LAISENIA QARASE and 2 Ors v MAHENDRA PAL CHAUDHRY

SUPREME COURT — CIVIL JURISDICTION

FATIAKI P, SPIGELMAN, GAULT, MASON and FRENCH JJ

18 June, 18 July 2003

[2003] FJSC 1

Constitutional law — Constitution — appeal — Section 99 interpretation — Prime Minister's obligation — multi-party Cabinet — Constitution ss 99(1), 99(2), 99(4), 99(5), 99(7), 99(8), 99(9).

The Prime Minister argued that s 99 did not entitle any party to participate in the Cabinet. The requirement in the section that he invite all eligible parties to be represented in the Cabinet was said to be no more than a mandatory first step in good faith negotiations concerning the possible formation of a multi-party government. The Prime Minister said he issued an invitation to the Fiji Labour Party as required by the Constitution. But, he says, that invitation was declined as no agreement could be reached about the policies to be implemented by the Cabinet.

Held — The Prime Minister's invitation to the Fiji Labour Party to be represented in the Cabinet was unconditional as well as FLP's acceptance. Section 99 was mandatory. The imposed obligation did not stop the Prime Minister to negotiate in good faith with FLP. It required the Prime Minister to consult with FLP's leader. It required him to select persons from FLP for appointment, to advise the president to appoint those persons as ministers and to appoint them to the Cabinet. The obligation was clear. It was not affected by perceived policy differences between PM's party and FLP. It must be implemented without further delay.

Appeal dismissed.

Cases referred to

Egan v Chadwick (1999) 46 NSWLR 563; [1999] NSWCA 176, cited.

McCulloch v State of Maryland (1819) 17 US 316; [1819] USSC 5; *President of the Republic of Fiji Islands v Kubuabola* Misc Case No 1 of 99; *Union Label Case* (1908) 6 CLR 469; [1908] HCA 94; 14 ALR 565 , considered.

Stephen Gageler, SC, *Nehla Basawaiya*, *Sainivalati Navoti* and *Ropate Green* for the 1st and 3rd Appellants.

George Williams, *Gyaneshwar Prasad Lala* and *Paulini Madanavosa* for the Respondent.

Fatiaki P, Spigelman, Gault, Mason and French JJ.

Summary

The case which falls for judgment today concerns s 99 of the Constitution. That section requires the establishment in Fiji of a multi-party Cabinet. It is that requirement which was said by the prime minister in 1997 to make the Constitution "a positive instrument of inter-ethnic co-operation and national unity".

The interpretation of s 99 and the nature of the obligation(s) it imposes on the prime minister of the day is in dispute.

The section says that the prime minister must establish a multi-party Cabinet. It also says he or she must invite all parties with more than 10% of the seats in the House of Representatives to be represented in the Cabinet in proportion to

their numbers in the house. It leaves the selection of persons to be appointed from those other parties to the prime minister but requires the prime minister to consult with the leaders of those parties.

The section also acknowledges that some or all parties may decline the prime minister's invitation to be represented in the Cabinet. In such an event Cabinet positions not taken up may be distributed across the remaining eligible parties and the prime minister's own party or coalition. If no party, takes up the invitation then the positions may all be filled by appointees from the prime minister's party or coalition.

The prime minister argues before this court that s 99 does not entitle any party to participate in the Cabinet. The requirement in the section that he invite all eligible parties to be represented in the Cabinet is said to be no more than a mandatory first step in good faith negotiations concerning the possible formation of a multi-party government.

The prime minister says he issued an invitation to the Fiji Labour Party as required by the Constitution. But, he says, that invitation was declined as no agreement could be reached about the policies to be implemented by the Cabinet.

This argument was not accepted in the Court of Appeal and the prime minister seeks to raise it again in this court.

In the opinion of this court the concept of "power-sharing" among the nation's different communities is central to the Constitution. Section 99 provides an important practical tool by which power sharing is to be achieved. Of course it requires good faith and honest dealings on both sides of politics. But it does not require prior agreement about policies and political agendas before it can be implemented.

Even without a multi-party requirement, Cabinet government involves the management of conflict and disagreement between ministers so that effective government can be achieved. This is even more so in the case of coalitions. That is why the conventions of "collective responsibility" "Cabinet confidentiality" and "Cabinet solidarity" all developed under the traditional Westminster system of one party Cabinet. They are recognised in the Constitution of Fiji. They are the tools which the Constitution provides to make multi-party government possible.

Having provided those tools the Constitution makes a command which must be obeyed, requiring the establishment of a multi-party Cabinet.

That obligation will not inevitably produce unworkable government in the light of a number of structural elements in the Constitution which should enable the government to operate effectively without prior agreement between the major parties. In particular, it does not require the prime minister to accept a minority position in Cabinet. For when s 99 is properly applied the majority party or coalition will always have a majority of positions in the Cabinet.

This court is of the opinion that the prime minister's invitation to the Fiji Labour Party to be represented in the Cabinet was, as the Court of Appeal found, unconditional. Similarly, the Fiji Labour Party's acceptance was also unconditional.

Section 99 is mandatory in its terms. The obligation it imposes does not stop at an obligation on the prime minister to negotiate in good faith with the Fiji Labour Party. It now requires the prime minister, as the Court of Appeal found, to consult with the leader of the Fiji Labour Party. It requires him thereafter to select persons from the Fiji Labour Party for appointment, to advise the president to appoint those persons as Ministers and to appoint them to the Cabinet.

The obligation is clear. It is not affected by perceived policy differences between the prime minister's party and the Fiji Labour Party. It must be implemented without further delay.

For the reasons which are published today the court is unanimous in dismissing the appeal and orders that the Appellants pay the Respondent's cost of the appeal.

[1] On 24 April 2002, the High Court of Fiji at Lautoka made the following order:

> 1. That as and from 10 September 2001 the First Named Defendant was and is required and obliged by the Constitution to consult the Leader of the Fiji Labour Party pursuant to s.99(9) of the Constitution and thereafter:
>
> (i) to advise the President to appoint as Minister; and
>
> (ii) to appoint to the Cabinet.
>
> such number of parliamentary members of the Fiji Labour Party as are in proportion to their numbers in the House of Representatives.

[2] On 24 May 2002, the Fiji Court of Appeal dismissed an appeal to that court by the present Appellants to this court from the judgment of the High Court. The Fiji Court of Appeal also ordered that the costs of the appeal to that court abide by the outcome of the appeal to this court.

[3] By s 122(2)(a) of the Constitution, the Court of Appeal may give leave to appeal from a final judgment of that court on a question certified by that court "to be of significant public importance".

[4] On 24 May 2002, the Court of Appeal, by order, certified that the questions raised by the grounds stated in the notice of appeal to that court from the judgment of the High Court were questions of significant public importance. On that day the court granted leave to appeal to this court.

[5] The grounds of appeal to the Fiji Court of Appeal, which were so certified, were as follows:

> (1) The Judge erred in the construction of section 99 of the Constitution.
>
> (2) The Judge erred in holding that subsection 99(5) of the Constitution imposes a duty on the Prime Minister to issue an invitation that is, in substance, an unconditional offer.
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> (3) The Judge erred in holding the construction of section 99 of the Constitution, and of subsection 99(5) in particular, to be:
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> (a) unambiguous; and
>
> (b) unaffected by:
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> (i) paragraphs (g), (h) and (i) of section 6 of the Constitution;
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> (ii) the context of Chapter 7 and of Part C of the Schedule to the Constitution;
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> (iii) the context in which the Constitution was drafted; and
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> (iv) practical difficulties inherent in the operation of a "multi-party government".
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> (4) The Judge ought to have held that the invitation to which sub-section 99(5) of the Constitution refers:
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> (a) creates no entitlement for any party to participate in Cabinet;
>
> (b) need not be unconditional;
>
> (c) is no more than a mandatory first step in good faith negotiations concerning the formation of a multi-party government; and
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> (d) in the absence of such negotiations resulting in agreement between the party to whom the invitation is issued and the Prime Minister's own party or coalition of parties that they are all willing to come together

to form a multi-party government, must be treated:

(i) as having been "declined" within the meaning of subsections 99(7) and (8); and

(ii) as demonstrating that representation of that party in the Cabinet is not "possible" within the meaning subsection 99(3).

(5) The Judge erred in holding Mr Chaudary's second letter of 10 September 2001 to be an unconditional acceptance of an unconditional invitation contained in Mr. Qarase's letter of 10 September 2001,

(6) The Judge ought to have held that:

(a) the correspondence demonstrated that no agreement between the parties had been or could be reached; and

(b) in those circumstances the invitation must be treated as having been declined.

[6] These grounds of appeal are referred to in the notice of appeal to this court and constitute the grounds of appeal to this court.

[7] The final order of the High Court referred to in para [1] above, was made consequent upon an earlier decision of the Court of Appeal on 15 February 2002, determining certain questions of law on a case stated by the High Court under s 15 of the Court of Appeal Act. It was in the course of determining those questions that the Court of Appeal expressed the reasons which led to the final order of the High Court, from which it dismissed the appeal. Those questions and answers will be further outlined below.

[8] The President of the Republic of Fiji Islands is the 2nd Appellant. However, the president has never taken an active part in these proceedings, neither in the High Court, nor in the Court of Appeal nor in this court. Submissions to this court were made on behalf of the Prime Minister and the Attorney-General, the first and third named Appellants.

[9] The issue before the court appears from the declaration made by the High Court set out fully above. It raises a fundamental question under the Constitution of the Republic of the Fiji Islands with respect to the nature of the Cabinet government for which Pt 3 of the Constitution of the Republic provides.

Provision of the Constitution

[10] The case turns on s 99 of the Constitution which provides:

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

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

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

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

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

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

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

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

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

[11] It will be necessary to consider in great detail some aspects of the text and structure of the Constitution. However, a number of specific provisions were relied upon in the submissions to this court and it is convenient to set them out in full. These include the following:

3. In the interpretation of a provision of this Constitution:
   (a) a construction that would promote the purpose or object underlying the provision, taking into account the spirit of this Constitution as a whole, is to be preferred to a construction that would not promote that purpose or object; and
   (b) regard must be had to the context in which this Constitution was drafted and to the intention that Constitutional Interpretation take into account social and cultural developments, especially:
      (i) developments in the understanding of the content of particular human rights; and
      (ii) developments in the promotion of particular human rights.

6. The people of the Fiji Islands recognise that, within the framework of this Constitution and the other laws of the State, the conduct of government is based on the following principles:

   …

   (g) the formation of a government that has the support of a majority in the House of Representatives depends on the electoral support received by the various political parties or pre-election coalitions, and, if it is necessary or desirable to form a coalition government from among competing parties, depends on their willingness to come together to form or support a government;
   (h) in the formation of a government, and in that government's conduct of the affairs of the nation through the promotion of legislation or the implementation of administrative policies, full account is taken of the interests of all communities;
   (i) to the extent that the interests of different communities are seen to conflict, all the interested parties negotiate in good faith in an endeavour to reach agreement;
   (j) in those negotiations, the paramountcy of Fijian interests as a protective principle continues to apply, so as to ensure that the interests of the Fijian community are not subordinated to the interests of other communities;
   (k) affirmative action and social justice programs to secure effective equality of access to opportunities, amenities or services for the Fijian and Rotuman people, as well as for other communities, for women as well as men, and for all disadvantaged citizens or groups, based on an allocation of resources broadly acceptable to all communities;

(l) the equitable sharing of political power amongst all communities in Fiji is matched by an equitable sharing of economic and commercial power to ensure that all communities fully benefit from the nation's economic progress.

7. (1) The principles referred to in section 6 are non-justiciable to the extent that they are made the subject of other provisions of this Constitution or of a law made under this Constitution.

(2) In the interpretation of this Constitution, or a law made under this Constitution, consideration must be given to those principles, when relevant.

[12] Chapter 7 of the Constitution is concerned with the subject of Executive Government. Parts 1 and 2 make provision for offices of President and Vice-President. Part 3 is entitled "Cabinet Government" within which the relevant sections, in addition to s 99, are:

96(1) Subject to subsection (2), in the exercise of his or her powers and executive authority, the President acts only on the advice of the Cabinet or a Minister or of some other body or authority prescribed by this Constitution for a particular purpose, as the body or authority on whose advice the President acts in that case.

(2) This Constitution prescribes the circumstances in which the President may act in his or her own judgment.

(97) Governments must have the confidence of the House of Representatives.

(98) The President, acting in his or her own judgment, appoints as Prime Minister the member of the House of Representatives who, in the President's opinion, can form a government that has the confidence of the House of Representatives.

…

(101) Before taking office, a Minister must make, before the President, the Oath of Allegiance and the Oath of Office set out in Part C of the Schedule.

102(1) The Cabinet is collectively responsible to the House of Representatives for the governance of the State.

(2) A Minister is individually responsible to the House of Representatives for all things done by or under the authority of the Minister, in the execution of his or her office.

103(1) The Ministers (including the Prime Minister) have such titles, portfolios and responsibilities as the Prime Minister determines from time to time.

(2) On the advice of the Prime Minister, the President, by direction in writing, assigns to the Prime Minister and to each other Minister responsibility for the conduct of a specified part of the business of the Government, including responsibility for general direction and control over a branch or branches of the Public Service or over a disciplined Force, as the case may be.

[13] The oath of office for which s 101 makes provision, with an equivalent form for an affirmation of office, provides:

I, A, B, being appointed Prime Minister / Attorney-General / Minister / Assistant Minister, do swear that I will to the best of my judgment, at all times when so required, freely give my counsel and advice to the President (or any other person for the time being lawfully performing the functions of that office) for the good management of the public affairs of Fiji, and I do further swear that I will not on any account, at any time whatsoever, disclose the counsel, advice, opinion or vote of any particular Minister and that I will not, except with the authority of the Cabinet and to such extent as may be required for the good management of the affairs of Fiji, directly or indirectly reveal the business or proceedings of the Cabinet and that in all things will be a true and faithful Prime Minister / Attorney-General / Minister / Assistant Minister. So help me God!

[14] It is also pertinent to note, in view of the use of the word "must" in each of the subss 99(4), (5) and (9), that s 194(12) provides:

(12) For the avoidance of doubt use of the word must in this Constitution imports obligation to the same extent as if the word shall were used.

[15] Furthermore, s 194(7) provides:

(7) A person, authority or body upon which functions are conferred by this Constitution has power to do everything necessary or convenient to be done for, or in connection with, the performance of those functions.

[16] Finally, s 82 relevantly provides for the possibility that there is no opposition party in the House of Representatives, a contingency which could arise if all parties are represented in Cabinet:

82(1) The Leader of the Opposition is appointed by the President.

(2) The President appoints as Leader of the Opposition the member of the House of Representatives whose appointment as Leader of the Opposition would, in the opinion of the President, be acceptable to the majority of the members in the House of the opposition party or parties.

(6) If the President is unable to make an appointment under subsection (2) because:

(a) an opposition party does not exist in the House of Representatives; or

(b) the President is of the opinion that there does not exist in the House a person whom the opposition party or parties would regard as acceptable to be appointed as Leader of the Opposition;

then for so long as the appointment is unable to be made the provisions of this Constitution providing for:

(c) the President to act on the advice of the Leader of the Opposition;

(d) the Leader of the Opposition to be consulted in relation to certain matters; or

(e) the Leader of the Opposition to nominate a person for appointment to an office, are of no effect and an appointment may be made or action may be taken without reference to the Leader of the Opposition.

[17] Immediately following the 2001 General Election the representation of political parties in the 71 member House of Representatives was as follows:

Soqosoqo Duavata ni Lewenivanua	(SDL)	32	(45.1%)
Fiji Labour Party	(FLP)	27	(38.0%)
Conservative Alliance/ Matanitu Vanua	(CAMV)	6	(8.5%)
New Labour Unity Party	(NLUP)	2	(2.8%)
National Federation Party	(NFP)	1	(1.4%)
Independents		2	(2.8%)

[18] On 10 September 2001 the president appointed the Prime Minister under s 98 of the Constitution. To do so, the president necessarily formed the opinion that the prime minister was the member of the House of Representatives who was able to "form a government that has the confidence of the House of Representatives".

[19] On the day of his appointment the prime minister wrote to the parliamentary leader of the FLP extending an invitation to the FLP to be represented in Cabinet. However, the prime minister went on in that letter to state:

- The policies of his Cabinet would "be based fundamentally on the policy manifesto of the [SDL]" which "on a number of key issues of vital concern to the long-term stability of our country are diametrically opposed [to those of the FLP]"; and

- In the interests of stable Government, it was "simply inconceivable" that the SDL "should" allow a situation to develop where we become a minority group in a Cabinet we have been entrusted both by his Excellency and by the people to lead

[20] The full text of this letter is annexed hereto and marked "A".

[21] The parliamentary leader of the FLP wrote back on the same day indicating acceptance of the invitation but stating that the participation of the FLP "in Cabinet and in government" would be in accordance with the provisions of the "Korolevu Declaration". The Korolevu Declaration was a document prepared by leaders of certain political parties in January 1999 to which the SDL never assented. The letter from the parliamentary leader of the FLP went on to quote from the "Korolevu Declaration" to the effect that:

- "Cabinet decision making in Government should be on a consensus seeking basis especially with regard to key issues and policies"; and
- "consensus seeking mechanisms in Cabinet should include the formulation of a broadly acceptable policy framework".

[22] The full text of this letter is annexed hereto and marked "B".

[23] On 12 September 2001 the prime minister wrote again to the parliamentary leader of the FLP. The prime minister expressed disappointment that the purported acceptance by the FLP of its invitation to participate in Cabinet did not expressly include an acceptance of the "basic condition" of the invitation that the policies of his Cabinet would be based on the policy manifesto of the SDL. The prime minister went on in the letter to:

- reject the application to the SDL of the "Korolevu Declaration";
- note the views of the parliamentary leader of the FLP recorded in the Fiji Times as to the differences between the SDL and the FLP; and
- point out that the SDL had "entered into a multi-party arrangement with the independents and the smaller parties in the House of Representatives" each of which had "accepted the SDL manifesto as the central policy guidance of Cabinet".

[24] The prime minister concluded:

> As your party has not accepted the same condition, I can only assume that you are unwilling to make a commitment at the outset, which would best promote the objective of a stable and workable government which, in turn, would best assure the effective promotion of national unity.
>
> In all the above circumstances, I regret to say that the conditions of your acceptance of my invitation are unacceptable, as they will not contribute to a stable and workable Cabinet, so essential to the promotion of national unity in Fiji.

[25] On 18 September 2001, the prime minister wrote to the president and said, inter alia:

> In my letter of invitation I had made it clear that parties joining my Cabinet would have to agree beforehand that the policy manifesto of the SDL Party would be the fundamental policy guide of Cabinet. We are the majority party in Parliament, and in Cabinet. We have been elected on the basis of our policy manifesto. Naturally and logically, it is not unreasonable to expect all parties joining the Cabinet to accept this condition. This, in fact, is what all members of my multi-party Cabinet from outside the SDL have accepted.
>
> The Fiji Labour party, however, did not accept the same condition, even though the FLP leader, Mr. Chaudhry, had himself acknowledged in a press conference the importance of a clear collective understanding on fundamental policies at the outset of the formation of a multi-party Cabinet.

[26] The prime minister advised the president to appoint ministers from the SDL, the CAMV, the NLUP and the Independents. The only party other than the SDL to receive more than 10% of the members in the House, the FLP led by the respondent, was not represented in the Cabinet.

The judgment of the Court of Appeal

[27] Of central significance for the judgment of the Court of Appeal was the interpretation of the exchange of correspondence of 10 September 2001, being Annexs "A" and "B" to this judgment.

[28] The court characterised the prime minister's letter to Mr Chaudhry in the following way:

> The 10 September letter … has to be construed objectively, the issue being how the recipient reasonably would interpret it. The objective interpretation, in our opinion, is that the letter contains the invitation required by s 99(5). In addition, it advised (or one might say warned) the plaintiff of the way the writer intended the affairs of Cabinet to be conducted. The letter did not ask the plaintiff or his party to agree.

The court found that the prime minister's letter was an unconditional invitation and accordingly was therefore consistent with his obligation under s 99(5) of the Constitution.

[29] With respect to Mr Chaudhry's reply, also dated 10 September, the court found:

> Since the Prime Minister's letter of 10 September was an unconditional invitation as required by s.99(5) coupled with information or a warning, there is no difficulty in construing the plaintiff's response as an unconditional acceptance. … his statement that the FLP's participation would be in accordance with the Constitution added nothing since its participation would necessarily have to be in accordance with the Constitution. The Korolevu Declaration is a political compact and neither the first respondent nor his party were signatory. The letter stated it was an acceptance of the Prime Minister's invitation, but like the Prime Minister's letter, it went on to give additional information. As with the Prime Minister's letter however this did not make the letter conditional. The plaintiff's reply did not ask the Prime Minister to agree to anything.

[30] Accordingly, the Court of Appeal held that Mr Chaudhry's letter was not conditional and could not be treated by the prime minister as if Mr Chaudhry had declined the prime minister's invitation. It held that the prime minister was required, by s 99 of the Constitution, to tender such advice to the president as would lead to the appointment of a Cabinet in which the FLP was represented in proportion to its numbers in the House of Representatives.

[31] The Court of Appeal went on to hold that the Prime Minister was in breach of a constitutional duty in failing to consult Mr Chaudhry in relation to the selection of members of the FLP for inclusion in the Cabinet and also in advising the president to appoint a Cabinet that did not contain any FLP members or, alternatively, in failing to advise the President to appoint FLP members as ministers.

[32] The answer to these questions in the original stated case is reflected in the declaration of the High Court, from which order the Court of Appeal dismissed an appeal and which is the subject of the appeal presently before the court.

[33] The Court of Appeal approached the interpretation of s 99 of the Constitution by placing it in its context, including the other provisions of the Constitution and also the history of the Constitution. The court referred to the

provisions already set out and, with respect to the constitutional history the court noted:

- The 1990 Constitution was promulgated to restore parliamentary democracy after the 1987 military coup.
- The interim nature of the 1990 Constitution was acknowledged by providing for its review within seven years.
- Following resolutions of both Houses of Parliament in September 1993, the president established the Fiji Constitution Review Commission on 15 March 1995.
- The commission made its report to the president on 9 September 1996: Report of the Fiji Constitution Review Committee The Fiji Islands: Towards a United Future Parliament of Fiji, Parliamentary Paper No 34 of 1996 ("the Reeves Commission Report").
- The Reeves Commission Report included reference to the desirability of multi-ethnic governments and of power sharing among the ethnic communities of Fiji.
- The Reeves Commission rejected the submission that the Cabinet should be formed from all parties in proportion to their representation in the Lower House.
- A joint meeting of both Houses of Parliament referred the Reeves Commission Report to a Joint Parliamentary Select Committee (JPSC).
- The JPSC reported on 13 May 1997 and proposed that, contrary to the recommendation of the Reeves Commission, there should be provision for a multi-party Cabinet.
- On 23 June, the Hon Major General SL Rabuka introduced the Constitution (Amendment) Bill 1997, which contained, in cl 98, the basis of s 99 of the Constitution with certain significant differences: the threshold for entitlement to representation was 4% and the clause did not, in terms, require the prime minister to issue an invitation to a minority party. There were no provisions equivalent to subs (6) and (7) of s 99.
- On 2 July 1997 Major General Rabuka moved in Committee that certain subclauses of cl 98 of the Bill be deleted and that subss (3)–(9) of what became s 99 be substituted.

[34] After setting out the constitutional history, the Court of Appeal directed its attention to the submissions made to it with respect to para (g) of s 6 of the Constitution which we have set out above. The court said:

> Clause 98 of the Bill differed significantly from the provisions contemplated by the Reeves Report. When it was amended in Parliament no attempt was made to amend what became section 6 to make paragraph (g) reflect section 99. However as counsel for the plaintiff submitted paragraph (g) is directed to the formation of a government, the process, dealt with in section 98 and not with the appointment of a Cabinet, which dealt with in section 99. The principles referred to in section 6 cannot be enforced by the Court because section 7(1) provides that they are non-justiciable. However section 7(2) provides that they must be considered in interpreting the Constitution. In this case those principles are of no relevance because what became section 99 was extensively amended without section 6 being amended, because none of the principles in section 6 deal with the appointment of a Cabinet, and because as will become apparent in the next section of this judgment, in our view the meaning of section 99 is clear. The principles in section 6 may help to resolve the meaning of the Constitution where this is not clear. They cannot be used to alter the clear meaning of section 99.

[35] The Court of Appeal's interpretation of s 99(5) is apparent, from the following extract from its judgment:

> Subsection (5) imposes a duty on the Prime Minister in support of the requirements of a multi-party Cabinet and proportionality stated in ss.(3) and (4). The Prime Minister must invite any party with at least l0% of the membership of the House (a qualified party) to be represented in the Cabinet in proportion to its numbers in the House.
>
> That duty is stated directly and simply. Whether viewed in isolation or in the context of s.99 as a whole, the words of ss (5) provide no basis at all for allowing the Prime Minister to impose any conditions on the invitations he must make. To repeat the precise terms, the Prime Minister "must invite [qualified] parties … to be represented". Section 194(7) which provides that those upon whom functions are conferred have power to do everything necessary or convenient to be done for or in connection with the performance of those functions does not help the Respondents. Section 99(5) does not confer a function, it simply imposes a duty.
>
> Section 194(7) is however relevant to the Prime Minister's function of forming a Cabinet and to the process for the accepting or declining of the required invitation. For example, it would allow the Prime Minister to make reasonable requirements about the time, place and method for acceptance of the invitation.
>
> The duty of the Prime Minister to issue the invitations is naturally and directly matched by the "entitlements" of qualified parties to be represented in Cabinet [ss (7)].
>
> To summarise, the words of s 99(5) read alone and with the other provisions of s.99 are plain. They require the Prime Minister to issue an invitation to qualified parties. No more. No less.

[36] The Court of Appeal noted that, other than the provisions for a multi-party Cabinet, the sections of the Constitution with respect to the executive government and the formation of a Cabinet are "an orthodox statement of the Westminster system of parliamentary Cabinet government". With respect to these provisions, the court concluded:

> The question which arises from these provisions is whether they qualify the duty imposed by s 99(5), and enable the Prime Minister to impose conditions on an invitation to be represented in Cabinet. We think not. The obligation placed on the Prime Minister is clear and precise. There is no ambiguity. There is no necessity for reading in any words. Any practical difficulties that may arise in the working of a multi-party Cabinet cannot affect the clear meaning of the words.

[37] The Court of Appeal referred to the judgment of this court in *The President of the Republic of Fiji Islands v Kubuabola* Misc1/99 3 September 1999 (the 1999 Supreme Court opinion). The Court of Appeal said:

> The 1999 Supreme Court Opinion makes it clear that a prime object of the Constitution is to promote the sharing of power. The construction which would allow a Prime Minister to impose a condition requiring a qualified party to agree to conform to the policies of the Prime Minister is contrary to the Opinion of the Supreme Court.
>
> We therefore hold that s 99(5) obliges a Prime Minister to invite, in unconditional terms, parties which have 10% or more of the membership of the House to be represented in the Cabinet in accordance with that provision. This means the invitation to participate in Cabinet may have to be issued across political lines. The text, the context, the history and the 1999 Supreme Court Opinion lead inexorably to this conclusion.

Submissions on the appeal

[38] The Appellants' principal contention was that the Court of Appeal was wrong in its approach to the interpretation of s 99(5) of the Constitution, by relying exclusively on the "clear meaning of the words" and the absence of

"ambiguity". The proper construction of s 99(5), it was submitted, should have been seen as affected by the context and specifically:

- Paragraphs (g), (h) and (i) of s 6.
- The context of Pt 3 of Ch 7.
- The historical context in which the Constitution was drafted.
- Practical difficulties inherent in the operation of a "multi-party government"

[39] The Appellants submitted that, on its proper construction, the word "invitation" in s 99(5) creates no entitlement for any party to participate in the Cabinet. The subsection imposes on the prime minister an obligation to issue an invitation but no more. It does not, either expressly or by implication, dictate the consequences of that invitation. Such an invitation is not capable of immediate binding acceptance.

[40] It was submitted that such an invitation is no more than a mandatory first step before the commencement of good faith negotiations concerning the possible formation of a coalition or multi-party government. Section 99(5) neither displaces the process of such negotiation and agreement, nor dictates its outcome.

[41] It was further submitted that, in the absence of negotiations resulting in an agreement between the parties that they are to come together to form a coalition or multiparty government, it should be determined that the invitation was "declined" within the meaning of s 99(7) and (8). Alternatively, it was submitted that absent such an agreement, it was demonstrated that representation of the party in the Cabinet is not "possible", within the meaning of s 99(4) of the Constitution.

[42] Against the background of the construction of s 99 for which the Appellants contend, the Appellants submit that the Court of Appeal erred in concluding on the facts that the letter from the Respondent of 10 September 2001, was an acceptance of the invitation contained in the prime minister's letter of the same date. They submitted that the correspondence did not result in any agreement concerning the formation of a multi-party government. On the contrary, it was submitted, the correspondence demonstrated that no agreement between the parties had been or could be reached. Accordingly, the prime minister's invitation was declined.

[43] The Appellants contended that the correct approach to interpreting any text such as a statute or a constitution is to consider the relevant context in the first instance and not merely at some later stage when ambiguity might be thought to arise.

[44] The Appellants submitted that the context of the provisions which fell for interpretation in these proceedings indicates that the Constitution of the Republic of the Fiji Islands reflects certain fundamental principles of the Westminster system, particularly:

- The absolute secrecy of Cabinet deliberations.
- The collective responsibility of Cabinet to the House of Representatives for the governance of the State.
- The requirement for the government to have the confidence of the majority of the House of Representatives.

[45] It was submitted these matters gave rise to necessary implications that the Cabinet is to form a government and that a member of the Cabinet is to be a member of the government and, accordingly, does not "contemplate the existence

of an opposition within either Cabinet or the government". Members of a multi-party Cabinet are ultimately bound to accept whatever policy the Cabinet ultimately chooses to pursue in a Westminster system. Accordingly, it was submitted, a Cabinet comprises a group of ministers who or whose parties have agreed to pursue a common policy.

[46] It was also submitted that it was the Cabinet collectively, not just the prime minister or the party or coalition led by the prime minister, that must command the confidence of the House of Representatives. It was, therefore, an implication of the constitutional structure that a government can only be formed on the basis of a workable consensus between parties whose members participate in Cabinet and who collectively have more than 50% of the seats in the House of Representatives. It was submitted that s 99(5) should be given an interpretation which allows it to operate so as to facilitate the creation of such a workable consensus between parties. The section should not be interpreted in such a manner as allows it to be used to force parties together in the absence of consensus.

[47] It was submitted that in its context, particularly para (g) of s 6 and the structure of Pt 3 of Ch 7, there can only be a Cabinet government where parties having a majority in the House of Representatives combine in a mutual willingness to work together. Section 99(5) does not give an invited party a unilateral option to require the formation of a coalition government, irrespective of the views of other parties. What is required is a process by which competing eligible parties manifest, to use the words of s 6(g), "their willingness to come together to form or support a government".

[48] In this context, the "invitation" in s 99(5) should be seen only as a mandatory first step on the path to good faith negotiation. Such negotiation may or may not result in an agreement. If it does result in a workable agreement, then a multi-party Cabinet can be formed. If it does not result in such an agreement, then the prime minister must form a government from his own party and, assuming that party does not have the necessary support in the House of Representatives in its own right, with such other parties or independents as come together in agreement.

[49] The Appellants drew particular attention to the reference in s 99(4) that a Cabinet "should … fairly represent parties represented in the House of Representatives". The term "fairly" it was submitted is an inherently flexible and relative concept. Furthermore, this objective is to be attained only "as far as possible". That is a reference to practicability given the constitutional structure and the political exigencies of the time. Neither subs 99(4), nor subs 99(5)–(8) contemplate that any party will have an absolute right to participate in Cabinet. The mandatory issuing of an invitation serves an important Constitutional purpose of providing a formal starting point for parties to determine their willingness to form a government through a process of negotiation.

[50] On the basis of this understanding of the role and function of s 99(5), the Appellants submitted that the Court of Appeal erred in characterising the correspondence of 10 September 2001 as amounting to an unconditional acceptance of an unconditional invitation. It was submitted that the prime minister had made it clear that he would only be willing to agree to FLP participation in Cabinet on the basis that Cabinet decisions were based on SDL policies. The purported acceptance was on a wholly different basis, to the effect that the Cabinet decision would not be based on SDL policies but on seeking a

compromise between the policies of the SDL and those of the FLP. There was no correspondence between the basis of the invitation and the basis of the purported acceptance. Accordingly, the Prime Minister, acting reasonably, was not bound to accept the purported acceptance by FLP.

[51] The Respondent submitted that the Court of Appeal was correct in holding that s 99 of the Constitution imposes a mandatory constitutional duty upon the prime minister to make an unconditional invitation to any party whose membership in the House of Representatives comprises more than 10% of that House, to be represented in the Cabinet in proportion to their numbers in the House. The Respondent also supported the factual finding of the Court of Appeal that the exchange of correspondence of 10 September 2001 constituted an unconditional acceptance of an unconditional invitation. The Respondent submitted that the correct approach to constitutional interpretation is the determination of the plain and ordinary meaning of the text of the Constitution. The mandatory and clear language of ss 99(3) and 99(5) cannot be qualified by the imposition of "conditions".

[52] The Respondent submitted that nothing in the language of s 99 contemplates that the prime minister has a choice as to whether to establish a multi-party Cabinet. The words "must establish" and "must invite" in each of ss 99(3) and 99(5), as the word "must" is explicated in s 194(12), are inconsistent with any discretion. The Respondent relied on the reasoning of this court in, In the matter of a Reference for an Opinion by his Excellency the President of the Republic of the Fiji Islands on the interpretation of s 64 and 99 of the Constitution (Amendment) Act 1997 (2002 Supreme Court Opinion).

[53] The Respondent submitted that the Constitution is permeated with the idea that power should be shared amongst the different ethnic groups of Fiji and relied on the observations in "the 1999 Supreme Court Opinion" on the subject. The Constitution rejects the "winner take all" approach of the traditional Westminster model.

[54] In the alternative to its primary submission, that the court does not need to go beyond the plain meaning of the words of the Constitutional text, the Respondent submitted that the constitutional history and extrinsic materials supported the construction for which it contended.

[55] The Respondent did not challenge the proposition that the prime minister may, in the invitation or otherwise, outline the manner in which he or she intends the Cabinet to operate and the policies he or she intends the government to pursue. However, such a communication is the provision of information to the recipient of the invitation to consider when deciding whether to accept the invitation.

[56] It may be, that by reason of the operation of the constitutional provisions, a consensus does not emerge in the Cabinet room. This, however, it was submitted, has political rather than legal consequences. The question of "workability" does not arise as a justiciable legal question under s 99.

[57] Even if this court, it was submitted, were to regard the Constitution as "unworkable", that would still not justify departure from the plain words of s 99. It would not have been intended for the judiciary to decide issues of a factual nature with respect to "workability", including such matters as:

- The compatibility of policies and even of personalities, therefore, the likelihood of consensus within Cabinet.

- The likelihood that parties and their leaders could reasonably reach agreement on conditions.
- Whether the prime minister has acted genuinely in insisting on particular conditions being necessary to achieve political consensus.

[58] It was submitted the court ought not to determine the extent of real or apparent differences between the political parties, nor rule on the political motivations of the leaders of such parties. They are political issues, unsuitable for judicial resolution. They are matters for parliament and, ultimately, for the electorate.

[59] In the alternative, the Respondent submitted that if the Appellants' construction is correct, and an issue does arise as to whether or not the proposition in the invitation letter from the prime minister of 10 September, that the policies of the Cabinet would "be based fundamentally on the policy manifest of the SDL" constituted a condition, the Respondent submitted that it was not a bona fide condition compatible with s 99(5). It was submitted that this condition, if it be such, undermines the idea of the multi-party Cabinet required by s 99(3).

[60] The Respondent also contended that there is no basis for a conclusion that, in the circumstances as they exist, a multi-party Cabinet would be "unworkable". There have been no negotiations, nor any process of consultation such as that contemplated by s 99(9). The reply from the parliamentary leader of the FLP of 10 September 2001 expressly referred to the possibility of achieving a consensus in the Cabinet. The capacity of the Cabinet to achieve such consensus, it was submitted quite simply, has never been tested.

[61] Both the Appellants' and the Respondent's submissions referred to the constitutional history to which further reference will need to be made below.

Approach to interpretation

[62] Statutory and constitutional interpretation, must always take as its point of departure the natural and ordinary meaning of the words appearing in the provision to be construed and read according to their context. So much was emphasised by this court in its opinion delivered on 15 March 2002 — "the 2002 Supreme Court Opinion". Sometimes, as in this case, the words so read will yield only one construction which may be called "the plain reading of the provision". That approach was sufficient in that case for the construction of s 64(2) of the Constitution.

[63] Construction builds upon the natural and ordinary meaning of the words in a constitutional provision. The way in which the words, taken together, are to be read will often involve selection from among a number of possible readings. That selection must have regard to the context which includes the whole of the document identified as the Constitution (Amendment) Act 1997. It must also have regard to the interpretive principles which are to be found in the Constitution itself and which apply to the whole of its text. These are set out in ss 3 and 7 read with s 6. The purpose or object underlying the provision to be construed, the spirit of the Constitution as a whole, context, in the extended sense of the context in which the Constitution was drafted, and social and cultural developments relating to particular human rights, all have a part to play by virtue of s 3. The important principles upon which the conduct of government is to be based which are set out in the compact (s 6) must also be given consideration when relevant (subs 7(2)).

[64] Construction is a multi-dimensional process. It is not appropriate to approach a text on the basis that some kind of ambiguity must first be found to exist in a specific provision before taking into account the whole of its context and other relevant principles and considerations. At the very least context must be considered in the first instance.

[65] This is of particular significance when interpreting a constitution. A basic rule of interpretation is that the nature of the document being construed is itself a matter to be considered. As Marshall CJ said in *McCulloch v Maryland* [1819] USSC 5; (1819) 17 US 316 at 407:

> We must never forget that it is a constitution we are expounding.

[66] Higgins J referred to this observation in the *Union Label Case* (1908) 6 CLR 469 at 611–12; 14 ALR 565 and said:

> Although we are to interpret the words of the constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting, to remember that it is a Constitution, a mechanism under which laws are to be made and not a mere Act; which declares what the law is. [Emphasis in original]

[67] A narrow literalism is not an appropriate way to interpret a constitution. Such a text, perhaps more than any other, must be interpreted by reference to the natural and ordinary meaning of its words, but not literally, and in its total context as well as by reference to the principles which it lays down for its own interpretation.

The approach to interpretation — Context, jurisprudence and history

[68] The process of interpreting the Constitution of Fiji, which is expressed to be the supreme law of the State, requires careful consideration of the inter — relationship among the institutions for which the Constitution expressly provides, together with the historical background and evolving needs of the people of the Fiji Islands who, in accordance with the Preamble of the Constitution, have given themselves the Constitution. It is also to be borne in mind as this court said in the "1999 Supreme Court Opinion":

> the Constitution has been drawn up with an eye to political realities and likelihoods. The construction to be placed on it in accordance with its spirit should not be directed or heavily influenced by the possibility of circumstances which the framers may have discounted as highly improbable.

[69] In the "2002 Supreme Court Opinion" the majority judgment at p 7 stated that ss 3, 6 and 7 of the Constitution contain principles relevant to its interpretation. The judgment also identified two matters of significance for the present case.

[70] First, with respect to the obligation, pursuant to s 3(b), to consider the context in which the Constitution was drafted, the court made reference, without disapproval, to the consideration in detail of that context in the decision of the Court of Appeal of 15 February 2002, from which, in substance, the proceedings now before this court are an appeal.

[71] Second, with respect to the compact identified in s 6, and pursuant to s 7(2) of the Constitution, this court reaffirmed the earlier judgment of the court in the "1999 Supreme Court Opinion", in which this court "stressed that the sharing of power was a central purpose of the 1997 Constitution".

[72] The "2002 Supreme Court Opinion" was given pursuant to a reference from the president to this court under s 123 of the Constitution. Advice was sought with regard to a difference of opinion that had arisen concerning the composition of the Senate, specifically, the meaning of s 64(1)(c), which provides that eight members of the Senate are to be appointed by the president on the advice of the leader of the opposition. The question arose under s 64(2) which provides:

> (2) The leaders of each of the parties entitled to be invited to participate in the Cabinet under section 99 nominate a person or persons for appointment under paragraph (1)(c) and, in tendering advice to the President pursuant to that paragraph, the Leader of the Opposition must ensure that the 8 persons proposed for appointment comprise such number of nominees of those parties as is proportionate to the size of the membership of those parties in the House of Representatives.

[73] The issues that arose for consideration by the court on that occasion are linked to the interpretation of s 99 which falls for determination in the present proceedings.

[74] In the "1999 Supreme Court Opinion", this court emphasised the significance of "power sharing" as a purpose of the Constitution. The court said at [19]–[20]:

> A central purpose of the 1997 Constitution is the sharing of power. The Republic of the Fiji Islands is declared in the course of the preamble to be a multi-cultural society. While some particular protection of Fijian interests is contemplated by s.6 (j), political power is to be shared equitably amongst all communities: s.6 (l). By s.99 (3) the Cabinet is to be a multi-party. Sharing of power means limitations of power. This concept of sharing permeates ss.64 and 99. For the purpose of determining the questions raised by the present reference, it must be given particular weight in resolving any ambiguity or deciding, which of a number of possible interpretations must be adopted. Section 3(a) so requires.
>
> It follows that there is a distribution of political power quite different from that which may be familiar under a traditional Westminster pattern. In a traditional Westminster style democracy a Prime Minister who enjoys the support of the Lower House can normally establish a Cabinet as he or she pleases. That is not the position in the Fiji Islands. Political power is divided among a number of groups, persons and parties; the share of each is in some way limited.

[75] In the "2002 Supreme Court Opinion" the court made reference to the "1999 Supreme Court Opinion", with its emphasis on the concept of power sharing and to s 6(l) in the compact, with its reference to "equitable sharing of: political power amongst all communities in Fiji". The court then said at 17:

> … as this court pointed out in the 1999 Supreme Court Opinion (at 8) a provision such as s.6(l) must be given weight in resolving any ambiguity, or deciding which of a number of possible interpretations may be adopted. However, the concept of power sharing does not exist in a vacuum, but must be seen in, and when necessary give, way to, the context and specific terms of the Constitution. The first task must always be to construe the actual words of the statute. As the 1999 Opinion noted, throughout the Constitution those empowered are also subject to limitations. In terms of s.99, and the flow-on effects of that section to s.64, power sharing does not extend to parties which do not attain the ten percent threshold. That threshold is fundamental to the workings of those provisions, and outweighs any implications that might be based on more general considerations, such as power sharing.

[76] The court went on to conclude that the FLP was the only qualified party for the purposes of s 99(5), being the only party to have attained more than ten percent of the seats in the House of Representatives at the 2001 elections. Accordingly, it was the only party entitled to nominations under s 64(1)(c).

[77] The Constitution of 1997 is the product of a long period of social and political tension in Fiji including a number of events that can only be described as constitutional crises. The primary tensions arose amongst ethnic communities in Fiji, particularly between the largest groups of indigenous Fijians and Indo-Fijians.

[78] The Constitution contains a number of fundamental provisions designed to ensure that this recent history is not repeated. This is manifest in the compact and Bill of Rights Charters of the Constitution and in the recognition of equal status of the three principal languages — English, Fijian and Hindustani — in ss 4 and 74. It is also manifest in the creation of institutions in which the different ethnic communities are enabled or required to work together. Section 99 is one of those provisions. Although it refers to political parties, it must be accepted that, at least as at the time the Constitution was adopted in 1997, many if not most parties in parliament were likely to represent to a substantial extent, if not completely, one or other of the ethnic communities of Fiji.

[79] The significance of ethnic tension and the recognition of the ethnocentric nature of political groupings in the political and constitutional history of Fiji led to the emergence of the concept of the multi-party Cabinet through the various steps traced by the Court of Appeal, as summarised in para [33] above.

[80] The Reeves Commission emphasised the importance of creating a multi-ethnic government of Fiji. It highlighted the wide support for this idea [para 2.01 and 9.83] and identified a multi-ethnic government as a "primary goal". [Paragraph 2.69; Recommendation 1; paras 9.82, 10.29]. The commission emphasised that the principal barrier to ethnic government was the system of communal representation in parliament under the 1970 and 1990 Constitutions [paras 2.4, 2.6, 2.33 2.37, 2.59 and 9.97]. Accordingly, it recommended that the new Constitution should reduce the significance of communal representation. [Paragraphs 2.76–2.77]. If this were done then power sharing would occur by voluntary participation or by the emergence of multi-ethnic parties. [Recommendation 3 paras 9.96, 9.98, Recommendation 237].

[81] Perhaps the central component of the commission's recommendations was its proposal for the election of members of the House of Representatives. It recommended the creation of three member constituencies with a preferential system of voting. Electorates of this character were designed to encourage inter-ethnic co-operation. The commission also recommended that, as a transitional measure only, 25 of 70 seats be reserved for particular communities. The balance would be open seats and, eventually, all would be open. This electoral system was designed to lead to the emergence of multi-ethnic government.

[82] As a result of the JPSC and further parliamentary consideration these proposals were rejected. Multi-member constituencies were not adopted and 46 out of 71 seats were reserved for ethnic communities.

[83] When the proposed electoral system was rejected, this removed the commission's mechanism for achieving the "primary goal of multi-ethnic government. This was a goal which was said to have widespread support. The

Reeves Commission intended to achieve this objective, indirectly, through an electoral system which provided strong incentive for co-operation across ethnic lines. As the commission put it:

> The main thrust of the report is to encourage the emergence of multi-ethnic parties or coalitions [paragraph 5.49].

[84] Once the electoral system was rejected, if the "primary goal" of multi-ethnic government was to be achieved, it had to be done by direct means.

[85] The Reeves Commission had considered and rejected a proposal that Cabinet should be formed from all the parties in proportion to their representation in the Lower House [para 9.87]. It identified the difficulties that could arise when such a requirement was combined with a Westminster system. However, once the Reeves Commission proposals for creating a system which could lead to multi-ethnic government were rejected, this alternative was revived.

[86] As noted above, the JPSC, which reported on 13 May 1997, recommended the creation of a multi-party government. Its report said, under the sub-heading "Multi-Party Government":

> G.1 The Reeves Commission had recommended that the primary goal of Fiji's constitutional arrangements should be to encourage the emergence of multi-ethnic government. In agreeing to this principle the JPSC has gone further and stipulates that the Constitution would include provisions that the Prime Minister must establish a multi-party Cabinet which would, as far as possible, be a fair representation of all parties represented in Parliament. A constitutional threshold should be set to provide the basis of representation therein.

[87] This constitutes a recognition that political parties were likely to remain ethnically based to a predominant degree. The objective of multi-ethnic government, expressed as a "primary goal", was however affirmed.

[88] A Bill was introduced on 23 June 1997 and was further amended during the course of the committee stages into its final form. During the course of his second reading speech the then Prime Minister Major General Rabuka said, (Hansard 23 June 1997, 4439):

> The most important area where we have made our Constitution a positive instrument of inter-ethnic cooperation and national unity is in our acceptance of the concept of a multi-party Cabinet, providing for the representation and participation of the different communities in Fiji, both in Cabinet and in Parliament. … We have to move away from the ethnic divide that for the past five years has been a divisive and unhappy feature of this chamber. We cannot make any real progress in promoting national unity in Fiji unless and until we have representatives of all communities sitting together in Cabinet and sitting alongside each other on both sides of this chamber. [Emphasis added.]

[89] The compact found in s 6 of the Constitution, to which principles the court must give consideration when interpreting the Constitution where relevant [see: s 7(2)], had its origins in the Reeves Commission Report [paras 5.42–5.64 and recommendation 29]. The relevant paragraphs are s 6 (g)–(l) as set out above. There were two significant changes between the Reeves Commission recommendation and the version ultimately adopted.

[90] First, there was an important deletion from what became s 6(g). As proposed by the Reeves Commission, this principle in the compact was as follows:

> The formation of a government that commands the support of a majority in the lower house of Parliament depends on the electoral support received by the various political parties or pre-election conditions, and, if it is necessary or desirable to form a coalition government from among competing parties, depend on the compatibility of their policies and their willingness to come together to form or support a government. [Emphasis added.]

[91] The emphasised words were deleted from the compact as contained in the draft Bill presented to the House. This was the same Bill that introduced the multi-party Cabinet provisions in s 99. Plainly, the framers of the Constitution understood that, however important compatibility of policies may be for a coalition government in a traditional Westminster system, such compatibility could not be assumed in a multi-party Cabinet system.

[92] The second difference is the addition of s 6(l). This was added to the Bill at the committee stage, without debate. It was not contained in the Reeves Commission Report, nor in the original draft Bill based on the JPSC Report.

[93] The drafting of s 6(l) is suggestive. It does not, in terms, express "power sharing" to be a "principle" in the compact. Rather it suggests that an existing "equitable sharing of political power" is to be "matched by an equitable sharing of economic and commercial power". It is the Constitution itself that establishes an "equitable sharing of political power". It is achieved by the requirements for the composition of the parliament in ss 51 and 64 and the requirements for the composition of the Cabinet in s 99. In the two manifestations of political power — legislative and executive — express provision was made for power sharing.

[94] The Reeves Commission had recommended an indirect means to achieve this end:

> Power sharing should be achieved through the voluntary co-operation of political parties, an increased support for a genuinely multi-ethnic party

[95] On the other hand, the Constitution as adopted, sought to achieve this objective by direct means.

[96] This history is an important part of "the context" within which the particular requirements of s 99 must be construed.

The construction of s 99

[97] In accordance with the general principles outlined above we begin by considering the words of s 99.

[98] Section 99(1) establishes the basic mechanism for the appointment and dismissal of ministers. Appointment and dismissal is the function of the president and the president alone. But in carrying out that function he or she acts upon the advice of the Prime Minister. By virtue of s 96(1) he or she can appoint or dismiss ministers only upon that advice. The Prime Minister is therefore the sole repository of authority to provide to the president, advice on the appointment or dismissal of ministers upon which the president acts. That authority is unimpaired by the obligation under s 99(3), to establish a multi-party Cabinet, for it is the Prime Minister who selects persons from parties other than his or her own party for appointment (s 99(9)).

[99] Section 99(2) prescribes, as a qualification for ministerial appointment, membership of the House of Representatives or the senate. It should be read with s 105(1)(d) which provides that the appointment of a minister terminates if the minister ceases to be a member of parliament. These provisions may bear upon

the consultation process for which s 99(9) provides. The disqualifying effect of resignation or expulsion of a member of the House of Representatives from his or her political party may provide an incentive to genuine consultation about particular appointments with the leaders of political parties invited to be represented in the Cabinet. They may operate as a practical constraint on the power of a Prime Minister, to select persons as ministers and to allocate portfolios to them.

[100] The primary obligation of the Prime Minister to establish a multi-party Cabinet is created by s 99(3). The text is explicit. He or she "must" establish such a Cabinet. That obligation is to be discharged "in the way set out" in s 99. A literal interpretation of s 99(3) would read it as creating an unconditional obligation defining, by reference to the balance of the section, the way in which that obligation is to be discharged. However as noted above, s 82 of the Constitution envisages the possibility (unlike the traditional Westminster model) that all parties are represented in Cabinet and that accordingly there can be no leader of the opposition. The balance of the section recognises that it may not be possible for the Prime Minister to discharge the obligation it imposes. For it may be that all parties to whom invitations are extended under s 99(5) to be represented in the Cabinet decline the invitation. In that event the Prime Minister "may look to his or her own party or coalition of parties to fill the positions in Cabinet." The obligation is thus qualified by the impossibility of its fulfilment where invitations are declined.

[101] An invitation may be declined by simple non-acceptance. It may also be declined by an acceptance subject to fixed conditions which cannot lawfully or reasonably be met. This court so held in the "1999 Supreme Court Opinion". It is however important to emphasise that an invitation or an acceptance accompanied by a statement of a political position or objective, however emphatic, is not likely to be regarded for that reason as an illusory invitation or a non-acceptance as the case may be. The primary obligation to establish a multi-party Cabinet which should fairly represent all parties is expressed in the mandatory language of "must establish". Although the Constitution contemplates in s 99(8) that all other parties may refuse to participate in Cabinet, the structure of s 99 plainly regards such outcome as a last resort.

[102] In determining whether the Prime Minister's obligation is capable of being discharged in a particular case, it is necessary to consider the content of that obligation by reference to the necessary attributes of the multi-party Cabinet which he or she is required to establish. In that consideration it must be borne in mind that the Constitution reflects the needs of the people. It represents an adaptation of the fundamental traditions of parliamentary government to the particular situation in Fiji. The Constitution does not reflect some form of ideal model of the Westminster system of government. The adoption of a Westminster model of responsible Cabinet government does not, of itself, carry an implication that no Cabinet can be formed in the absence of prior consensus on policy.

[103] Indeed, the Westminster system is, and has always been, an evolving system, often developing in ad hoc and fortuitous way. The original model based on the British Parliament, was frequently modified before being adopted elsewhere. Nor has the model been static in Britain or in any other nation which has adopted it. There are variations between nations, and over time within nations, as to important aspects of the system. Such variations have included the significance attached to the principles of collective responsibility and individual

ministerial responsibility and to the stringency with which those principles are applied. It is not permissible to adopt and apply an ideal type of Westminster model which leads to a strained construction of the words of the Constitution.

[104] The provision for a "multi-party Cabinet" in s 99 of the Constitution represents a modification of the Westminster model. It is a modification directed to the exigencies of a particular time and place. The Westminster model has always been adaptable in such respects, for example the all party Cabinet of World War II Britain or the government of national unity of post apartheid South Africa.

[105] Many matters that, in other nations, have been left to non-justiciable adaptation by means of constitutional convention and political and parliamentary practice are referred to explicitly in the Fiji Constitution. These include matters that are not explicitly mentioned in other written constitutions based on the Westminster model, that is the Australian Constitution originally contained no reference to the Cabinet or to political parties.

[106] Certain familiar incidents of Cabinet government established under the Westminster system are apparent from the text of the Constitution. First there is the requirement that "the Cabinet is collectively responsible to the House of Representatives for the Governance of the State" (s 102(1)). Linked to that is the requirement that governments must have the confidence of the House of Representatives (s 97). The notion of collective responsibility has historically been expressed in terms of Cabinet solidarity. That is to say, ministers who are members of the Cabinet will publicly stand by decisions of the Cabinet and, if unable to do so, will resign. That this traditional concept informs the term "collectively responsible" in s 102 is reinforced by the terms of the oath or affirmation of office that each person appointed as a minister is required; by s 101, to make before the president. That oath or affirmation is set out above and includes a promise not to disclose Cabinet deliberations.

[107] The objective of a multi-party Cabinet to which s 99(3) is directed, is capable of being achieved consistently with these constitutionally recognised attributes of Cabinet government in Fiji. For a Cabinet may consist of members of different parties who bring to it differing perspectives and policies and yet reach collective decision after discussion, negotiation and compromise. It may be that the convention of Cabinet solidarity will be satisfied in such a case by a dissenting minister refraining from publicly criticising a decision contrary to his own party policy. It is not to be expected, at this early stage of the implementation of the 1997 Constitution, that there will be settled conventions to cover all contingencies or difficulties. conventions cannot be the subject of judicial prescription. They are matters for the elected representatives of the people to develop in working out the future governance of their nation. That, it is hardly necessary to say, mandates a degree of give and take and good faith on all sides.

[108] As Sir Victor Windeyer, formerly a judge of the High Court of Australia and a noted legal historian, once put it:

> "That the players should be making the rules as the game proceeds may seem strange. Yet this has been the course of much British constitutional history. It may well be inevitable if the organs of government are not to become atrophied; for definition can produce a rigor juris, only one stage removed from rigor mortis" — Responsible Government Highlights, Sidelights and Reflections(1952) 42 JRAHS 257 at 272 noted in *Egan v Chadwick* (1999) 46 NSWLR 563; [1999] NSWCA 176 at [31].

[109] Section 99(4) is a statement of the principles underpinning the way in which the Cabinet is to be composed. It gives content to the term "multi-party Cabinet" in s 99(3) by requiring that the composition of the Cabinet "as far as possible fairly represents the parties represented in the House of Representatives" The term "as far as possible" reflects the reality that the parties may not be able to be represented in Cabinet in exact mathematical proportion to their seats in the House. It also reflects the practical limitation that some parties may decline the Prime Minister's invitation.

[110] Section 99(5) then imposes upon the Prime Minister the precise obligation to "invite all parties whose membership in the House of Representatives comprises at least 10% of the total membership of the House to be represented in the Cabinet in proportion to their numbers in the House". Again the obligation is emphatically expressed. The Prime Minister "must" extend the invitation to all eligible parties. The invitation to the parties contemplated by s 99(5) is an invitation "to be represented in the Cabinet". This is not simply an invitation for their members to be there without any agenda or policies of their own. This is a provision which advances the central constitutional purpose of power sharing.

[111] Section 99(5) by referring to representation of the eligible parties allows that their representatives may take into Cabinet deliberations their own policies and agendas. If they do so however, they do so subject to the requirements of collective responsibility and confidentiality which are recognised in the Constitution as aids to effective government. This may mean a more difficult Cabinet to manage than a Cabinet whose members belong to the same party or a coalition that has worked out some consensus before its formation. But this is the kind of Cabinet that is envisaged by the Constitution and it cannot be rejected as unworkable in principle because of that difficulty.

[112] Division of opinion in Cabinets is nothing new. The conventions of collective responsibility and Cabinet confidentiality respond to division and allow conflict in Cabinet to be managed so that effective government is possible. The Prime Minister is entitled therefore to say that his own appointees intend to implement the policies of his party. That is not to prevent representatives of other parties from urging their own policies where they arise. Nor is it beyond the bounds of possibility that negotiated outcomes in the national interest will be reached. Section 99 aims to encourage debate on contentious policies including debate across party lines. It may also be observed that there is much in the routine business of government that will not involve any real clash of policy at all. Indeed much of the routine work of individual Ministers does not require references to Cabinet.

[113] Section 99(7) provides for an imperfect form of multi-party Cabinet where one or more, but not all, eligible parties decline the Prime Minister's invitation. The allocation of ministerial positions is re-determined in accordance with the proportions of the accepting parties inter se. Subsection (7) is of importance for the present case in that it refers to the "entitlements" of parties to "Cabinet positions". This lies against the proposition that the obligation to invite parties to be represented is no more than any obligation to treat and to negotiate in good faith. The purpose of the mandatory invitation under s 99(5) is, save when any party declines to participate, to ensure that each party is, in fact,

represented in Cabinet. It is such actual representation that is described in mandatory language as an "entitlement" in s 99(7) and which is protected from dilution by s 99(6) and (7).

[114] Section 99(8) as earlier noted, recognises that the Prime Minister's primary obligation may not be capable of being discharged.

[115] Section 99(9) leaves the formal power of selection of persons from parties other than his or her own, in the hands of the Prime Minister subject to consultation with the leaders of those parties. In the ordinary course it is likely that the persons appointed will be appointed with the consent of their party or its leadership.

[116] The structure of s 99 has a certain linear logic about it. It will, however, operate in the context of political posturing and negotiation. Negotiation between the Prime Minister and the leaders of various parties may take place in advance of any formal invitation or concurrently with its issue. There may be interrelated discussions about the formation of coalitions or the development of protocols or understandings in relation to certain areas of policy. The persons to be appointed as ministers and the portfolios allocated to them will also, in all probability, have a role to play in such negotiations. Equally, in determining whether or not to accept an invitation, parties will no doubt consider whether it might be preferable to remain out of Cabinet and in opposition. It must also be remembered that the appointment of the Prime Minister precedes the establishment of the Cabinet. That appointment may itself have been the product of negotiations leading to the formation of coalitions or undertakings of support.

[117] No doubt there is an obligation on the Prime Minister to negotiate in good faith at least to the extent necessary to ensure that his invitation is a genuine invitation and is maintained as such. An invitation issued on conditions which are incapable of satisfaction will not meet the obligation. On the other hand an invitation issued with a prognosis that the functioning of the Cabinet will be difficult or close to unworkable does not thereby cease to be an invitation. And if it be accepted, the Prime Minister must then proceed to consult and select and to advise the appointment of ministers for the other parties. As a general proposition it should also be noted that the obligation to establish a multi-party Cabinet carries with it an obligation to maintain a multi-party Cabinet. This latter obligation may arise in connection with ministerial resignations, by-elections or changes in the size of the Cabinet.

[118] There are further contextual considerations which bear upon the construction of s 99.

[119] The Appellants drew attention to changes that were made to the Bill in the Committee stages. The Bill, as originally introduced had, in lieu of what became ss 99(3)–(8), contained the following provisions:

> (3) The Prime Minister determines the size of the Cabinet but, in doing so, must ensure that it is a multi-party Cabinet formed in the way set out in this section.
>
> (4) Subject to sub-section (5), in selecting persons for appointment as Minister, the Prime Minister must ensure that all parties whose membership in the House of Representatives comprises at least 4% of the total membership of the House are represented in the Cabinet in proportion of their numbers in the House.
>
> (5) If a party declines an invitation from the Prime Minister to be represented in the Cabinet, the Prime Minister may look to his or her own party or coalition to fill the particular place or places in the Cabinet.

[120] Although provision was made in the proposed subs (5) for the declining of an invitation, there was no express provision for the making of an invitation. The formulation "must ensure" in the proposed subss (3) and (4) did not, in terms, allow for the possibility of a party refusing to participate.

[121] With respect to the primary obligation to establish a multi-party Cabinet, the formulation of "must ensure" was replaced by the equally mandatory "must establish" while acknowledging that the "fair" representation of all parties could only be achieved "as far as possible" [ss 99(3)]. It protected the integrity of the power sharing system by ensuring that the refusal of any one party to participate in the Cabinet could not be taken up entirely by the Prime Minister's own party [ss 99(7)] unless all other parties declined [ss 99(8)]

[122] With respect to the secondary threshold obligation in ss 99(5), the threshold was increased from 4% to 10%, thus ensuring that only major parties had an entitlement. Furthermore, the formulation "must ensure" was replaced by "must invite". The mandatory quality of the "entitlement" — as the effect of s 99(3) is described in ss 99(7) — is confirmed by the protection created by ensuring that it is not reduced by the Prime Minister offering seats to minor parties [ss 99(6)] and the pari passu increase in the entitlement if any other majority party declines the invitation.

[123] The Appellants submitted that the change from "must ensure" in the draft Bill to "must invite" in s 99(5) supported the interpretation for which they contended that is it constitutes a mandatory first step — described in submissions as "a formal invitation" — without mandating an outcome. In our opinion, for the textual reasons outlined earlier, the change of terminology did not alter the mandatory nature of the constitutional requirements, including a mandatory outcome.

[124] The constitutional requirement that, subject only to a refusal to participate, there be actual representation of all major parties, is inconsistent with the Appellant's contention that an invitation is merely a first step in the course of reaching some form of agreement or workable consensus. The framers of the Constitution were concerned to ensure, as far as it was possible to ensure, that there be established a multi-party Cabinet in which all major parties are represented.

[125] The Appellants placed reliance on the terminology of s 6(g) which concludes with the words: "depends on their willingness to come together to form or support a government". This, it was submitted, supported the construction of s 99(5) as merely the commencement of a process of negotiation, the result of which was contingent on the "willingness" referred to in s 6(g).

[126] The terminology of s 6(g) was, with the deletion to which we have referred above, in the form suggested by the Reeves Commission. Although the deletion indicated an understanding that the multi-party Cabinet provisions were inconsistent with an assumed "compatibility" of policies between competing parties, there remains an element of discordance between the mandatory language of s 99 and the terminology of s 6(g) which states: "if it is necessary or desirable to form a coalition government from among competing parties". That terminology is perfectly apt in the context of the Reeves Commission recommendations. It is not, however, obviously applicable to the terms of s 99(3): "The Prime Minister must establish a multi-party Cabinet".

[127] Section 6 is a statement of "principle" to which "consideration" must be given when interpreting the Constitution, but only when the principle is "relevant" [s 7(2)].

[128] The introductory words of s 6(g) are: "the formation of a government". That is terminology capable of application to both the primary obligation in s 99(3) and the secondary threshold obligation in s 99(5). However, such assistance as can be derived from s 6(g) does not support the Appellants' argument. The phrase "willingness to come together to form or support a government", even if it were to apply to a multi-party Cabinet, rather than to a coalition to which reference is made in s 99(8) (a point which it is unnecessary to decide), goes no further than referring to the possibility that a party may decline the invitation. The formulation "willingness to come together" does not suggest a process of negotiation leading to a "workable consensus", but merely the conclusion of a process of internal deliberation.

[129] In the context of the prior history and the constitutional crises to which we have referred above, power sharing among the ethnic communities of Fiji, as expected to be reflected (at least in the medium term) in the party affiliations of members of the House of Representatives, was a central purpose of the Constitution. That purpose would not be served and, indeed, could be fundamentally undermined, if an invitation by a Prime Minister under s 99(5) could be subject to conditions or if the establishment of a multi-party Cabinet were determined by the fact, let alone by the Prime Minister's opinion, that a political party which comprises at least ten percent of the membership of the House, was unwilling to pursue or accept particular policies.

[130] As this court said in the "1999 Supreme Court Opinion" at p 8:

> The Court is satisfied that the concept of power sharing in the Constitution requires invitation to the Cabinet, and consequently in effect to the Senate, to be issued to parties with at least 10% of House membership, other than the Prime Minister's own party. His own party is protected by his rights to establish his Cabinet (subject always to the principles in s.99) and to secure 9 Senate appointments.

The determination of the appeal

[131] The Court of Appeal correctly construed the exchange of correspondence of 10 September as an unconditional acceptance of an unconditional invitation. The balance of the content of the two letters was in the circumstances of this case of no constitutional significance.

[132] In the "1999 Supreme Court Opinion" the court had to consider a purported acceptance after the 1999 election of an invitation under s 99(5) which was expressed in the following terms: "We have decided to accept on the following conditions". Those conditions included stipulating as to which portfolios would be held by particular persons, about appointments to the senate and about the occupation of other public posts. This court said at 14:

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

[133] Nothing in the Respondent's letter of 10 September was of this character. There was a clear unconditional acceptance followed by a statement as to how the FLP proposed to conduct itself. It concluded with an expression of willingness to engage in a consultative process. Nothing suggested that the invitation was, in substance, declined.

[134] Indeed, as we have earlier observed, even an invitation or acceptance expressed to be subject to conditions may not represent a failure to invite or an act of declining. Allowance must be made for the possibility that, in political negotiations, the forceful assertion of a requirement may not represent a final position. This court construed the letter of purported acceptance under consideration in the 1999 Supreme Court Opinion as a final non-negotiable position. That was a finding of fact "in the circumstances" of the case. In other circumstances, even a similarly expressed "acceptance", or "invitation", may lead to a different conclusion. We should add that rigid stances are not readily reconciled with the compact and the spirit of the Constitution as a whole.

[135] The order made correctly states that the Prime Minister must consult with the Leader of the FLP under s 99(9) and advise the president to appoint the number of persons stated to the Cabinet. Subject to that obligation, the composition of the Cabinet, the identification of the persons to be ministers and the operations of the Cabinet are not constitutionally prescribed. They are matters to be determined by political practice and perhaps eventually, by constitutional convention, which are inherently more flexible than constitutional prescription.

[136] There is not, in our opinion, any aspect of the circumstances of the present case which suggests that this flexibility should be constrained by making such matters potentially justiciable in a constitutional context. The Constitution provides for a range of pertinent contingencies which may arise, including disagreement over policy.

[137] First, there is express provision for the consequences of a party declining an invitation in s 99(7) and (8).

[138] Second, the Prime Minister retains the authority to select persons for appointment as ministers and to allocate portfolios [s 103(1) and (2)]. This process of selection and allocation may well accommodate differences in policy. The right of a party leader to be consulted under s 99(9), although his or her views are entitled to weight and the process must be a genuine consultation, is not a right of concurrence. This contrasts with the right of that leader to nominate a member of the senate under s 64(2).

[139] Third, the government, manifest in the Cabinet, must collectively retain the confidence of the House of Representatives under s 97.

[140] Fourth, the Cabinet is collectively responsible to the House of Representatives under s 102(1).

[141] Fifth each minister is individually responsible to the House of Representatives [s 102(2)].

[142] Furthermore, when, as has occurred, there are only two parties which have more than 10% of the membership of the House, the Prime Minister can ensure that the majority party has a majority in the Cabinet. [ss 99(4), (5) and(6)]. It may also be noted that so long as the Prime Minister's party has a majority of the total of parliamentary seats held by that party and all other eligible parties it will have an entitlement to a majority of the positions in the Cabinet. For assuming each eligible party accepts the invitation for representation in the

Cabinet its entitlement to representation will be measured by the proportion of the number of parliamentary seats it holds to the total number of parliamentary seats held by the government or coalition party and all eligible parties. On that basis, in the present case, the Prime Minister's party has an entitlement to a majority position in the Cabinet.

[143] These structural elements should enable the creation of a workable government, without the necessity of a prior coalition agreement. Whether such an agreement is or is not desirable, and if it is desirable what should be the scope and detail of its content, is not a matter that should be constitutionalised. It can be left to the political exigencies of the times and the ultimate sanction of the ballot box. An agreement of this character is not a pre-condition for membership of the multi-party Cabinet envisaged by s 99 of the Constitution.

[144] The appeal should be dismissed. Costs should follow the event. The Appellants should pay the Respondent's costs both in this court and in the Court of Appeal. The Appellants should pay the costs of overseas counsel engaged by the Respondent.

ANNEXURE "A"

OFFICE OF THE PRIME MINISTER, SUVA, FIJI

Telephone (679) 211 201
Facsimile (679) 307 806

10th September, 2001

Hon Mahendra P Chaudary
Leader
Fiji Labour Party
SUVA

Dear Sir,

It is a requirement under s 99(5) of the Constitution that the Prime Minister, once appointed, should invite all parties that receive at least 10% of the total membership of the House of Representatives to be represented in Cabinet.

This morning I have accepted appointment as Prime Minister at the invitation of His Excellency, the President. In this capacity, I now extend an invitation to you and your party, in accordance with the requirement of the Constitution.

I should, however, be candid in stressing that I already have the necessary numbers to maintain and sustain our position in the House of Representatives as a viable, stable and effective Government.

I have already formed a coalition with like-minded parties and individuals based on consensus and voluntary agreement.

The policies of my Cabinet will be based fundamentally on the policy manifesto of the Soqosoqo Duavata ni Lewenivanua, as the leader of this multi-party coalition. Our policies and your policies on a number of key issues of vital concern to the long-term stability of our country are diametrically opposed. Given this, I genuinely do not think there is sufficient basis for a workable partnership with your party in my Cabinet. Indeed, for my party, there can be no compromise on these issues. We have been given a clear and decisive mandate by the people who have voted my party in with the largest representative group in the House of Representatives. As such, we have no mandate to make any changes or adjustments to the policies on which we have been elected.

There is also the make up of the House of Representatives as the outcome of the General Elections. We are the majority party and it is simply inconceivable that we should allow a situation where we become the minority group in a

Cabinet we have been entrusted both by His Excellency the President and by the people to lead. What Fiji needs is a stable Government and the Soqosoqo Duavata ni Lewenivanua is fully capable of delivering that with its coalition of like-minded parties and individuals.

I have set this out very clearly because in the present circumstances, the requirement under s 99(5) of the Constitution is both unrealistic and unworkable.

However, I give you and the whole country a firm assurance that we shall govern Fiji in the best interests of its entire people.

Yours faithfully,

[L Qarase]

Prime Minister.

ANNEXURE "B"
FIJI LABOUR PARTY

REF: FLP-PC/01/09/2

10th September, 2001

Hon Laisenia Qarase
Prime Minister of the Republic of the Fiji Islands
Prime Minister's Office
Government Buildings
Suva
FIJI ISLANDS

Dear Prime Minister,

Reference is made to your letter of offer to FLP for representation in the Cabinet and to my letter bearing even date delivered to you earlier today. I have much pleasure in informing you that the FLP Parliamentary Caucus has had mature deliberations on your said offer of today and, has authorised me to inform and advice you that the FLP accepts your invitation under s 99(5) of the Constitution of the Republic of the Fiji Islands to be represented in the Cabinet.

I thank you for your invitation and FLP looks forward to working together with your party to rebuild Fiji in a spirit of national reconciliation.

My party's participation in Cabinet and in government will be in accordance with the provisions of the Constitution and with that of the Korolevu Declaration Parliamentary Paper No 15 of 1999.

I wish kindly to bring to your attention clause number 4 of the Declaration which reads as follows:

> 4. The manner in which the Cabinet conducts its business.
>
> (a) Cabinet decision making Government should be on a consensus seeking basis especially with regard to key issues and policies.
>
> (b) Parties represented in the Cabinet may express and record independent views on the Cabinet decisions but members of the Cabinet must comply with the principles of collective responsibility
>
> (c) Consensus seeking mechanisms in Cabinet should include the formulation of a broadly acceptable policy framework, the establishment of Cabinet committees to examine any major disagreements on policy issues and the establishment of flexible rules governing communications by ministers to their respective party caucuses.

Furthermore, I reserve my right to address you further at an appropriate time during our consultations, which you no doubt will be initiating very shortly, with regard to the other matters raised in your letter:

I advise you that I am available to start the consultative process as envisaged in the Constitution and particularly in regards to the appointment of Ministers, Assistant Ministers, senators, policy formulation and in the matters pertinent to minority parties in the Parliament.

I look forward to meeting you to initiate our consultation process urgently.

Yours sincerely,

Mahendra Chaudhry

PARLIAMENTARY LEADER/FIJI LABOUR PARTY LEADER.