The Sir Moti Tikaram Memorial Lecture for 2018
by Chief Justice Anthony Gates
Friday 28th September 2018

"Can the Courts always deliver Justice and the Rule of Law"

Your Excellency Ratu Epeli Nailatikau, Chancellor of the University
Hon. Judges
Hon. Leader of the Opposition and Hon. Members of Parliament
Acting Vice Chancellor Professor Narendra Reddy
Mr. Anil Tikaram Chair of Council and Members of the Family of Sir Moti
Madam Dean
Lecturers and students of the University
Ladies and Gentlemen

When approached a few weeks ago by Professor Shaista Shameem to give this year's Sir Moti Tikaram Memorial Lecture I readily, if unwisely, gave my assent. Like the question posed in the topic I had my doubts as to whether I could deliver a sufficiency of scholarship and panache to the task. I shall be saying something about the necessity for a clear understanding of the separation of powers in the State. But I shall try to avoid comment on any matter likely to come before the courts for a decision. In all such matters, whatever is said before the hearing, what matters most is for the facts and the legal arguments put before the court, to be considered without regard to any prior media or other commentaries. Second, I realise we are on the threshold of a General Election. My observations on past events are not made to castigate one group or another. My concerns are only on issues in the broadest sense, and are not to be read as an engagement into the fray of current political debate.

Scouts observing the comings and goings at the Chief Justices Chambers, led to information being given out on social media recently that Professor Shameem had visited the Chief Justice to lobby for her "so said" favoured candidate to succeed the Chief Justice when he retired. The visit was of course for the purpose only to make courteous request for me to do today's lecture. A likely story you will say.

The need for foundational facts before propagating scientific theory has yet to influence the scribes on the social media channels. The influence, accuracy, and prestige of such debating chambers are therefore still being evaluated. Some may consider this form of communication channel to be a new forensic methodology. For the moment they remain a mix of folksy hearsay, gossip, old fashioned malice and thick layers of Irish blarney. This weakness exposes the first impediment to obtaining justice and thus the upholding of the Rule of Law – namely the ascertainment of true facts. So far I have not seen in an affidavit a citation to social media as a reference for a factual proposition. But it appears to have reached the mainstream media, and such citations appear in academic articles and treatises. However the resort to social media is an undesirable short cut, and a source a layer below that of old fashioned hearsay evidence.

I have often felt legislation should permit courts to admit hearsay into evidence. A witness may share some comment with another who then reports that to court. Obviously it is not trustworthy for being indirect and for not being an eye witness account. But the witness brings the comment into his or her evidence as a piece of the jig saw or narrative. A judicial officer directing either the assessors or him or herself in a judgment could easily indicate the

weaknesses of such evidence or a part of it in establishing the truth of the comment.

In trials lay witnesses are stopped from giving hearsay evidence. Sometimes this intervention or correction may put the witness off his or her stride in telling their story. For the rule against hearsay is not understood and does not give access to the justice process for those unfamiliar with technical rules of court. Perhaps we should allow the evidence to come out just as it may in ordinary conversation, and then evaluate it afterwards. Assessors are not naïve and can easily see that this evidence cannot prove what another witness saw but who is not available. At the end of the day the courts must ask "has the case been proved with a sufficiency of reliable truthful quality evidence?"

But before proceeding further, may I make some brief observations about Sir Moti Tikaram. Sir Moti and I were both serving judicial officers who endured the upsets to the judiciary of the two military coups of 1987 and the civilian coup of 2000. In 2000 the Supreme Court of which Sir Moti was a Resident Judge of Appeal was purportedly abolished. In ***Prasad v AG*** *[2000] 2 FLR 89 at p113* I suggested that the Supreme Court had not been abolished and that no doctrine of necessity could apply to legitimise an otherwise unconstitutional and unnecessary amendment.

Sir Moti was deeply shocked by the attempt to do away with the Supreme Court. Gradually he recovered his poise. Perhaps it was this interference with the justice system that made him so particular about the continuance of the institution in a time of unconstitutionality. When the next event occurred in 2006, and worse when the entire judiciary was dismissed after the abrogation of the 1997 Constitution in 2009, he threw his weight behind the upholding,

buttressing, and continuance of the institution. He was not approved in some circles for this stance, but undoubtedly he was right.

In the case of ***In re James*** (an insolvent) [1977] Ch. 41 the English Court of Appeal had been concerned with the enforcement in England of a debt from an order of the Rhodesian Courts at the time of UDI. The majority of the court found against enforcement in England on the basis the order had been issued by a non-British court under the illegal regime, and thus did not comply with section 122 of the Bankruptcy Act 1914.

In a dissenting judgement, Lord Denning sitting as Master of the Rolls, saw things differently. He noted that the debtor himself, David James, took no issue on jurisdiction of the Rhodesian Courts. But the Attorney-General intervened on behalf of the British Government and raised the issue not previously raised before the Registrar in Bankruptcy. Undoubtedly the British Government had a strong policy interest in not recognising the illegal regime in Rhodesia. But this line of argument in a bankruptcy matter, may have gone against previous approaches to such problems. During the American Civil War, the courts of both sides recognised orders for enforcement of property rights, for the recovery of debt, and for upholding the administration of estates, trusteeships, and wills. Indeed in this way the courts demonstrated respect for the Rule of Law in another jurisdiction even one towards which their own Government might otherwise be hostile. Hostility is not the key principle here, but rather Justice and the Rule of Law. Respect for those routine laws also demonstrated the court's own independence from its Government, as did Lord Atkin in his courageous dissenting judgment in wartime England in ***Anderson v Liversidge*** [1942] AC 206.

I return to UDI in Rhodesia and how it had affected the judges in office. Lord Denning said the Court of Appeal was urged by the Government's Law Officer, the Attorney-General "to impose a legal blockade as a counterpart of the economic blockade." The white settlers in rebellion had made no complaint against the lawful sovereign, the Queen of England also Queen of Rhodesia. They pledged their loyalty and allegiance to her. They went on to form their own executive and parliament.

> "But" said his lordship, "they left the judges undisturbed."
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> "They left the judges still pledged under their oath of allegiance to the Queen: and under their judicial oath well and truly to serve her in the office of a judge. They left the courts to carry on with their daily tasks. They made emergency regulations, of course. But, apart from these, they left the existing law as it was. After all, they were as much concerned as anyone to see that law and order were maintained.
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> They carried on with their normal tasks. So did the police. So did the judges. So did the officers of the courts. It was absolutely necessary for them to do it. Otherwise there would be utter chaos.
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> I would ask this question: if the judges and officers of the courts had not carried on with their normal tasks, what was to happen to the criminal law? Were murderers to go free? Were thieves to go unpunished? And, I would add, what was to happen to the civil law? Were debtors absolved from payment? Were contracts no longer binding? Or wrongdoers not to be compelled to make compensation? If law and order were to be maintained, it was imperative that the judges should continue in office and that the courts should continue to function. That was, I am sure, the intendment of the lawful sovereign, the Queen of England, as well as of the unlawful regime itself."

In the 2nd military coup in Fiji, the judges and other judicial officers were asked to swear an oath of allegiance to the newly proclaimed Head of State. Most of the judges and Magistrates, and that included Sir Moti and myself

refused to do so. We were, as expected, accordingly dismissed. In 2000 no new oath to the usurping regime was thrust upon us. Without the requirement of a new oath in 1987 the courts might have been able to continue functioning. The interpretation of laws would, as the Rhodesian judges also acknowledged, have posed difficult issues for the courts.

It could be said that "A judge is a judge is a judge." Lord Denning again:

> "No matter by whom the man was appointed a judge, no matter at what date he was appointed, he is sitting as a judge of the court and the order made by him is an order of the High Court of Rhodesia. He sits in the seat of a judge. He wears the robes of a judge. He holds the office of a judge. Maybe he was not validly appointed. But, still, he holds the office. It is the office that matters, not the incumbent."

This was the position Sir Moti took. The situation undoubtedly becomes more difficult for the courts. But it is the judge's duty to hold the fort and to maintain the continuum. In that, judges are in no special category separate from surgeons in the hospitals. Are they not to heal the usurpers and their supporters? They carry on for the sake of the inhabitants of the State, and that means everyone in the State.

I was grateful for Sir Moti's support with the challenge to hold the institution steady in unsteady times. He was concerned with the survival of the judiciary. It was not a question of taking sides. Whilst attending 2 side events at the UN in Geneva recently I called on the Chief Justice, the President of the Tribunal Federale in Lausanne. All Justices of the court have to be confirmed by the Swiss Parliament. We did not go into the advantages or disadvantages of political involvement in the appointment process of Judges or those of the US Supreme Court, but Mr. President was adamant he totally approved of the

concept that a "Judge is a judge is a judge." By whatever route a person is placed on the court, his or her duty thereafter must fulfil everyone's expectations of their separation from Government.

Margaret Thatcher, the former Prime Minister of Great Britain, believed that we must be ferocious in the defence of the reasonable. In advising Magistrates on sentencing Lord Goddard LCJ said if an offence was found to be prevalent in their districts they must harden their hearts in sentencing. Similarly democracy as a governing philosophy behind our public administration must be able to respond to fresh needs by deft adaptation. The existence of dithering committees or excessive procedure will not safeguard the State or the public, rather it will create the vacuum for stronger more authoritarian forces to move in and to take over.

The right to equality and freedom from discrimination [section 26 in the Bill of Rights Chapter] is one of the most significant protections under the Constitution, indeed in any State. Alas in all jurisdictions it is not always well achieved in the courts. When anyone associated with power, fame or celebrity comes before the court, the courts have sometimes lost focus. Examples abound.

You may remember the treatment of Patty Hearst the granddaughter of media baron Randolph Hearst. Hearst had always wielded economic and political power through his media organisations. He ran Orson Welles out of town for daring to criticise Hearst's mistress' lacklustre acting performance in a "B' movie. He shut down publicity for the film "Citizen Kane", later regarded as one of the most important films ever produced which Welles himself had produced, directed, as well as acted in. In 1974 a radical marxist group calling

itself the Symbionese Liberation Army kidnapped Ms Hearst from her fiance's home. On her behalf it was said she was then raped and brutalised.

From bank film footage however it appeared she had become a willing pro-active participant of the gang. She wielded a gun at bank robberies and on one occasion unilaterally opened fire with an automatic from a getaway vehicle to free one member of the gang from an entanglement at a corner shop.

She was sentenced for her robbery participation to 7 years imprisonment. Under President Carter she only served 2 years, and President Clinton gave her a full pardon in 2001. The case was called the most extraordinary case of the 20th century. As with all cases of controversy many differing views were expressed. In interviews later she was vague about her participation saying she had not known what was happening, and that she did not remember things. One of the leaders of the gang subsequently said "we had kidnapped a freak." The gang had totally trusted her as a full participant in their cause and activities. Other members referred to her putting a bomb at one point under a police car, and insisted that she had not been brainwashed. She had had numerous opportunities to leave the gang, and to escape, but never did. Eventually she was captured by the Los Angeles police.

There was the strange outcome of the case of Johnny Depp and his dogs more recently. Would an ordinary citizen or foreign visitor have received the same treatment for breach of Australia's quarantine laws? In the 1980s in Fiji I recall special treatment in 2 cases accorded to soccer players who had assaulted the referee breaking bones in the process. In the same period in an assault on police matter, reviewed in the High Court, it was said in the judgment the Accused was a significant member of the community as the son of a High

Chief. In all of these cases imprisonment was found not to be a suitable punishment. Such leniency was contrary to sentencing precedent. I would like to think that equality today is held in higher regard as a principle of the Constitution. We keep referring to it in our judicial training. But errors will continue to occur if judicial officers are not courageous enough, and do not remain unmoved by the fame or standing of the Accused. Powerful personages sometimes have deep pockets and fine lawyers. Great efforts are put into keeping clients out of prison or from receiving sentences within the tariff, when established legal principle would seem to indicate a heavier penalty was unavoidable. In the review case of ***Batiratu*** HAR001/2012 13th February 2012; see too ***The State v Taniela Vakalaca*** HAC027/2018 Goundar J, I had occasion to consider English and Fiji authorities. There continue to be cases, where the principle of equal treatment before the courts comes up for consideration. The courts in Fiji have clear local precedent not to treat celebrity cases more leniently, than those of less fortunate or less significant persons in the community. India has been stressed in this area. Its Supreme Court pronounces regularly on key constitutional protections in memorable prose. But at the State level the great sometimes escape censure, or when sentenced to imprisonment, do not seem to reach the prison gates, or remain for long within them. The charms of Bollywood are as a talisman fending off harm to any of its favoured stars.

The Senate confirmation hearings for Justice Kavanaugh's appointment to the Supreme Court are also procedurally troubling. In effect the Senate is conducting a rape trial in truncated form. Its decision may condemn Justice Kavanaugh for the remainder of his life without possibility of redress. Yet he has never been charged with the felony of rape, never had a chance of being represented by legal counsel, and of defending himself in a regulated trial with

the safeguards normally granted to an Accused. Trials for the criminal offence of rape are conducted before a judge and jury in the Criminal Courts. Parliament does not intrude into the business of the courts. Guilt or innocence on a rape charge is for the courts to decide after a full trial in proceedings sanitized of irrelevant political issues. Dr. Ford may not be blamed for her difficulties in laying an early complaint but the doctrine of the separation of powers would insist that such a serious complaint should be brought before the normal courts in a routine way. The present proceedings have turned out to be a celebrity trial before politicians, in expedited form. It is difficult to have faith that the only issue is character and not all of the issues surrounding the balance of supposed political allegiances in America's highest court.

Many new rights have been included in the Bill of Rights Chapter of the 2013 Constitution. Fiji is not alone in having noble provisions to aim for. But many countries cannot financially or by resources realistically achieve such rights. In reality they are there in the Constitution to aspire to, to move towards. How will the courts deal with applications for redress?

In several countries including Fiji, housing costs have gone beyond the means of many. Purchasing or leasing, the paying of a mortgage or the paying of rent, take an excessive amount from their incomes. There is a huge pressure for public housing, and in Europe it is exacerbated by the influx of large numbers of refugees. Many governments will have to commence substantial programmes of building to accommodate those unable to afford their own or private rental housing.

There are rights to health, to food of acceptable quality, to clean and safe water and to a clean environment. For reasons of reducing health service costs,

modern governments will be obliged to be more pro-active in regulating food type, production and manufacturing. Those at the poorest ends of society always seem to have been sold items as well as food that is unsuitable and bad for them. The Pacific Islands routinely seem to have low quality food dumped on them. Today where are the healthy inexpensive foods now readily available in richer countries? How can the Government achieve the attainment of these rights? Rights are enforced not just to avoid starvation but also to have available food of proven nutritional and health value.

In England recently the Department known as Public Health England had set a target for cafes restaurants and coffee shops to reduce sugar in their everyday produce by 20% by 2020. The WHO warned 2 weeks ago that the UK was 5th out of 176 countries raising concerns linked to obesity. The Government announced that all eating establishments must list calories on their menus to cut obesity. Preliminary lists showed Costas Starbucks and Café Nero listing the calories and the sugar content of their muffins. Most exceeded the maximum set by the National Health Service of 30g of sugar per day.

The problem is not fully comprehended. Governments are faced with spiralling costs of health care which users insist must be extensive in cover and timely in operational remedy. Will the Government have to regulate fast foods, fatty, salty, and sugary foods as well as foods considered carcinogenic? How are the rights given in the Constitution to be achieved? Treatment for illness cannot be refused on the basis of the patient's lifestyle, eating choices and lack of exercise. How many of these patient errors are patient faults? To accord the rights, what burdens are cast on Government to conduct effective awareness training, to implement better public health policies, schooling, school food, and

physical education facilities? What was considered sufficient in the 1930s or 1970s is unlikely to satisfy public requirements and special needs for today.

In the 1960s in England the Judges issued what was known as the Judges Rules. They were issued to ensure a fairer approach to the interviewing of suspects and to see that basic rights were accorded to interviewees. They seem somewhat old fashioned today. Many jurisdictions now use video recording of such interviews. Fiji is in the throes of applying this system also. The Judges and Magistrates wish to see better quality evidence of any admissions made by an Accused. The video recording with its devices to prevent tampering, is the necessary corroborative evidence of the interview, its procedure and content, and its voluntariness, said to have been conducted by the interviewing officer and his witness.

This format meets our need for higher standards and an unquestionable record. Even documents put to the suspect can then be stored without possibility of loss in the cloud and elsewhere.

The Justice sector institutions have been working together to bring about this important reform – Police, Judiciary, DPP, Legal Aid Commission, Human Rights Commission. Sir Moti would have liked that idea. The same grouping but including Corrections, has worked on the further implementation of the Standard Minimum Rules for the Treatment of Prisoners [1955 and 1977], now known as the Mandela Rules. We have voluntarily attended the UN at Geneva and reported in Side Events at the meeting of the Human Rights Council on progress. How important it is for our institutions to work together. Though we have separate concerns for different clients or interests we all want improvements to the system. I can assure you significant progress has been

made, and professional workable relationships continue to achieve those results. Before long I anticipate only video recorded police interviews will be adduced in court.

These endeavours may not been seen as a traditional role for the courts. It has been a facilitative role, and if truly successful I can see it as one to deliver justice and fairness to suspects or detainees. For persons to be treated professionally and properly and without violence in police stations is an important pillar in the operation of the Rule of Law. The 1st Hour Procedure worked by lawyers from the Legal Aid Commission ensures a lawyer is present to provide advice to a suspect prior to interview, and to sit with him or her during the interview at the Police Station.

How effective are the decisions of the courts in changing society's opinions? That is not an easy question to gauge. In the early 2000s there was a serious issue of overcrowding in the Remand Centres, specially in Suva. The Director of the Human Rights Commission, your present Dean Professor Shaista Shameem brought a series of cases to the courts. Her Counsel applied for a view of the remand centre. The judges agreed.

At first the then Commissioner refused to allow the judges inside. Later the Commissioner relented. Presented in the affidavit material was evidence of numerous reports over the previous 30 years from Government or Government commissioned Engineers on the safety of the prison. All had condemned the remand building stating that the weakening of the brick and iron work had deprived it of its strength and support. It could collapse in an earthquake or storm.

Our visit showed the sorry state of affairs. The ironwork now exposed had rusted away in places, the brick or concrete patchwork also diminished. The cells were narrow, dark, damp, smelly and rain entered through the bars. Meals and toilet had to be taken in the cells and mattresses were on the ground and wet. Members of the delegation were visibly shocked at how their cousins had to live in these conditions, 3 to a cell.

Three judges delivered judgments in separate cases one after the other from the same bench. Bail was granted in cases not normally considered suitable for the grant of bail, but strict terms were ordered. As judges we were pilloried in Parliament and it was said we were in need of psychiatric treatment. In a sense our decisions were ignored so far as it affected prison conditions.

Some 5 years or so later, construction commenced on a new remand centre for Suva. I went to the opening. A serious problem had been addressed. Lautoka already has its new remand centre. There are further plans for 2019 for building works to improve matters at other prisons.

Sometimes the court is disregarded. We speak through our judgments, we give reasons. It seems we have no coercive powers of enforcement. Our words must be restrained, measured, sympathetic, but ultimately crafted to give a firm clear decision of the law as we see it. In many cases time may reap a favourable harvest, if not always this year. Maybe the next. The philosophy behind the decision or the dissenting decision is eventually recognised and accepted.

In 1840 the Amistad Slave Ship case came before the US Supreme Court. The court decided that the Africans had been taken illegally from their homes in

West Africa. They were not and had never been slaves. The court ordered them to be freed and returned to Africa. Did this case lead on to the abolition of slavery? Some said not. For most black people could not argue that they had been taken from Africa. Many had been born at a time when their parents were already slaves. What can be said is that consideration was directed to the problem of slavery which was an affront to Christian beliefs. With its grand preamble, and stress on equality of birth, how was it the Constitution of America did not apply to the non-white races?

On some issues a pronouncement from the court can be helpful sometimes definitive and conclusive. In matters involving historic and attitudinal positions, the courts cannot achieve much success.

Change will not occur in a hurry if a society is confined, suspicious, distrustful and medieval in outlook. Where there are tribal and religious differences it is important that leaders of both groups begin the business of breaking down misunderstandings and suspicions. To do that each group must be prepared to mingle, to meet, to talk, to listen, to do things together, indeed to invite each other into their homes and religious houses. Unless this is done there is little or no understanding of the others point of view. The outward differences must be de-mystified.

Those changes are for Governments, and civil society to achieve, not the courts. Perhaps with the greater use of mediation the courts will have a larger part to play. But the bitter disputes of today will not be brought to an end through a court case. Prior to 1987 the people of Fiji had been good at sitting down together and resolving their issues. This mediatory form needs to be looked at again.

Just before he was elected Prime Minister Justin Trudeau reflected how the presence of riot police had prevented the separatist mobs from moving into downtown Ottawa, he said:

> "All these years later, I still think back to that day from time to time and imagine how much our country would have changed if a mere 27,145 No voters had decided to cast their lot with the separatists. Canada would probably no longer exist. And what message would we have offered the world? If even a country as respectful of its diversities as ours had failed to reconcile its differences, what hope would the rest of the world have of getting along?
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> To this day, that question is one that drives me."

AHCT Gates
Chief Justice

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