

TURMOIL IN THE PACIFIC

2009 – A YEAR PERHAPS BEST FORGOTTEN

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I. INTRODUCTION

From its dawn until the dusk of its last day, 2009 proved to be tumultuous year for the Pacific region where the force of manmade disasters was intermingled with the impact of nature's wrath causing considerable uncertainty and a climate of distrust. During this time the region's courts delivered decisions which were of national and international significance as well as fundamental in their social impact. Cases of particular impact included the Fiji Court of Appeal's determination¹ in April that the assumption and numerous exercise of powers by the interim Government were unlawful under the Fiji Constitution, which was swiftly followed by the abrogation of the Constitution in May; the Tonga Court of Appeal² acquitting five People's Representatives of joint charges of seditious conspiracy; the Samoa Supreme Court³ upsetting a decision by the country's Speaker to disqualify seven opposition members of Parliament from their seats and declaring such seats vacant; in November the withdrawal of Parliamentary immunity as a senator by the French Senate led to the arrest, detention and charges laid against French Polynesia's veteran politician and long serving former President Gaston Flosse;⁴ and finally in December, the Queensland⁵ Supreme Court granted a permanent stay of sexual charges against a former Solomon Islands Attorney-General Julian Moti.

The sinking of a public ferry in Tonga with the loss of many lives in August and a series of powerful earthquakes producing enormous tsunami proved fatal to the citizens of Samoa and American Samoa and disrupted the lives of the two nations. Tonga dealt with the aftermath of its tragedy with the appointment of a Royal Commission of Inquiry and criminal investigations into those identified as possibly contributing to the sinking.

The instances of national unrest across the region, were also mirrored in unstable regional relations, as the sometimes superficial solidarity of Forum member countries was exposed in matters such as: disagreements on the progress of the Economic Partnership Agreement (EPA) with the European

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1 *Qarase v Bainimarama* [2009] FJCA 9; ABU0077.2008s (9 April 2009).

2 *R v Pohiva* [2009] TOCA 19; [2010] 1 LRC 763 (10 July 2009).

3 *Aiafi v Speaker of the Legislative Assembly* [2009] WSSC 65 (8 July 2009).

4 Patrick Antoine Decloitre "Former Tahiti President Thrown in Jail" *Pacific Islands Report* (Hawaii, 11 November 2009).

5 *R v Moti* [2009] QSC 407 (15 December 2009).

Union and the timing of the commencement of PACER-Plus negotiations; the location and funding for the Office of the Chief Trade Adviser (OCTA); the actual timing and implementation of the changed arrangements between Secretariat of the Pacific Community (SPC), the Pacific Regional Environmental Programme (SPREP) and the Pacific Islands Applied Geoscience Commission (SOPAC). During the year there was a perceptible hardening of attitude by some Forum leaders against Fiji's interim regime (particularly the Samoan Prime Minister) counterbalanced with the ever strengthening call for re-engagement and dialogue from yet a different but a growing group of Forum island countries.

II. FIJI

Port Moresby, in Papua New Guinea hosted a Pacific Islands Forum Special Leaders Retreat on 27 January 2009⁶ which was specifically convened to discuss Fiji. Leaders from Australia, Cook Islands, Kiribati, Nauru, New Zealand, Niue, PNG, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu were joined by representatives of FSM, Fiji and Palau and revisited the commitment made to them in 2007 by Fiji's Interim Prime Minister that the country would hold parliamentary elections by March 2009.

The Forum Leaders considered that whilst there were long term issues that needed to be addressed in Fiji, there was a need for the country to demonstrate its commitment to the restoration of Parliamentary democracy in Fiji through the conduct of elections and as such required the Fiji Interim Government to: nominate an election date by 1 May 2009; conduct an election by the end of December 2009; and publicly declare and take such actions by 1 May 2009.⁷

Failing these steps being taken by the interim Government, targeted measures would be imposed by the Forum under paragraph 2(iv) of the Biketawa Declaration⁸ which would be in the form of:⁹

- Suspension of the leader, Ministers, officials of the Fiji interim Government from all Forum meetings and events; and
- The ineligibility of the Fiji Interim Government to benefit from Forum initiatives or assistance, other than assistance toward the restoration of democracy.

The Forum Ministerial Contact Group was tasked with monitoring the situation and was required report back to Forum leaders as necessary.

On 2 May,¹⁰ the Chair of the Forum and Premier of Niue, the Hon Take Talagi MP announced that the military regime was suspended from the Forum. In the official Forum press release, the Forum Chair explained the

6 Pacific Islands Forum "Forum Leaders Special Retreat Communique on Fiji" (press release, 27 January 2009).

7 Ibid, at [3(h)].

8 Biketawa Declaration 28 October 2000.

9 Ibid, at [3(i)].

10 Pacific Islands Forum "Forum Chair on Suspension of Fiji military regime from PIF" (press release, 2 May 2009).

decision was a direct consequence of Commodore Bainimarama's failure to constructively address by 1 May 2009, the expectations of the Forum and went on to state:

It is also particularly timely given the recent disturbing deterioration of the political, legal and human rights situation in Fiji since 10 April 2009.

And further:

A regime which displays such a total disregard for basic human rights, democracy and freedom has no place in the Pacific Islands Forum.

The specific mention of the 10 April 2009 date clearly referred to the events which took place immediately after the delivery of the Fiji Court of Appeal's¹¹ decision on 9 April. In October 2008, the Fiji High Court had ruled that:¹²

- the President as Head of State retained prerogative powers to act according to discretion for the public good, without the description of law; and
- the doctrine of necessity was available as legal justification for actions of those without prerogative power but acting for the public good.

In April, the Fiji Court of Appeal (comprising three Australian judges: Powell JA; Lloyd JA and Douglas JA) determined that:¹³

- the President's power to discuss a Prime Minister is clearly delimited (by the provisions of section 109 of the Fiji Constitution) to circumstances where a Government loses or fails to get the confidence of the House of Representative;
- once the power is exercised then the appointment of a caretaker Prime Minister is fundamentally to advise a dissolution of the Parliament;
- the prerogative power sought to be exercised by the President, does not exist in Fiji due to the provisions of the 1997 Constitution which thoroughly delimits the President's legal powers;
- accordingly the President could not dismiss a Prime Minister in any circumstances other than those prescribed in section 109 and could not therefore establish an interim government;
- the doctrine of necessity could not be used to justify a "revolutionary regime".

The Court effectively found that the assumption of authority by Commodore Bainimarama and the subsequent acts which followed including the dismissal of Prime Minister Qarase, the dissolution of Parliament and the establishment of an interim regime to govern the Fiji Islands which were unlawful acts under the Fiji Constitution.

The interim regime's response to the landmark decision was both swift and substantive and led to the resignation and reappointment of the Interim Prime Minister, the disestablishment of the Courts and the dismissal of all judges, and, most fundamentally, a decree from the President abrogating the Fiji Constitution. This effectively left the country with no constitutional touchstone with government business conducted solely through the authority of decrees issued by the interim administration.

11 *Qarase v Bainimarama* [2009] FJCA 9; ABU0077.2008s (9 April 2009).

12 *Qarase v Bainimarama* [2008] FJHC 241; HBC 60.2007s; HBC 398.2007s (9 October 2008).

13 *Qarase v Bainimarama* [2009] FJCA 9; ABU0077.2008s (9 April 2009).

Whilst the Fiji media continued to attract their fair share of the attention under such decrees (with the imposition of extensive controls on the public release of information and public comment), the country's lawyers also became subject to a Legal Practitioners Decree issued by the President in the middle of the year, which effectively usurped the role of the Fiji Law Society as the regulator of the legal profession, and authorised a newly established Independent Legal Services Commission to issue practicing certificates and deal with all complaints and disciplinary matters.

On 1 September¹⁴ the Commonwealth Secretary-General announced the suspension of Fiji from the Commonwealth with immediate effect. The suspension followed the involvement of the Commonwealth Ministerial Action Group which had sought a firm commitment from Fiji by 1 September to reactivate a process which would lead to the conduct of credible elections by October 2010, which was not forthcoming.

At the end of 2009, Fiji remained suspended from both the Forum and the Commonwealth and as a regional agenda item, continues to challenge the unity of the Forum member Countries.

III. SAMOA

Constitutional challenges to the ruling HRPP Government was the 'plat du jour' during the year after opposition parties mounted three significant challenges to national legislation including certain provisions of the Electoral Act, Parliamentary Standing Orders and the exercise by the Speaker of certain provisions of the much amended Electoral Act which essentially linked candidates' ability to file an electoral petition to how successful they were compared to the winning candidate.

In *Samoa Party v Attorney-General*,¹⁵ members of one of the opposition parties sought to challenge the statutory threshold requiring an unsuccessful candidate to obtain 50% of the successful candidate's number of votes before a right to challenge the result was available under electoral laws. The plaintiffs were unsuccessful in their challenge to the validity of the electoral provisions at first instance and filed an appeal. The main grounds of the constitutional challenge argued: the existence of a constitutional right to vote necessarily also came with a right to challenge an electoral result; the threshold for challenging an electoral result was discriminatory in nature; the provisions also breached the constitutional right to participate in free and fair elections and for electors to enforce the proper conduct of such elections.

14 Commonwealth Secretariat "Fiji Suspended from the Commonwealth" (press release, 1 September 2009).

15 *Samoa Party v Attorney-General* [2009] WSSC 23 (20 March 2009).

The Samoa Court of Appeal (comprising Baragwanath J, Slicer J and Fisher J) dismissed the Samoa Party's appeal¹⁶ from the decision of the Chief Justice which rejected the challenge at first instance, and determined that there was no demonstrated inconsistency between the electoral provisions challenged and the Constitution because:

- candidates meeting the threshold retained their right to challenge the result;
- the right to bring a private criminal prosecution exists against a successful candidate (albeit within a seven day limitation period), thus retaining the opportunity to challenge electoral results together with the right for the Electoral Commissioner to bring an electoral petition which was recently provided for under the Electoral Act.

In *Samoa Democratic Party (SDUP) v Leiataua*,¹⁷ another opposition party mounted a constitutional challenge in respect of the validity of Parliamentary Standing Orders which prescribe a minimum of eight members of a recognised parliamentary party before there is formal recognition in the Legislative Assembly of the MPs as the Parliamentary Opposition. Recognition as the Opposition affords certain privileges within the Legislative Chamber including a right of response and formal recognition during debate as well as access to public funding and higher salaries and benefits for its members. The application by the Attorney-General to strike out the proceedings ultimately failed, and leave was given to the plaintiff to file amended pleadings. In responding to the strike out application, the plaintiffs argued that the Standing Orders were unconstitutional insofar as they were discriminatory by conferring a privilege to political parties of more than eight members on the grounds of their political opinion, and the functions of the official Opposition were critical to freedom of expression (given the absence of any party meeting the eight member threshold). The Supreme Court refused the motion to strike out the proceedings on the basis that none of the usual grounds to warrant the exercise of the Court's discretion were satisfied and that whilst there was a real doubt of the applicants' likely prospect of success, the issue was one of public importance and full argument was warranted after certain procedural deficiencies in the pleadings were addressed in amended pleadings. The case did not however progress further.

In *Aiafi v Speaker of the Legislative Assembly*¹⁸ a third group of opposition MPs challenged the Speaker's interpretation of electoral provisions resulting in the disqualification of three members of a newly declared (but unregistered) political party and his declaration of vacancies in their constituency seats. This led to a successful challenge before the Supreme Court which held that the disqualification of such members of Parliament was contrary to the provisions of the electoral legislation. In response to the decision, a swiftly passed amendment to the empowering Act left three opposition members facing by-elections with mixed results ie leaving the Leader of the Tautua

16 *Samoa Party v Attorney-General* [2010] WSCA 4 (7 May 2010).

17 *Samoa Democratic Party (SDUP) v Leiataua* [2009] WSSC 49 (6 May 2009).

18 [2009] WSSC 65 (8 July 2009).

party (also the plaintiff in the proceedings) without a seat after his defeat in the by-election; one party member winning a decisive victory, and the third party member elected unopposed.

The constitutional challenges from small and relatively marginalised groupings within the Samoan Parliament would appear to reflect their inability to wrestle any reasonable support from within Parliament and is illustrative of the strength of the ruling party which has enjoyed 28 years of uninterrupted power. Recent legislative measures have been seen as effectively removing any viable basis for an organised opposition to upset or challenge the current administration. 2009 marked an important year in Samoan jurisprudence as a groundswell of public opposition to a change of road from left to right also resulted in yet another constitutional challenge in *Jackson v Attorney-General*.¹⁹ In this case, the Supreme Court dismissed the application for declarations that the road change provisions were a breach of Article 5 of the Constitution concerning the right to life. Justice Nelson however concluded his judgment with the following “[i]t is written in Gallatians that ye shall reap what ye sow. Let us make a fervent prayer that the switch is not a harvest of mayhem and destruction”.

IV. VANUATU

In *Natapei v Korman, Republic of Vanuatu*²⁰ the Vanuatu Supreme Court (acting under an Urgent Constitutional Application) ordered that the decision of the Speaker of Parliament on 27 November declaring the applicant’s seat vacant was unconstitutional and of no legal effect. The application was brought after the Speaker declared the applicant Prime Minister’s seat vacant due to his absence from three consecutive sittings of Parliament.

In his decision, the country’s Chief Justice, as a preliminary matter, considered the role of the Supreme Court in respect of the Legislative Assembly’s internal proceedings or the actions of the Speaker and confirmed that without a breach of the Constitution the Supreme Court has no power to inquire into the validity of such. However where there is such a breach, “[t]he Supreme Court is then duty bound to interfere and uphold the Constitution.”

The Court found that the facts of the case were such that the power to unseat the applicant was unconstitutional for the following reasons:

- the Speaker was aware and informed of the applicant’s absence;
- the Speaker failed to provide the applicant with an opportunity to respond to an announcement or declaration of vacancy; and
- the provisions of the Act in question cannot have automatic effect by operation of law.

The case of *The President v The Speaker*²¹ is also a fascinating study in the tension between the various organs of Government. The President of the Republic of Vanuatu lodged a constitutional referral with the Supreme Court

19 [2009] WSSC 122 (28 August 2009).

20 [2009] VUSC 147; Constitutional Case No 8 of 2009 (5 December 2009).

21 [2009] VUSC 35; Constitutional Case No 1 of 2009 (19 May 2009).

seeking a determination on the constitutionality of an amendment to the Employment Act increasing the entitlements for pregnant employees after the bill had been passed by Parliament and then referred to the President for his assent.

The ground for the President's referral was that the amendment bill was a breach of Article 16(1) of the Vanuatu Constitution where Parliament makes laws for the "peace, order and good government of Vanuatu." However, it was argued that the proposed amendments were not for the good government of Vanuatu due to:

- the absence of prior meaningful consultation "... for this bill which dramatically changes the law, ...";
- the impact of increased overheads on employers such that they would be forced to lay off employees which would lead to increased unemployment and disorder; and
- the significant impact on Ni-Vanuatu businesses.

The Attorney-General filed an application to strike out the referral primarily on the basis that the provisions were valid in every respect and there was no inconsistency between the Bill and the relevant articles of the Constitution. The Supreme Court agreed and for the detailed reasons set out in the judgment the referral was struck out.

The use of a constitutional referral by a President in light of the role which he holds as the country's Head of State, is perhaps a timely reminder that notwithstanding the ongoing evolution of governance in the Pacific region, first principles such as the separation of powers, parliamentary sovereignty and the rule of law, remain at the heart of their quest for democracy, independence and self determination.

V. PAPUA NEW GUINEA

The country has continued to advance land reform and improved land administration as a means to facilitating community development and increased investment.

The launch in 2009 of a national fifty (50) year strategic plan for Papua New Guinea coincided with the confirmation of a liquefied natural gas project heralded as the single biggest commercial deal struck in the Pacific and worth an estimated A\$15.6 billion to the economy.

A Parliamentary investigation has also commenced to seek increased representation by women in Parliament.

VI. SOLOMON ISLANDS

On 25 February, the Truth and Reconciliation Act 2008 came into force in the Solomon Islands marking a significant development in the national resolution of existing tensions caused by the 1998 armed conflict. In April Bishop Desmond Tutu from South Africa visited the country to further support the process of reconciliation and members of the Truth and Reconciliation Commission were appointed in September.

VII. TRADE

The progress in the EPA negotiations between the Pacific Forum Countries and the European Union ground to a perceptible crawl in 2009 as issues about the Office of the Chief Trade Adviser – its location, funding and accountability diminished the capacity of Forum Island Countries to progress the negotiations without their principal adviser.

A similar state of affairs arose in respect of the progress of PACER-Plus negotiations which have been delayed and have also attracted dissent from certain parts of the region concerned at the inequality of bargaining position of the Pacific Island states with Australia and New Zealand. However four priority areas have now been identified for the conduct of the negotiations which are: rules of origin; regional labour mobility, development assistance and trade facilitation.

VIII. FISH

The Pacific tuna fishery has been lauded as a fishery resource that is subject to some of the most progressive fishery management strategies in the world.

Under the auspices of the Tuna Commission and initiatives promoted in particular by the Nauru group of fisheries nations, the Commission has implemented the world's only boarding and inspection program for high seas tuna and in April implemented a satellite tracking system for fishing vessels.

The significance of the Tuna Commission and the role in which the Forum Fisheries Agency and its members have in the work of the Commission is an excellent but not always common example of the power of regional solidarity.