, and came to a different conclusion. On 1 September he purported to convene Parliament to sit one week thence, for the purpose of a non-confidence vote in the Prime Minister. On 4 September Ulufa'alu took the matter to the High Court.

There, Muria CJ, relying on the judgment in *Pitakaka* completed by himself and Connelly P and McPherson JA in *Governor General v Hilly*, declared that the Governor General had the power to convene Parliament as he had.<sup>29</sup> Section 72(1), which required the Prime Minister's advice for such a step, allowed the Governor General to overrule the Prime Minister "when the normal machinery provided by the Constitution becomes unworkable or impracticable." That is, this was not the exercise of a reserve power of, and by, the *Governor-General*. This was the exercise of a jurisdiction of, and by, the *court*, to alter Constitutional terms to make them 'workable'.

That litigation delayed Parliament beyond the Governor General's date. On the day after Muria CJ's judgment, the Speaker convened Parliament for the 25<sup>th</sup>. On 16 September Lungole-Awich J in the High Court dismissed a challenge to this,<sup>30</sup> and on the 17<sup>th</sup>, the Governor General called Parliament for the next day. On 18 September Parliament duly sat, non-confidence was moved – and Ulufa'alu *won the vote*.

The seemingly open political road led nowhere for the Prime Minister's opponents, this time. But the way in law was open now to Governors-General, quite outside the Constitution's terms, to engineer Parliamentary tests of a Prime Minister's support. The High Court in these rulings had cleared the path left open by the Court of Appeal in *Governor General v Hilly*.

Ulufa'alu appealed Lungole-Awich J's declaration. Denying the Governor General's application to strike out the appeal as moot, the Court of Appeal took the opportunity in *Prime Minister v Governor General* to settle what it had left unsettled before. It shut the door, finally, on ways around the Constitution – while leaving it on the latch.<sup>31</sup>

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<sup>29</sup> *Ulufa'alu v Governor-General* [1998] SBHC 50 (8 September 1998).

<sup>30</sup> Unreported.

To do so the Court of Appeal had to deal with the Governor General's reasonable objection that there was no live issue. The events in question had occurred the year before, no-one was asking to 'turn the clock back', and there was no prospect at the moment of another such act by the Governor General. The Court of Appeal's response meandered somewhat, but ended in a clear enunciation of its role in the relationship of law to politics.

After discussing a dozen Australian precedents and the old House of Lords decision used in them, the Court of Appeal admitted that by ordinary common law, this issue was indeed 'abstract' and so non-justiciable.<sup>32</sup> But this was not an ordinary common-law issue. It was a constitutional issue. The common-law rule requiring a real dispute for the exercise of judicial power reflected the nature of that power as the ultimate means of resolving controversies among the people over their rights and duties; but the judicial power, "naturally", extends as well to settling disputes between the other branches of governmental power, even when they are abstract. In this case the Governor-General, on the one hand, and the Parliament and "executive", on the other hand, were in disaccord over their basic relations. That can only create "instability", and –

"It is undesirable that the answer to the question should remain in doubt when there is an opportunity to resolve it."

Moreover, the previous appellate decision, *Hilly v Pitakaka* – technically an authoritative, 'binding' decision, there being no court higher than the Court of Appeal in Solomon Islands law – had been subject to much criticism. It was "our responsibility", the Court of Appeal held, to settle this matter now.

Andrew Nori, party in the earlier case, was now counsel on this appeal – for the Governor General. And he put the Governor General's position as high as it could be argued. Not only was Muria CJ correct in construing s.72 to contain this extra power, but the Governor General had the power regardless of that section or any other, as a 'reserve power'. So both of the ways around the textual Constitution were before the court: the judicial insertion of a power, in terms held to be 'implicit' in the Constitution, and the royal way, prerogatives dating from before the Constitution, inherited by Her Majesty's Governor-General.

In six steps, the Court of Appeal blocked up the exits from the Constitution.

The first step was not from the Constitution itself, but from the common law – the common law of constitutional interpretation. This was the principle laid down for the Commonwealth by the Privy Council in *Minister of Home Affairs v Fisher*: that constitutions are to receive

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<sup>31</sup> *Prime Minister v Governor-General* [1999] SBCA 6 (1 September 1999). The bench was Mason P with McPherson and Williams JJA. The judgment was unanimous. Five years before, McPherson JA had sat in *GG v Hilly*, and Williams JA in *Hilly v Pitakaka*.

<sup>32</sup> The House of Lords decision was *Russian Commercial & Industrial Bank v British Bank of Foreign Trade* [1921] 2 AC 438 (for a matter to be justiciable, the question must be real; the applicant must have a real interest in settling it; and there must be a real person disputing the applicant's position who likewise has a real interest, opposed to that of the applicant). By the Constitution the Solomon Islands common law is based on English common law.

‘purposive interpretation’.<sup>33</sup> Courts should construe constitutional terms according to the legislative purpose they suggest.

Two, the purpose suggested by this Constitution’s terms was to provide a complete legal structure for the Solomon Islands government. This constitution is indeed based on the Westminster model, but with modifications, and the chief modification is the conversion into written rules of the ‘conventions’ borrowed from Westminster. The purpose of doing that is to avoid a continuing reliance on the precedents and theory of what would be, after Independence, a foreign country. The Solomon Islands, new to this form of government, had a “codified” system of rules laid out in its Constitution.

Moreover, the very content of the Westminster rules was changed. Concerning the Governor General, he or she is elected by Parliament; he or she does not appoint the Prime Minister, and although the Governor General prorogues and dissolves Parliament, this ‘power’ is triggered only by Parliamentary vote; and various other powers are described in detail by Constitutional provisions. These include some to be exercised ‘in his own deliberate judgment’ – and convening a Parliamentary session is not one of them.

In “striking contrast” to the Constitutions of Australia and Canada (i.e., Dominion constitutions directly adopting Westminster), the Solomon Islands Constitution provides an “exclusive and exhaustive code” of the position and powers of the Governor-General.

Therefore, as step three, the power claimed in this case can only be valid as ‘implied’ by the Constitution’s terms. *Hilly v Pitakaka* held this power to be implied – and that decision, simply, was wrong. This is the fourth step: there is nothing in the Constitution implying such a power, and no authority for it but *Hilly v Pitakaka* itself, which henceforth is no authority at all.

What could be called the ‘latch’ appears at this point in the reasoning. The Court of Appeal does declare that the Constitution may ‘imply’ some powers of the Governor-General which are not mentioned in its terms. The power to dismiss a Prime Minister in circumstances like those of *Hilly v Pitakaka*, or of the current case, is not one of them; but the Court of Appeal explicitly leaves open the possibility of a power to dismiss the Prime Minister when he or she gives illegal ‘advice’, or when supply (government financing) is threatened – those being conventionally supposed to be prerogatives of the Westminster Crown.

The fifth step is to reject ‘necessity’ as anything more than a factor in working out ‘implied’ meanings of the Constitution. That is, a governmental crisis is no ground for bypassing the Constitution. That the Constitution might contemplate powers it does not describe in the Governor General, to deal with crises it might implicitly anticipate, is as far as this argument can go. It would be “unwise” to say that an appropriate crisis could not arise in the future.

In any event the facts of this case, or those of *Hilly v Pitakaka*, do not constitute such a crisis. True, in the earlier case the necessary *Appropriations Act* had not been passed; but the need for money “will inevitably generate the convening of Parliament.” In other words the courts should let the political process operate, even when it becomes disorderly. Not every violation

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<sup>33</sup> *Minister of Home Affairs v Fisher* [1980] AC 319 (Privy Council). Although decided after Solomons’ Independence, this is the authority cited around the Commonwealth on the point.

of the rules justifies judicial interference. The court had earlier said that rulings encouraging the Governor General to involve himself in politics should be avoided, the business of Parliament being “in the nature of things” up to Parliament. Here it is saying the same for itself, and the law.

Finally, step six, the Court of Appeal addresses the notion of ‘reserve’ powers directly adopted from Westminster. And the verdict is simple: there is no room for them as such. The Solomon Islands Constitution codifies the Governor General’s powers precisely because the notion of ‘reserve’ powers is “vague, uncertain, and ambiguous”.

#### **4. *Ulufa’alu*: The Constitution Implies No Coup**

If the Solomon Islands had not known a constitutional crisis in 1999, it did the next year. Violence between militias formed by members of the two island populations most prominent in the capital Honiara, those of Guadalcanal and Malaita, led to a general breakdown of the state, and in particular of the police as a disciplined force (there is no military force). In June of 2000 – while Fiji was in the throes of the Speight putsch – Malaita Eagle Force members, with police officers and police weapons, occupied the home of the Prime Minister and held him captive. They were led by Andrew Nori, with two other politicians, Manasseh Sogavere and Charles Dausabea. Sogavere was Leader of the Opposition. The Prime Minister, again, was Bart Ulufa’alu.

A week later, still captive, Ulufa’alu wrote a letter to the Governor General resigning his office as Prime Minister. The Governor General convened Parliament to elect a new Prime Minister. Sogavere won, 23-21 (six MPs did not attend). When freed, Ulufa’alu sued the government and the three leaders of the Malaita Eagle Force crew, asking for a declaration that the election of Sogavere was invalid (and claiming that his and others’ Constitutional rights to liberty had been violated).

Palmer ACJ heard the case, and issued a judgment a year later, dismissing the application. Ulufa’alu appealed, but it would be three years before the Court of Appeal ruled on the appeal. During those years, litigation in Fiji, concerning its coups of 2000, recognised a ‘doctrine of necessity’ that could justify suspending the Constitution during an emergency<sup>34</sup> – while in the Solomon Islands, regular elections had followed the events of June 2000, and foreign military and police forces, acting as ‘RAMSI’, had created a state of order. (Australia dominated the Regional Assistance Mission to Solomon Islands, but it included New Zealand, PNG, Tonga, and several other smaller countries.)

It was not necessary to decide whether the Fiji doctrine was available in the Solomon Islands, the Court of Appeal ruled, in *Ulufa’alu v AG*.<sup>35</sup> (This reference to the Fiji decision of *Republic of Fiji v Prasad* is the only occasion on which any judgment discussed in this paper mentions a precedent from another South Pacific jurisdiction.) There had been no suspension

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<sup>34</sup> *Republic of Fiji v Prasad* [2001] FJCA 2 (1 March 2001).

<sup>35</sup> *Ulufa’alu v AG, Sogavere, Dausebea, Nori, et al* [2004] SBCA 1 (2 August 2004). The bench was Lord Slynn of Hadley P and Ward and McPherson JJA. Lord Slynn P was of the House of Lords bench.

or violation of the Constitution in Honiara. It was true that Ulufa'alu had been forced to make his 'resignation'. Indeed the defendants conceded this in court. But the *terms* of the Constitution had been followed:

*34. Tenure of office of Ministers*

...  
(3) The office of Prime Minister shall also become vacant -

...  
(d) if he resigns such office by writing under his hand addressed to the Governor-General.

*Schedule 2: Election of Prime Minister*

1. As soon as possible after a general election of members of Parliament, or whenever there is a vacancy in the office of Prime Minister, the Governor-General shall convene a meeting of members for the purpose of electing a Prime Minister...

It does not say, there, that the "writing under his hand" must be made *voluntarily*. On the facts, the writing was made, and addressed to and received by the Governor General, and so the resignation was effective "automatically". The Governor General had no discretion to exercise. Similarly, the Schedule 2 procedure triggered by a vacancy grants the Governor General no discretion; he "shall" convene Parliament. The term 'shall' creates a duty to act, not a power to decide how to act: no *power* of the Governor-General was at issue.

The codified machinery of the Solomon Islands Constitution operates without add-ons. There may be 'implied' powers, and terms, assuming that *Prime Minister v Governor General* remains good law. But the implications do not extend far. They do not extend to reading a requirement into the procedure for a Prime Minister's resignation that the Prime Minister not be acting with a gun to his head.

Note, however, that radically strict as this reading is, its practical effect was to leave in place a political situation which had recovered from the disorder of the 2000 events.

That might have been the point. The same point can be seen in the Vanuatu Court of Appeal's resort to honest mistake as a way to acquit the coup makers in that country, which also permitted a political solution to endure. Nonetheless, neither decision challenged the ideal of politics bound by law – of constitutionality.

In Parts II and III of this paper we turn to how similar issues, and ultimately such a challenge, were handled by the courts of Fiji.

[Editor's note: Parts II and III will be published in the next ordinary edition of the Journal of South Pacific Law.]