Powers and Pardon.

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This brief paper will discuss the sources and use of the power to pardon and its variants by an executive seeking an end to a period of instability. It will consider the concept of prerogative and reserve powers and attempt to draw together some of the loose threads that surround the debate about the extent of those powers and the extent to which they may be judicially considered.

Preliminary:
It is not uncommon for governments to fall and be replaced following periods of instability including insurrection and revolution. Whatever the causes of the unrest or motivations of those responsible, the sequel to the instability is usually a period of resolution followed by rebuilding of systems and institutions of government – in one form or another.

This paper looks at an aspect of the process by which rebuilding becomes possible – the processes by which those responsible for the unrest are either prosecuted and/or pardoned or granted some other form of relief from the consequences of their actions.

Sources of the power:
There are two possible sources of power to a Head of State in a constitutional democracy – prerogative or reserve powers and Constitutional. It may be argued that there is a third power namely the courts with their power to interpret the Constitution and by so doing, maintain it is a condition of relevance and utility to the needs of the day.

The history of many of the Pacific States is that they are former colonies or dependencies of Great Britain, Australia or New Zealand. Their development towards the status of independent republic within the Commonwealth has usually included a period during which the Queen was Head of State acting through local Governors-General. Reflecting the long constitutional development of the relationship between Monarch and Executive in England, most of the powers formerly exercisable by the Monarch in the exercise of their sole prerogative became powers exercised by those Governors-General and later their Presidents on the advice of Ministers (usually the Prime Minister). Each has moved towards that general form of government that we know as 'representative' in which the Head of State acts on advice and the Prime Minister and government of the day are responsible for those actions. There remain some functions in which the Head of State may act independently or even contrary to advice. These powers are said to be reserved or reserve powers. In some, the mechanisms establishing the limited powers of independent action by the Head of State are express and wholly statutory; in others, they are conventions and traditions outside the language of the Constitution itself – as in Australia where even the relationship between the Governor-General and the political leader of government is barely alluded to in the written Constitution.

Fiji provides a good example of the former. It is useful to set out S.96 of the Fiji Constitution that relevantly provides:

> "**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."

These explicit provisions would exclude the possibility of so-called reserve powers in the Head of State that do not derive from the Constitution itself. The circumstances in which the President acts on his own judgment are confined to and by the Constitution. They are:

- He may summon Parliament (S.68);
- appoint a Chair of the Constituency Boundaries Commission (but only after consultation with the Prime Minister and Leader of the Opposition (S.76);
- appoint a Chair to the Electoral Commission (S.78);
- appoint and dismiss the leader of the Opposition in Parliament (S. 82);
- appoint and dismiss the Prime Minister (S.98);
- appoint an alternate Prime Minister after a no confidence motion (S.108);
- appoint a caretaker Prime Minister (S. 109);
- appoint 2 members of the Commission on the Prerogative of mercy (S.115);

In a constitutional model such as this, it may be argued that there are no further powers in the Head of State that are not explicit in the Constitution itself; that there are no prerogative or non-constitutional reserve powers at all since their existence has been excluded by the express and therefore limiting language of the Constitution.

Australia provides an example of the convention-based constitution where the exercise of prerogative or reserve powers is substantially controlled by extra-constitutional conventions. Speaking in 1995, Sir Harry Gibbs described the Australian position thus:

> "… there are some powers which the Governor-General or, in the case of a State, the Governor, can exercise as he or she thinks fit, without the advice, or contrary to the advice, of the Prime Minister or Premier. Those powers are known as the reserve powers. They are not often exercised but are held in reserve to be used when necessary to ensure that the Executive acts in accordance with the law and conventions of the Constitution."[1]

Power to Pardon:
It may be helpful to provide a context in which to discuss this power. A convenient example is available in the Trinidad and Tobago insurrection of July, 1990 by members of the group named Jamaat Ali Muslimeem. 114 members of that group

stormed the Lower House of the Parliament and took as hostage the Prime Minister and a number of members of the House of Representatives and others. It was a brief but violent attempted coup in which people were killed and injured by the rebels. Details may be read in the judgments of the Privy Council of 1992 and 1994[2] which came to decide important issues related to the powers to pardon and to prosecute.

There were communications between the rebels and state authorities through a mediator. The state authorities included the Acting President (the President himself was out of the country), the Deputy Prime Minister and a number of senators and leaders of the army and the police.

On the day after the insurrection started, the Acting President granted a pardon in the form of a general amnesty to the applicants. In so doing he was exercising the powers of the President under section 87(1) of the Constitution of Trinidad and Tobago 1976. This section provided:

> **87(1)** The President may grant to any person a **pardon,** either free or subject to lawful conditions, respecting any offences that he may have committed. The power of the President under this subsection may be exercised by him either before or after the person is charged with any offence and before he is convicted thereof."

A quick look at some Pacific States' Constitutions yields the following variations on that theme:

Cook Islands: S.76B The Constitution of the Cook Islands – the Prerogative of Mercy and Pardon is exercised by the Queen's Representative following a resolution passed by at least two-thirds of the members. It is not expressly provided whether the prerogative is in any way limited to post-conviction use. See the discussion below on the prerogative power.

Republic of Kiribati: The Constitution of Kiribati S. 50 – 'The Beretienti (President) acting in accordance with the advice of Cabinet may grant to any person concerned in or convicted of any offence against the law in force in Kiribati a pardon, either free or subject to conditions;' Note that this is a power exercise both before and after conviction.

Fiji: Constitution of the Republic of the Fiji Islands S.115 (1) - The President may: (a) grant to a person convicted of an offence under the law of the State a pardon or a conditional pardon; (3) In the exercise of his or her powers under subsection (1), the President acts on the advice of the Commission [on the Prerogative of Mercy].

Nauru: The Republic of Nauru and the Supreme Law of Nauru S.80(a) – 'The Council of State may … grant a pardon, either free or subject to lawful conditions, to a person convicted of an offence;'

Norfolk Island: Norfolk Island Act 1979 (Cth) S.66(1) – 'The Governor-General [of Australia], acting with the advice of the Attorney-General may …. Grant to a person convicted by a Court of the Territory exercising criminal jurisdiction a pardon either free or conditional …' (See similar provisions in Cocos (Keeling) Islands Act 1955 s.

17; Heard Island and McDonald Islands Act 1953 s.12; Australian Antarctic Territory Act 1954 s. 13; Ashmore and Cartier Islands Acceptance Act 1933 s.13)

Papua New Guinea: Constitution of the Independent State of Papua New Guinea S.151 – '*(1)* Subject to this Subdivision, the Head of State, acting with, and in accordance with, the advice of the National Executive Council, may grant to a person convicted of an offence or held in penal detention under a law of Papua New Guinea - *(a)* a pardon, either free or conditional;'

Samoa: The Constitution of the Independent State of Samoa S.110 – The Head of State (after consultation with the Prime Minister's designated Minister) 'shall have power to grant pardons, reprieves and respites …'

Solomon Islands: The Solomon Islands Independence Order 1978 (as amended) S.45(1)(a) – The Governor-General may, in the name and on behalf of the Head of State -
(a) grant to any person convicted of any offence under the law of Solomon Islands a pardon, either free or subject to lawful conditions;'

Tonga: The Constitution of Tonga S.37 – 'It shall be lawful for the King with the consent of the Privy Council to pardon any person who has been convicted of a breach of law, or to remit or mitigate any sentence, or any part of any sentence, imposed by any court for a breach of law:'

This brief excursion is sufficient to identify a number of interesting and importantly different degrees of forgiveness or forbearance on the part of the State including pardon, amnesty, immunity, reprieve and respite. Some describe a largely judicial function (mercy in sentencing); some an executive act; some have effect as wholly removing the criminal act (pardon); some merely suspend the operation of the normal criminal and civil processes flowing from unlawful conduct (amnesty, immunity); and some operate only to reduce or mitigate punishment (respites and reprieves).

The difference is potentially important if it were ever to be asked whether any particular act of forgiveness or forbearance could later be disavowed, denied, withdrawn or revoked. A full pardon, having the effect of entirely expunging the criminal act, would be incapable of revocation or withdrawal. Once pardoned, it is as if the act had not occurred. But where all that has occurred is that the susceptibility of the subject to the due process of the law has been suspended by a grant of immunity, it may well be argued that the immunity could subsequently be withdrawn and the subject restored to the former position before the law.

Such measures have been and are being considered, for example, in recent developments in diverse places such as:

- Estonia – where the former Minister for Defence has been stripped by the legislature of his immunity from prosecution;[3]
- Israel – where the Knesset has voted to remove the Immunity of a radical MP exposing him to prosecution for offences against the State (he resigned and fled the country before being arrested);

- Honduras – in 2003, the Congress voted to amend the Constitution to remove immunities granted to various state officials[4]

In a post-conflict transitional period during which a return to normalcy is being prepared, consideration is invariably given to the use of the power to pardon or immunise. It will always be a difficult and delicate matter to resolve within the existing constitutional framework. A frequent lament within the Pacific communities over the past few years has been that some State instrumentalities did not respond appropriately to earlier instances of extra-constitutional conduct and have thereby contributed to the creation of an atmosphere which, while not being strictly conducive to further similar events, is at least not hostile to them.

A possibility that is not often discussed where immunities have been given for past conduct, is for legislators and/or later modellers of Constitutions to consider whether the balance of the Public Interest and national security does not require the withdrawal or revocation of that immunity thereby opening the way to a full and open exploration of all unresolved issues of responsibility and culpability. I speak of course of a Truth Commission style of process with all necessary powers including coercive powers.

The existence of a Constitutional formula, with some degree of limitation on the exercise of the pardon power would argue strongly against the existence of any further power not derived from the Constitution itself such as a final supra-constitutional prerogative power to pardon or grant a pre-conviction amnesty or immunity. I realize that this too is not without controversy. It is a constitution-centric argument which may be contrasted with the more State-centric view that the State per se has a right to act in self-preservation and this is not derived from law as such but from the nature of the state.[5]

Some of the powers seen in the Pacific States are post-conviction only (Fiji, Nauru, Solomon Islands, Norfolk Island and the other Australian dependencies mentioned above and Tonga); one is available before or after conviction (Kiribati) and others are non-specific or equivocal (Cook Islands and Samoa). Self-evidently, where a power exists to pardon post-conviction only, there can be little argument for a residual prerogative to pardon pre-conviction since the prerogative would be excluded by the specific statutory provision. In the Trinidad and Tobago example the power to Pardon pre-conviction was available to the President. The residual issue arising in that case was not the existence or the exercise of that power but the extent to which it may subsequently be argued that it had been exercised under duress rendering the pardon invalid.

Some of the powers provided in the various constitutional models mentioned are exercisable after certain conditions are satisfied such as consultation with Cabinet or a Commission or a vote of the Parliament. Such conditions must be met and the question whether they were in fact met would be susceptible to judicial inquiry. The manner in which the prerogative was exercised would not.

An example of a pardon (using the language of immunity) that was found to be invalid because the constitutional limitations on the pardon power were not met is to be found in the Fijian cases arising out of the attempted coup of 2000. The Immunity

Decree purporting to grant Speight and those assisting him immunity from criminal and civil action was found to offend S.115 of the Constitution that limited the pardon power to a post-conviction act of the President after consultation with the Commission on the Prerogative of mercy. Since the Constitution remained in place throughout that attempted coup, the Immunity Decree could not have the force of law. The same decree also failed for the additional reason that it failed to satisfy the requirements for the operation of the doctrine of necessity. Other Immunity Decrees were also promulgated in parallel with the Speight Immunity. They were never tested but would inevitably fail for the same reason.

Later attempts were made to have an Immunity Bill brought before the Fiji Parliament. Such a Bill would have been unconstitutional in that it would have abrogated those powers uniquely belonging to the President. Fortunately, it never came to the point where the bill would have needed to be challenged although it was close. Had the now infamous Truth and Reconciliation Bill been passed, it would have been unconstitutional at many, many levels and created a lifetime of litigation.

While I have diverted a little from my theme, I will divert a little longer and further to add that the tradition of Directors of Public Prosecutions granting Immunities from Prosecution in normal criminal matters to persons involved in criminal activity in return for their giving evidence against accomplices is also flawed for the very same reason that they amount to the exercise of the Pardon power that is the exclusive domain of the President and may not in any event be awarded pre-conviction. The most a DPP can do, in the absence of some specific power in the Constitution is to undertake not to prosecute in respect of the disclosures against interest made (and perhaps other derivative offences uncovered as a result). That an immunity is an exercise of the pardon power was one of the rulings on law made in the Silatolu/Nata treason trial by Wilson J in the High Court of Fiji 2003.

It is of course fundamental to any exercise of a Constitutional (and also prerogative) power that it be undertaken for the defence of the extant State, the Constitution and the security of government. An executive act that had the effect or purpose of assisting in the insurrection would not be sustainable. If it were otherwise, it would be possible to subvert the executive authority to the point of making it an effective proxy for the unlawful regime and an instrument for its advancement. This much (i.e. the rule in Madzimbamuto v Lardner-Burke) has also been declared to be the law of Fiji in the Chandrika Prasad case.

Prerogative powers:
Prerogative powers are a "relic of a past age" said Lord Reid, "not lost by disuse, but only available for a case not covered by statute."[6] Their scope is difficult to define but where resorted to in order to cope with an emergency "it may be important to the Executive to know that there exists an alternative source of emergency powers, especially in a crisis where the legislative arm of government has been paralysed."[7] Care must be taken, when looking at the case-law on this topic emanating from England to remember that in England the prerogatives retain meaning because the Monarch remains Head of State. In other States that have given themselves Constitutions to mark their independence, it may not necessarily be assumed that the rules relating to prerogatives will be capable of being transplanted from the English

Monarchical model without major modifications. In some instances, such as Fiji, it is open to be argued that there are no residual prerogatives. That argument does not resolve one way or another whether there is an exception of a war prerogative given that the Fiji Constitution is entirely silent on that issue; but then again, so is the Australian Constitution.

Being relics of a past age, it is unsurprising that prerogative powers developed as unique powers of a Monarch by virtue of the "pre-eminence which the King hath over all other persons, and out of the ordinary course of common law, in right of his regal dignity. … for if once any one prerogative of the Crown could be held in common with the subject, it would cease to be prerogative any longer."[8] With rather more concise language but no greater clarity, Dicey referred to it as "The residue of discretionary authority, which at any given time is legally left in the hands of the Crown."[9]

The prerogative (if it is not - either expressly or by necessary implication - excluded by a written Constitution) may be activated by circumstance, as in the case of war, where it is not doubted that a prerogative power to wage war does vest in the Crown/Head of State since it is invested with final control of the armed forces. This much is acknowledged by Lord Reid in the Burmah Oil case:

> "The reason for leaving the waging of war to the King (or now, the executive) is obvious. A schoolboy's knowledge of history is ample to disclose some if the disasters which have been due to Parliamentary or other outside attempts at control."[10]

More recently, Lord Denning observed in Laker Airways v Dept of Trade[11] that:

> "The prerogative is a discretionary power exercisable by the executive government for the public good, in certain spheres of governmental activity for which the law has made no provision such as the war prerogative. … The law does not interfere with the proper exercise of the discretion by the executive in those circumstances; but it can set limits by defining the bounds of the activity: and it can intervene if the discretion is exercised improperly or mistakenly. This is a fundamental principle of our constitution."

Whether the war prerogative may also be activated and employed in times of internal unrest as distinct from war is moot.

Lee notes the absence of clear authority on the set of circumstances which can justify the exercise of the prerogative.[12] Viscount Radcliffe in the Burmah Oil case did not doubt that there was a Crown prerogative to act to protect public safety in a "sudden and extreme" emergency. He acknowledged without resolving the question that "Riot, pestilence and conflagration might well be other circumstances but without much more recorded history of unchallenged exercises of such a prerogative" he did not think he could say more.[13] Lee thought that apart from Viscount Radcliffe's observation, the question whether the prerogative might be invoked in an emergency other than war was clouded with uncertainty.[14]

The resolution of this issue has considerable importance in post-conflict transition. It is necessary to determine whether the Executive has a prerogative to act where the emergency did not amount to war, and also, whether that power extended so far as to include a power to legislate to the exclusion of any elected legislature. The Courts have a role in the resolution of both questions. Their jurisdiction is not ousted. That the Courts may inquire whether the prerogative exists seems well settled as is the corollary that the Courts may not inquire into the manner of exercise of a prerogative once it is determined that it does exist. An early instance may be found in The Case of Proclamations[15] where the Courts denied the King power to create new offences by proclamation. For a more recent instance of the corollary see Chandler v Director of Public Prosecutions[16] in which Lord Reid said "Anyone is entitled, in or out of Parliament, to urge that policy regarding the armed forces should be changed, … , no one is entitled to challenge it in court."[17] The comment by Lord Denning in the Laker Airways case cited above tends to blur the distinctions between the two aspects of the traditional dichotomy.

Assuming *de bene esse* the existence of the prerogative in times of emergency not amounting to war, the remaining question for present purposes is whether the power extends so far as to allow the executive to legislate.

The discussion begins in Pakistan in the post-independence period before a Constitution had been promulgated. In 1955, the Federal Court of Pakistan struck down as void 44 laws purportedly made by the initial Constituent Assembly in a seven-year period from 1947 to 1954 before it was dissolved by the Governor-General[18]. None had been submitted to the Governor-General for assent as required by law. Within a week of that decision (on 27th March, 1955), the Governor-General issued an emergency proclamation citing provisions of the Government of India Act and "all other powers enabling him in that behalf" and purporting to validate many of the voided laws. This emergency proclamation was subsequently declared void by the Federal Court because the law did not permit him to validate constitutional laws retrospectively and refusing to acknowledge the existence in the Governor-General of any other powers beyond those given by Statute.[19]

Not discouraged, the Governor-General had, within a further fortnight, issued a further Proclamation assuming "such powers as were necessary to validate and enforce the laws that were needed to avoid a breakdown in the constitutional and administrative machinery of the country or to preserve the State and maintain the Government of the country in its existing condition" He then purported, once again, to validate the same laws the Federal Court had just struck down – but did so subject to the opinion of that Court.[20]

The Court was divided. The majority (Muhammad Munir C.J, Akram and Rahman JJ) found no assistance in precedent or the texts and in the absence of assistance were able to find rules "which are part of the common law of all civilised States and which every written constitution of a civilised people takes for granted" called the law of civil or State necessity.[21] Muhammad Munior C.J's primary source was drawn from the oft-quoted Cromwell lament "If nothing should be done but what is according to law, the throat of the nation might be cut while we send for someone to make a law." and other maxims of a like nature including "That which otherwise is not lawful,

necessity makes lawful; the safety of the people is the supreme law; the safety of the State is the supreme law."

There is a powerful response to those maxims to be found in Pitt's speech to the House of Commons in 1783 when he said:

> "Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves"[22]

Interestingly for present purposes, the majority also referred to this passage from Dicey:

> "There are times of tumult or invasion when for the sake of legality itself the rules of law must be broken. The course which the government must then take is clear. The Ministry must break the law and trust for protection to an Act of Indemnity."[23]

"If the law as stated …that the Crown is the only branch of legislature that is capable of performing an act at a time when Parliament is not in being is correct, legislative powers of the Crown in an emergency are a necessary corollary from that statement … the free exercise of a discretion or prerogative power at a critical juncture is essential to the executive government of every civilised country, the indispensable condition being that the exercise of that power is always subject to the legislative authority of Parliament, to be exercised ex post facto. … The emergency legislative power, however, cannot extend to matters which are not the product of the necessity, as for instance, changes to the Constitution which are not directly referable to the emergency."

On the basis outlined, the majority proceeded to validate the purported exercise of legislative power by the Governor-General to avert an impending disaster and prevent the state and society from dissolution.[24]

Of course, it remains open to question whether these decisions have much bearing upon the affairs of any country other than Pakistan. Granville Williams has said that the prerogative of necessity is now in disuse because it is covered by and therefore superseded by statute.[25] Lee reads this down and limits it to the prerogative to impinge on private property[26] but doubts that the English courts would entertain the argument of an extraordinary prerogative which extends to the assumption of legislative power citing *The Zamora*[27] and observes also that Diplock L.J. insisted in *British Broadcasting Corporation v Johns*[28] "It is 350 years and a civil war too late for the Queen's courts to broaden the prerogative."

Nwabueze in a 1973 text offered a summary of the conditions that must exist in order to give rise to such a prerogative based on necessity:

(a) an imperative necessity arising from an imminent and extreme danger affecting the safety of the state or society;
(b) action taken to meet the exigency must be inevitable in the sense of being the only remedy;

(c) it must be of a temporary character limited to the duration of the exceptional circumstances;
(d) the temporary incapacitation of the authority (if any) which normally has the competence to act[29].

This was published a few years before the Privy Council decision in Madzimbamuto v Lardner Burke[30] but was not limited to the Southern Rhodesia situation. It included a review of events elsewhere including Pakistan, Cyprus and Nigeria. However, for present purposes, the Madzimbamuto decision has become the foundation stone for discussions of the doctrine of necessity and has in fact been declared to state the law for some States including Fiji.

Much will depend in a particular case on whether there were in place and in effect Constitutional and other written laws in which the powers of the State are spelt out. Where a law exists that prescribes the manner in which the Head of State and the Executive may act in a given situation, little support can be offered for supra-legal adventures in the name of some supposed necessity. It is not appropriate to speak of prerogative powers in a situation where the exercise of the power derives from a Constitution or other written law. This is more properly an exercise of an Executive power provided by Statute.

The prerogative powers of mercy and pardon were widely used in the early days of the colonies – particularly penal colonies such as Australia where a very high proportion of the convicts sent to Australia were, at some time or other granted a pardon and release. The Monarch in England had an unlimited power to pardon before and after conviction.[31] In the United States of America, the President enjoys an 'unbridled pardon authority'[32] deriving from Article II, Section 2, Clause 1 of the Constitution:

> "The President …. Shall have power to grant Reprieves and Pardons for Offences against the United States, except in cases of impeachment."

The inclusion of both reprieves and pardons is not without significance. "A reprieve reduces the severity of a punishment without removing the guilt of the person reprieved. A pardon removes both punishment and guilt."[33] Many studies of the Presidential power make reference to the passage from Alexander Hamilton in the Federalist Papers:

> "in seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the common wealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall."[34]

Examples of the use of the power in that context may be had from George Washington who pardoned leaders of the Whiskey Rebellion, and Andrew Johnson who pardoned Confederate soldiers following the Civil War.

An earlier mechanism by which pardons and immunities were granted in order to bring insurrections to an end included so-called Acts of Indemnity. These have a long history. Several Acts of Indemnity were passed in Northern Ireland between 1796 and 1800 following the suppression of widespread rebellion.[35] The distinguishing

feature of these enactments and most since has usually and properly been that they are intended to protect persons who have exceeded their powers in good faith rather than shield those who have themselves unlawfully assumed and exercised power without the intention or purpose of protecting or restoring lawful government.

In the Pacific, Acts of Indemnity have appeared in three forms: specific inclusions in the 1990 so-called Fiji Constitution and their repetition in the 1997 Constitution (Rabuka), Decrees by individuals claiming to some form of Interim authority (Rabuka and Speight) and more recently Presidential Proclamations in the purported exercise of reserve powers and/or emergency powers.

The only immunity thus far granted to any coup-maker that has been judicially challenged has been the Immunity Decree 2000 in favour of Speight and associates in the dying days of his attempted coup. That document was first considered by Surman J in an interlocutory ruling in 2000 in which he held (on the basis of very limited argument) that the purported Decree could not be called in aid by Speight and his associates because they had failed to comply with some conditions contained in the Muanikau Accord relating to the surrender of weapons.[36] However fragile that argument was, it was superseded by the ruling in 2003 by Wilson J in the High Court of Fiji in the prosecution of *The State v Silatolu and Nata* for treason when it was determined that the Decree failed for two primary reasons either of which would have sufficed:

1. The Decree signed by Cdr. Bainimarama as "Head of the Interim Military Government" was a form of pardon and under the Constitution of Fiji (which had never ceased to operate) the only power to pardon rested with the President and was, in any event an exclusively post-conviction power; and
2. The Decree failed multiple tests set by the House of Lords in the decision of *Madzimbamuto*[37] that had been adopted by the Supreme Court of Fiji as stating the law for her purposes (*Chandrika Prasad's* case[38]).

Had the other Immunity Decree promulgated simultaneously with it[39] been challenged, there can be little doubt that it would have met the same fate. The decree would have been struck down as incompetent. Their positions were indistinguishable. Ironically, both decrees were heavily modelled on those produced in 1987 for Rabuka et al.

The immunity conferred on Rabuka and others by the 1990 and 1997 Constitutions has never been judicially challenged or revoked.

Wright v Fitzgerald [40] is cited as "authority for the proposition that an Act of Indemnity is no defence where the conduct sought to be justified was not bona fide directed to the suppression"[41] of unlawful actions – in that case a period of insurrection. In a modern commentary on Wright v Fitzgerald, O'Higgins concluded that the case is "authority for the proposition that there is a presumption that Parliament does not intend to indemnify a defendant for merely wanton or cruel acts not justified by the necessity of the situation."[42] O'Higgins argues also that the test in any particular case is entirely objective.[43]

O'Higgins cites, in conclusion, a passage from Dicey:

> ‘ … of all laws which a Legislature can pass, an Act of Indemnity is the most likely to produce injustice. It is on the face of it the legalisation of illegality; the hope of it encourages acts of vigour, but it also encourages violations of law and of humanity. …’[44]

Pardons with future effect:

Negotiations leading to a resolution between the executive and rebels will frequently occur against a fluid and emotionally charged background. This is heightened if there are hostages involved and heightened further if there has been violence. Negotiations in that atmosphere will therefore be difficult and require hard decisions to be taken. The Privy Council in the Trinidad and Tobago cases mentioned above observed that it is the business of the Head of State to make difficult – often life-and-death – decisions in an atmosphere highly charged with threats and fears. But that does not give rise to any later claim that the decisions were taken under duress unless there was in fact a ‘gun to the head’.[45]

The problem of future effect was the undoing of the Pardon given to the rebels in the Trinidad and Tobago case. The Privy Council struck it down because it purported to grant immunity for offences committed subsequent to the grant. The Privy Council held allowing the appeal, that the initial validity of the pardon had to be considered as at the time of the grant; that a pardon could only relate to offences already committed, and the power to grant a pardon under section 87(1) of the Constitution did not extend to offences not yet committed; that although a purposive construction should be applied in order to uphold the validity of a pardon**,** the Acting President had no power to grant a pardon taking effect at an uncertain time in the future and purporting to pardon offences committed in the meantime; that since at the time of the grant of the pardon compliance with the condition safely to return the hostages would probably not be reasonably practical until after a substantial period of time had elapsed in which the unlawful insurrection would continue, the Acting President could not grant a pardon applicable to continuing offences committed during that period even though in all the circumstances the delay in releasing the hostages had not been unreasonable; that the pardon was not valid if treated as an offer of a pardon capable of acceptance by compliance with a condition.

This limitation on the pardon power has influenced the drafting of Immunity Decrees since that time. We see, for example, in the instrument dated 18th January, 2007 the President signing a Decree the authority for which is ambiguously recited as being “the reserve powers of the Constitution inherent in the President and by the constitutional law and common law of Fiji and by all other laws so appertaining”.

I do not propose to embark on any discussion of that decree or its validity. But I make these few points. Firstly, the pardoning of “continuing offences” that extended beyond the date of the grant was declared void in the Phillips case; secondly the document is careful to limit the period of time covered by it to the period immediately before its execution. It provides an Immunity to:

> “ any person or persons who by his or their agreement, acts or omissions, caused or facilitated or confederated in or incited or conspired or aided or abetted or counseled or procured or in any way (whether before December 5th

2006 or on it and up until January 5th 2007) to intervene in oust and remove from office the then legislative and executive organs of Government of the Fiji Islands, its Prime Minister, Ministers, Officials and also of other persons whose office or employment were not conducive to the public interest of the beloved people of Fiji."

The significance of the date 5th January, 2007 is that it was on this date that the President is said to have resumed his office so the offences covered by it were those committed "from 5th December 2006 until the restoration of executive power of the State in me the President … ."

It follows that the document – whatever its validity may be in respect of the period before January 5th and any 'continung offences' cannot and does not purport to grant Immunity from or in respect of offences committed after that date. It is for others to consider what, if any, offences were committed after that date including what might be called "continuing" offences committed both before and after January 5th.

The care in the drafting reflects an acute awareness of the problems of pardons having a future effect.

Conclusion:

Pardons and Immunities may be a useful instrument for the restoration of law and order and a return to government on terms acceptable to the majority of the population, but they are a two-edged sword. It is argued that Immunities have contributed to the ease and confidence with which later extra-constitutional excursions may be undertaken; that they tend to escalate the likely levels of violence in the event that governments resist the solutions demanded by rebels – that the use of escalating levels of force will produce capitulation if necessary and an Immunity granted to the rebels; that they do not provide any political or legal disincentive to further instability and to that extent undermine the Rule of Law and the authority of Government.

In preparing the grounds for a new system of government to replace a post-conflict administration, consideration may well be given both to the withdrawal of old immunities and the creation of new ones. And in that context, care needs to be taken only to forgive that which has already been done, not that which may yet be done in the future.

An Act of Indemnity is inevitably one of the first pieces of business of a new order but in States where the Pardon power is limited to a post-conviction regime only, the power to pass such a law must be in serious doubt. It is for this reason, in particular, that such occasions are also an opportunity to reconsider the entire Constitutional environment.

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[1] Gibbs, H, Sir, in an address to the Australians for Constitutional Monarchy, 9th Oct, 1995.
[2] Lennox Phillips and others v Director of Public Prosecutions and anor [1992] 1 AC 545 and Attorney-General of Trinidad and Tobago v Lennox Phillips and others [1995] 1 AC 396
[3] Associated Press Worldstream, 3 August, 2005
[4] US State Dept Country Report, Honduras, 2005 (online at http://www.state.gov/g/drl/rls/hrrpt/2004/41765.htm

[5] For an interesting discussion of both views see Jakab, A., 'German Constitutional Law and Doctrine on "State of Emergency": Paradigms and Dilemmas of a Traditional (Continental) Discourse, 7 German Law Journal No. 5 May, 2006.
[6] Burmah Oil Co. Ltd v Lord Advocate [1965] A.C. 75, 101
[7] Lee, H.P., 'The Prerogative in Relation to Emergencies' Ch III in *Emergency Powers*, Law Book Company 1984, 37
[8] Blackstone, Commentaries on the Law of England, Vol 1, p. 239.
[9] Dicey, "Law of Constitutions" (10th Ed), p.424; and see per Lord Reid in Burmah Oil supra at 99.
[10] Id, n4 @ 100.
[11] [1977] 1 Q.B. 643
[12] Id, n5 @ 38
[13] Id, n4 @115
[14] Id n4 @ 39
[15] (1611), 12 Co Rep. 74
[16] [1964] A.C. 763
[17] Id at 791.
[18] Federation of Pakistan and others v Moulvi Tamizuddin Khan reported in Jennings "Constitutional Problems in Pakistan" Greenwood press, 1957)
[19] Id @ 249-250
[20] Jennings, n16 Special reference No. 1 of 1955. @ 259.
[21] Lee Id @ 60; citing Jennings @ 298.
[22] Cited by Glanville Williams op. cit., p. 225
[23] Dicey, Law of Constitutions 9th Ed, pp 412-413.
[24] Id n16 @ 306-307.
[25] Williams, G., "The Defence of Necessity" (1953) Current Legal Problems 216 @ 231.
[26] Lee, Id n5 @ 63
[27] [1916] 2 A.C. 77 per Lord Parker @ 90. "The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by courts opf law in this country is out of harmony with the principles of our Constitution."
[28] [1965] Ch. 32 @ 79
[29] Nwabueze B.O., "Constitutionalism in the Emergent States" (Hurst & Co., London, 1973), pp 181-182.
[30] Mazimbamuto v Lardner-Burke (1978) 3 WLR 1229
[31] Maitland FW, "The Constitutional History of England (1908 reprinted, 1955) 493.
[32] Dorne, C and Gewerth, K, 'Mercy in a climate of retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures' (1999) 25 New England Journal on Criminal and Civil Confinement 413, 438.
[33] Institute of Governmental Studies, University of California 'Presidential Pardons' March, 2001 accessed online at http://igs.berkeley.edu/library/pardon.html June, 2008; see also Azize, J "The Prerogative of mercy in NSW" 'Public Space' The Journal of Law and Social Justice (2007) Vol 1, Art 6 pp 1-36.
[34] Federalist #74 of 25th March, 1788 accessed online at http://usgovinfo.about.com/library/fed/blfed74.htm June, 2008.
[35] For example Indemnity for Suppressing the Insurrections Act 36 Geo. 3 c.6 (1796); and another by the same name in 1797 at 37Geo. 3 c.39 and in 1798 at 38 Geo 3 c.19 and c.74, in 1799 at 39 Geo.3 c.3 and c.50, in 1800 at 40 Geo. 3 c,89. An Australian instance may be found in the Victorian Martial Law Indemnity Law Act 1855.
[36] In fact the Accord contained no such condition. The only reference to weapons was in a recital of the Objectives of the Interim Military Government. There was never any express undertaking made on behalf of the Speight group to return weapons. The Accord may be read at many sites such as http://maorinews.com/karere/fiji/muanikau.htm
[37] Madzimbamuto v Lardner-Burke [1969] 1 AC 645
[38] The Republic of Fiji and another v Chandrika Prasad (Civil Appeal ABU 0078/2000)
[39] Immunity (Disciplined Forces) Decree 2000
[40] (1799) 27 St. Tr. 759
[41] Lee H.P., (1984) *Military Aid to the Civil Power in Australia* Ch VI in 'Emergency Powers' Law Book Co.
[42] O'Higgins, P., "Wright v Fitzgerald Revisited" (1926) 25 M.L.R. 413 in which other cases also making the same point are mentioned in note 2.

[43] Id., p.421
[44] Id., p. 422 citing Dicey A.V., 'A leap in the Dark, or our new Constitution', London 1893 pp 87-88.
[45] Attorney-General of Trinidad and Tobago and another v Lennox Phillips and others [1995] 1 A.C. 396, 410, 411, 412, 413. Students of Fiji history will remember that there was once such a case - and I am not here referring to any recent event; rather, to the occasion in 1850 mentioned by Professor Derrick when Cakobau was threatened and coerced at gunpoint by a visiting US naval Captain into signing a Treaty including in it a promise to pay some U.S.$ 30,000 by way of compensation to one Williams for the loss of his house and contents on the island of Nukalau when it was destroyed by fire in the 1830's. He subsequently pleaded duress in avoidance of that Deed because he had literally been held at gunpoint in order to force him to execute the instrument.