
Fiji: The *coup d'etat* and the Human Rights Commission

Noel Cox

Abstract

The Fiji Human Rights Commission has argued that the December 2006 Fijian military coup d'etat was justified on the grounds of necessity, to overthrow an “illegally constituted, unconstitutional Government which was acting against the public interest in violation of public security and public safety protections in the Constitution”. It is surprising that a human rights body should offer support for a coup. Perhaps more worryingly is the Commission’s endorsement of a political role for the military. The January 2007 report which contains these conclusions amounts to a remarkable apology for the recent coup by the Republic of Fiji Military Forces, by an independent statutory body charged with safeguarding human rights in the island state. This does not auger well for the future of the rule of law in that country, and places increased onus on the legal profession to encourage the acceptance of at least minimal standards of constitutionality.

Introduction

The Fiji Human Rights Commission (“the Commission”) paper on “The Assumption of Executive Authority on December 5th 2006 by Commodore J.V. Bainimarama, Commander of the Republic of Fiji Military Forces: Legal, Constitutional and Human Rights Issues” is a remarkable apology for the military regime in Fiji. There are two elements in its report that lead to this conclusion. The first (which has two parts) is the assertion that:

The RFMF overthrew an illegally constituted, unconstitutional Government which was acting against the public interest in violation of public security and public safety protections in the Constitution.¹

This amounts to not only to a condemnation of the previous (civilian) Government as illegal, but also to an endorsement of a political role for the Republic of Fiji Military Forces (RFMF). The second element is that overthrow of the Government was not merely in the interests of the country, but was legal, under the doctrine of necessity. Both of these arguments are contentious, the first because it is not the role of the military to act as a political arbiter, and it is for the courts to decide if a Government acts improperly or illegally (or indeed is illegally or irregularly constituted). Secondly the doctrine of necessity provides limited legal justification for certain acts in defence of the constitutional order or the stability of a country, but does not allow military coups against de facto or de jure Governments.

It might seem curious to focus attention in this paper on the Fiji Human Rights Commission, rather than on the military that actually launched the coup. But the latter has

¹ Fiji Human Rights Commission, “The Assumption of Executive Authority on December 5th 2006 by Commodore J.V. Bainimarama, Commander of the Republic of Fiji Military Forces: Legal, Constitutional and Human Rights Issues” (Fiji Human Rights Commission, Suva, 2007), p. 31 [hereafter “Fiji Human Rights Commission”].

already been criticised, and to some extent conditions in Fiji have moved on from the initial situation (though they remain far from regular). The reason for the focus of this paper is that the failure of the Commission to criticise the coup – indeed its endorsement of it – is a dangerous development in an already difficult situation, fraught with risk to the future stability of civil society. If the Fiji Human Rights Commission cannot bring itself champion the paramountcy of the rule of law, and instead encourages the military to adopt an active political role, then the constitution of the country is in serious and probably long-term trouble.

This paper will look at the arguments used by the Fiji Human Rights Commission, and then discuss the implications of such thinking for the future of the rule of law, and of democracy, in Fiji.

Background

The origins of the 2006 coup can be traced to the 1987 coups,² but the nature of the events immediately preceding the latest coup will not to be examined here. The circumstances of this coup are relatively clear. In the words of the Commission's report:

In December 2006 the Commander of the Republic of the Fiji Military Forces, Commodore J. V. Bainimarama, announced that he had assumed executive authority of Fiji, President of Fiji, and declared a State of Emergency. He advised that the country would, in the meantime, be run by a military council, but the ministries would continue to function under their respective Chief Executive Officers.³

This was criticised overseas and in Fiji, and the Commission issued its own report, largely in response to requests for advice, from those unsure of the legal status of the military coup:⁴

In response to a the number of requests from members of the public, on the 4th January 2007 the Fiji Human Rights Commission's Director, Dr Shaista Shameem, issued a paper outlining the Commission's view of the legality of the Commodore's actions.⁵

The Commission's stance, as outlined in that report, is apparently in favour of “security, defence and well being”⁶ at the expense of constitutional orthodoxy or legitimacy. But whether this army-imposed stability can be maintained in the longer term, in the absence of respect for the rule of law, is unclear. The history of Fiji since 1987 suggests that it may not be possible.

It is curious that the coup should be categorised by the Commission as a “constitutional rearrangement”,⁷ and this does not look good for the future of the country. The Commission

² See also N. Cox, “*Republic of Fiji v Prasad*: A military government on trial” [2001] New Zealand Armed Forces Law Review 5-9.

³ Fiji Human Rights Commission, p. 1.

⁴ From the original 1987 coup onward the extent to which legal arguments have been utilized to provide colour of right to what would, in most countries be instantly dismissed as illegal, has been remarkable.

⁵ Fiji Human Rights Commission, p. 1.

⁶ s 94 of the 1990 Constitution and imported into s 112 of the 1997 Constitution.

⁷ Fiji Human Rights Commission, p. 28.

reflects only one viewpoint, but it is a statutory body, and its pronouncements will have influence within Fiji, if not abroad.

The Commission should have made it clear that the constitutional order cannot be so readily changed, even if the doctrine of necessity does legitimate otherwise illegal emergency action. Admittedly it does note that a constitution may not easily be abrogated, but it too readily allows the military the discretion to overrule –or overthrow – the civil government. It concentrates on the positive role the military is expected to play:

For constitutional bodies such as the Commission, the military currently exercises effective authority in Fiji. The RFMF is now reportedly set on a course to destroy corruption, introduce good governance and accountability, and prepare the country for census and elections. The Commission will monitor the process by which this is being done through the appropriate provisions of the Constitution.⁸

Good governance should begin at the top – and include allegiance to the principles of the rule of law, which includes the subordination of the military to the civil authority.

We will commence with a look at what the Commission had to say about the legality of the Commander's actions.

Necessity

The assumption of power by the military was justified by the Commander of the RFMF on the basis of the doctrine of necessity. There may have been some evidence of irregular or illegal actions by the Government that the Commander overthrew, but rather than condemning the military putsch as illegal, the Commission backed it as justified. In doing so it relied on a novel application of the doctrine of necessity:

The Commander cited the doctrine of 'Necessity' as expressed in the Fiji cases of the *State v Chandrika Prasad*, *Yabaki v The President*, and the Pakistani case of *Musharaf*. In these cases the courts established the parameters within which 'duty of necessity' could be invoked by the person *de facto* or *de jure* claiming to exercise the 'reserve' power of the head of state or sovereign.⁹

"Necessity" is the necessity for the action of governmental authorities – not for one of the uniformed bodies of the state to overthrow the legitimate political organs of the state. In this case the "exercise [of] the 'reserve' power of the head of state or sovereign" was by the armed forces commander, in declaring a state of emergency, and effectively temporarily assuming the office of President, and establishing a *de facto* military regime. It is scarcely credible that action on this scale could be justified under the doctrine of necessity, in any circumstances.

Events in 2006 were similar to those in 1987, when an illusion of constitutionality was also invoked by the then Lieutenant-Colonel Sitiveni Rabuka, third ranking officer in the Royal Fiji Military Forces, while at the same time rebelling against his senior officers, and imprisoning them and other political opponents. Because the Governor-General remained in

⁸ Fiji Human Rights Commission, p. 28.

⁹ Fiji Human Rights Commission, p. 2.

office and the Colonel, initially at least, wished to utilise him in order to give at least some patina of legitimacy, subsequent legal action focused upon the Governor-General's action in dismissing the Government.

In accordance with the wording usual in modern Commonwealth constitutions, s 72 (1) of the Fiji Constitution of 1970 stated that “[t]he executive authority of Fiji is vested in Her Majesty”.¹⁰ Under s 72 (2) that authority might generally “be exercised on behalf of Her Majesty by the Governor-General”. Neither powers conferred by the Constitution nor the implied emergency powers however gave legal validity to the Governor-General's action of 19 May 1987¹¹ in dissolving Parliament and declaring all ministerial offices vacant,¹² on the initiative of the Colonel.

As the Governor-General was bound to dissolve Parliament only on the advice of the Prime Minister,¹³ and the dissolution was without such advice, it would be invalid unless covered by the emergency prerogative or the necessity doctrine. Since the Fijian Constitution itself precluded relying on the prerogative for this purpose;¹⁴ the second had to be relied on. A merely *de facto* dissolution¹⁵ by the Governor-General, in excess of his power, might still be legally effective to bring a Parliament to an end.¹⁶ But arguments of legality masked the true situation; that the director of operations of the Royal Fiji Military Forces had seized power and was manipulating the legitimate civilian authorities through force, the threat of force, and spurious quasi-legal arguments of “necessity”. In reality it was a simple case of military dominance; the civil Government – including the Governor-General – was powerless to stand in its way (and many of the political elite were secretly or openly supportive of the objectives of the coup leader).

The 2000 coup, and that in December 2006, reflected a similar approach to governance: political intervention by the then Commander of the RFMF to remove a Government of which he didn't approve, behind the camouflage of legality.

Neither the 1997 Constitution, nor general principles of constitutional law, permits the armed forces to assume executive authority in such a manner. Martial law is the suspension of normal law. When this is done by the military acting at the behest of the civil authorities, justified by extreme circumstances, it is regrettable but not illegal.¹⁷ But this is not merely martial law; it is the military deliberately supplanting the civil government. It is without the consent of political leaders, and indeed against their wishes, and is therefore nothing less than a military coup. In no foreseeable circumstances can the military abrogate the Constitution, or flout its provisions in such a manner – and purporting to assume the powers of President, and appointing a new Prime Minister, amounts to the *de facto* suspension or abrogation of the constitution. Whether it is also *de jure* is a matter only time (and the courts) can tell.

The claimed illegality of civil government

The basis for the claimed “necessity” was that the military had to intervene to dismiss a Government that was itself illegal:

¹⁰Fiji Independence Act 1970, Fiji Independence Order 1970.

¹¹Fiji Royal Gazette, vol. 114, No 38, of that day.

¹²F. M. Brookfield, “The Fiji revolution of 1987” [1988] New Zealand Law Journal 250-56, 251.

¹³s 70 (1).

¹⁴*Attorney-General v De Keyser's Royal Hotel* [1920] AC 508.

¹⁵*Victoria v The Commonwealth* (1975) 134 CLR 81, 120, 178.

¹⁶F. M. Brookfield, “The Fiji revolution of 1987” [1988] New Zealand Law Journal 250-56, 252.

¹⁷The Crown can exercise powers not specifically conferred upon it to preserve constitutional order, as in Grenada in 1983, and Fiji in 1987; *Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 35; P. St. J. Smart, “Revolution, Constitution and the Commonwealth: Grenada” (1986) 35 International and Comparative Law Quarterly 950.

We come to the conclusion then, that the use of ‘duty of necessity’ in 2001 by the President, Ratu J. Iloilo, himself a 2001 appointee of the Council of Chiefs, was unconstitutional given, as the Court of Appeal said, the circumscribed circumstances in which that duty can be used. If that decision was unconstitutional, so were the subsequent events: the appointment of the caretaker Prime Minister to dissolve Parliament; the appointment of another caretaker Prime Minister, Laisenia Qarase; and the holding of the 2001 elections.¹⁸

It was worrying that the Commission would deny to the Prime Minister the right to rely on “necessity”, and to allow this, in a much broader set of circumstances, to the Commander of the RFMF. The military has no right to act independently, except in the most extreme circumstances, such as the entire absence of the civil Government. Even if the post-2001 Government were irregularly appointed, that would be for the courts to decide, not the military.

The argument followed by the Commission traces the purported illegality of the Government to include the 2006 election:

The elections of 2001 were therefore based, not on an extra-constitutional duty of necessity, but on a series of executive decisions that were pronounced, albeit obiter, by the Court of Appeal as unconstitutional. The validity or legitimacy of the 2001 elections is therefore questionable. For 5 years, from 2001 to 2005 the Government of Laisenia Qarase, after elections, proceeded to rule on the basis of an act that was unconstitutional.¹⁹

Technical illegality would indeed be a serious matter, but the Government was generally accepted as the *de facto* Government of Fiji – and most regarded it as the *de jure* Government also. It is one thing for the leader of a military coup to attempt to justify his actions by criticising the legitimacy of the Government he has overthrown – but for the Human Rights Commission to do so also is deeply disturbing.

Emergency action

There can be no doubt that the power of a head of State, under even a written constitution, extends by implication to executive acts. It also extends to legislative acts taken temporarily (that is, until confirmed, varied or disallowed by the lawful legislature) to preserve the constitution, even though the constitution itself contains no express warrant for them.²⁰

This principle has been applied in Grenada, where the Governor-General powers in this respect were approved by the Grenada Court of Appeal.²¹ This limited necessity doctrine has also been applied in Canada, to validate a body of legislation which had been

¹⁸ Fiji Human Rights Commission, p. 4.

¹⁹ Fiji Human Rights Commission, p. 4.

²⁰ F. M. Brookfield, “The Fiji revolution of 1987” [1988] New Zealand Law Journal 250-56, 251.

²¹ *Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 35; [1987] LRC (Const) 127; P. St. J. Smart, “Revolution, Constitution and the Commonwealth: Grenada” (1986) 35 International and Comparative Law Quarterly 950.

unconstitutionally enacted.²² The essence of the emergency powers is that they are implied to enable the executive authority to act to preserve or restore the Constitution where it is under revolutionary attack or otherwise in crisis.²³

But rather than acting to bolster the constitutional government, the RFMF undermined it – and was supported in this by the Commission, which also criticised the role of the Great Council of Chiefs (GCC), the body which, *inter alia*, appoints the President:

The GCC, as the appointing authority of the President, also acted illegally in instructing the President to summon the new Parliament. In fact, in March 2001, the legal Government of Fiji was still the Labour Government. The subsequent acts by the executive appointing body, the executive, the appointment of two Caretaker Prime Ministers, dissolution of Parliament and the holding of new elections were all illegally facilitated.²⁴

The Commission did its best to impugn the previous regime:

During the course of its first five year term, the Qarase Government did everything in its power to undermine the Constitution, especially the entrenched Bill of Rights. It expanded beyond reason all the limitation clauses in the Bill of Rights provisions, especially those in section 38, to justify its anti-human rights and discriminatory policies.²⁵

It is entitled to criticise the actions of previous Governments. It is not the place of this paper to comment in detail on the accuracy of the attacks upon the Qarase Government by the Commission, nor on the accuracy of the assessment of the 2006 election. But emergency action by government agencies is only justified in exceptional circumstances, and the effective overthrow of a civilian Government would rarely be justified or justifiable, unless the “Government” were clearly neither the *de jure* government, nor an effective *de facto* government. The military exists to serve the civilian government, not the other way around.

A permanent political role for the military?

What may be seen as the most serious problem highlighted by the Commission’s report, but which may not be confined – indeed is not confined – to the Commission, is the view of the constitutional and political role of the military. The Commission begins by observing that:

...the Constitutional position of the military has never really been articulated since 1990 and a question could have easily been referred to the Supreme Court for its opinion to avert potential public security threats. Certainly the Human Rights Commission saw the military’s role as expressed in section 94 of the 1990 Constitution and imported into section 112 of the 1997 Constitution as being of constitutional interest. Section 94 (3) of the 1990 Constitution states: ‘It shall be the overall

²²Reference *Re Language Rights under the Manitoba Act 1870* (1985) 19 DLR (4th) 1 (SCC).

²³F. M. Brookfield, “The Fiji revolution of 1987” [1988] New Zealand Law Journal 250-56.

²⁴Fiji Human Rights Commission, p. 5.

²⁵Fiji Human Rights Commission, p. 5.

responsibility of the Republic of the Fiji Military Forces to ensure at all times the security, defence and well being of Fiji and its peoples'.²⁶

This is effectively adopting the argument used at times in Latin America and elsewhere, where repeated military coups were launched “for the good of the country”. Section 94 cannot be read to allow the RFMF to overthrow a civil government, even if that Government might be irregular in some manner, or even acting improperly. It is for the courts, not the military, to decide the legality or otherwise of a Government.

That is not to say that the doctrine of necessity has no role to play. The Court of Appeal of Fiji, in *Republic of Fiji v Prasad*²⁷ quoted with approval Professor F. M. Brookfield’s *Waitangi and Indigenous Rights Revolution. Law and Legitimation*:

The courts, then, are under a duty to uphold the legal order of which they are part. But in doing so they may sometimes recognize as valid emergency action taken by the executive government or its armed forces which would be unlawful in normal circumstances but which is justified in times of extreme crisis by the principle of necessity²⁸

The court’s duty to uphold the legal order is qualified by other manifestations of the necessity principle, one of which, as recognized by the courts in some modern cases under written constitutions, has allowed temporary and strictly limited deviations from the constitution for the express purpose of safeguarding it or for preserving the rule of law. Although the quote above refers to “action taken by the executive government *or its armed forces*”, there is a presumption that any action would be on the initiative, or with the consent, of the Government, and not directly opposed to it. Action by the armed forces must be taken in accordance with the wishes of the civil government; the doctrine of necessity cannot be used to justify a military coup against the duly constituted government of the land.

It is only under an extraordinary and frightening situation that the military can take unilateral and illegal action on its own initiative. It is unclear that such a situation prevailed in Fiji in 2006. The onus is on the military to show that such action was necessary – and a mere assertion of “necessity” is not sufficient justification for overthrowing an apparently lawfully appointed Government. The Commission was disappointing in its analysis of the situation:

It is now apparent that the 2006 elections were not held in compliance with the Constitution. This finding questions the legitimacy of the result, and whether the rights of the voters were protected in accordance with sections 55 and 56 of the Constitution. It is doubtful that the Qarase Government was elected in compliance with the relevant provisions of the 1997 Constitution. The question of whether the Qarase Government was democratically elected is therefore also significant.²⁹

Irregularity (if such there be) may mean that the Government was illegal in a technical sense, but it was still the de facto (if not de jure) Government. The assumption of power by

²⁶ Fiji Human Rights Commission, p. 6.

²⁷ *Republic of Fiji Islands v Prasad* [2001] FJCA 2; [2001] NZAR 385 [Court of Appeal of Fiji].

²⁸ (Auckland University Press, Auckland, 1999), 20.

²⁹ Fiji Human Rights Commission, p. 10.

the military is even more irregular, and it is unsatisfactory for the Commission to suggest that this is a “more lawful” action. This rather absurd conclusion seems to have derived from an inadequate reading of case law, but also more dangerously, from a rather naive approach to the principles of the rule of law. This is clear in the following quote from the Commission’s report:

What the Commander overthrew on December 2006 was not the legitimate and democratically elected Government of Fiji. Only an accurate assessment of boundaries based on up-to-date Census would be able to determine if any Government is the constitutional Government of Fiji. Therefore, whether there is an illegality or legality associated with the Commander overthrowing a Government which was elected unconstitutionally and therefore illegally, may be a matter for the courts.³⁰

The Commission returned to its attacks on the deposed Government:

The Qarase Government was involved in massive violations of human rights in Fiji, constituting crimes against humanity, and made serious attempts to impose ethnic cleansing tactics in Fiji. The Commission attempted to thwart such inroads into constitutionality by a combination of persuasion and warnings, but ultimately, its funding was reduced, and even foreign government funding politicized by adverse reports on the Commission’s investigations and analysis of Government’s abuse of human rights and fundamental freedoms.³¹

Whatever the validity of such sweeping claims – which, if true, ought to have brought the opprobrium of the Commission upon the Government at an earlier stage – it is followed by an incorrect view of legality of actions of military.

The question of legality of the military takeover was unclear from the very beginning. There were a number of extra-constitutional principles invoked by the Commander in undertaking his ‘clean-up’. The fact that he ‘cleaned up’ an unconstitutionally elected Government whose *raison d’être* from 2001-2006 was to make every attempt to sweep the Constitution aside at every opportunity and to impose policies and legislation which would have constituted a crime against humanity according to international law would be a consideration in any determination of legality in this case.³²

This contains remarkable and contentious claims, especially with respect to international law. What is central to this paper is that the Commission’s report reflects an unsatisfactory understanding of the limits of the doctrine of necessity, and the role of the military:

The doctrine of necessity invoked by the Commander has not so far had the effect of abrogating the 1997 Constitution of Fiji, though some warnings have been given that it could be abrogated. The Commander had, on the first day of his takeover, declared a

³⁰ Fiji Human Rights Commission, p. 10.

³¹ Fiji Human Rights Commission, p. 15.

³² Fiji Human Rights Commission, p. 16.

State of Emergency. Chapter 14 of the Constitution sets out provisions to be followed under a state of emergency. This Chapter allows Parliament to make a law conferring power on the President, acting on the advice of the Cabinet, to proclaim a state of emergency.³³

Since the RFMF Commander was neither the President nor acting on the advice of the Cabinet this was irregular – though not necessarily wholly illegal and void, if other factors existed to justify it. But the report continues to reflect a curious belief that the Commander of the RFMF has the legal power to change the law:

To date, the 1997 Constitution remains intact, but the reality is that the limitation clauses in the Bill of Rights provisions are more visible. The Commander announced on December 17th that he would consider abrogating the Constitution if that was the only way to obtain immunity for the actions of the RFMF on December 5 2006. This led many people to suggest ways to avoid abrogation since most want the Constitution retained. The view of the people is that the Bill of Rights provisions must remain. The Human Rights Commission would look very carefully at any amendments proposed to the Bill of Rights to ensure compliance with the spirit of the Constitution.³⁴

It must be remembered that it is not easy to abrogate a Constitution that people have given to themselves, pursuant to the Preamble in the 1997 Constitution. The case of Chandrika Prasad, which the Commission prepared for solicitors for Prasad, is evidence of the difficulty with which constitutions can be removed.³⁵

This might be described as interestingly naive if it were not so serious. The Commission seems happy to condone the actions of the military while condemning those of the civil Government. The military are the servants not simply of the political regime, but of the state, though they receive their orders from the political leadership. It is scarcely conceivable that the military, as an agency of the state, can have the power to abrogate the Constitution. Force may render a constitution effectively abrogated, and the courts may well hold that this has occurred, but there should be no presumption that the military has a right to abrogate the Constitution at will.

The Commission's report went further, and attacked Australia and New Zealand also:

Upon hearing this New Zealand reaction in the news media, the Human Rights Commission staff telephoned contacts in New Zealand in an attempt to ask its Prime Minister to listen to different advice by sending envoys with a more accurate sense of reality and deeper understanding of the position of everyone in Fiji, though this did not transpire. She continued to make statements in the press which, inevitably, were ignored by the Commander. The Australian reaction was equally savage. Such reactions from Australia and New Zealand limited their ability to monitor, assist or play any role whatsoever to improve the situation.³⁶

³³ Fiji Human Rights Commission, p. 17.

³⁴ Fiji Human Rights Commission, p. 21.

³⁵ Fiji Human Rights Commission, p. 21.

³⁶ Fiji Human Rights Commission, p. 25.

The essence of this seems to be a grievance that other countries have not acquiesced in the arguably illegal action of the Fijian military. It is possible that there may be practical or even legal justification for the commander of the armed forces to assume the executive authority of head of State, declare a State of Emergency, and proceed to run the country through a military council. But the probability is otherwise, and the onus is on the military to justify their actions – a justification that would be met with healthy scepticism from home and abroad.

Ironically enough, the Commission accused others of misreading the situation in Fiji:

The complete misreading of the situation, perhaps based on unreliable NGO information, assisted in producing ill-timed reactions and un-diplomatic language which made matters worse for the ordinary people of Fiji during the weeks leading up to and including the military takeover on December 5th. Such reactions and interventionist policy fostered a deterioration of the human rights situation in Fiji between Christmas Eve and Boxing Day.³⁷

The political situation might have been misunderstood – and this paper cannot consider that aspect of the situation – but constitutionally the situation is sufficiently clear.

Since 1987 there has been a growing tendency in Fiji to view the RFMF as a permanent part of the political scene. This is to embark upon a slippery slope from which recovery is hard. It is doubly hard when the risks are apparently not recognised by the statutory body charged with protecting human rights in the country. It is scarcely an exaggeration to say that this report is worrying and irresponsible in its support for a politically-active military.

Further, there is also a suggestion by the Commission that censorship and the enforced politicalisation of Non-Governmental Organisations (NGOs) would be desirable:

The role of the NGOs in being able to disseminate accurate information to their donors must be reviewed.³⁸

There is an endorsement by the Commission of the paramountcy of human rights – but this is coupled with an unusual interpretation of the Constitution:

The Human Rights Commission continues to emphasise that human rights considerations are paramount and the military has been reminded a number of times that the Bill of Rights binds all levels of the State, including public officials. While ‘duty of necessity’ was invoked to dismiss the Government after allowing the Commander to ‘step into the shoes’ of the President, this duty must continue to be exercised pursuant to section 94 of the 1990 Constitution and section 112 of the 1997 Constitution. The principles of ‘duty of necessity’ established by Gates J in the Chandrika Prasad case is relevant in this respect and should be considered carefully. The duty is to uphold the Constitution and respect the rights and welfare of citizens is a fundamental duty which the military has undertaken to respect.³⁹

³⁷ Fiji Human Rights Commission, p. 26.

³⁸ Fiji Human Rights Commission, p. 26.

³⁹ Fiji Human Rights Commission, p. 29.

This shows a serious misunderstanding of the role of the military. Further paragraphs in the report reinforce this depressing impression:

The second issue is the new role in which the military finds itself in Fiji. In fact it is not a new role as the idea is provided for in the 1990 Constitution. Section 94 of the 1990 Constitution certainly envisaged an interventionist role for the military but, judging by the recent reaction of one of the Constitutional Review Commission members to the crisis, his original intention, (whether or not shared by everyone else on the Commission) may not have been to see the military in this way, given its history in looking after the welfare of only certain interests to the exclusion of others. Nevertheless, judging from the military's actions from 2001, it has increasingly regarded itself as being able to protect national interests. This means that the military sees itself as being able to exercise force for the public good. This is anathema to those who see a militarized society as objectionable and reflects some of the hesitation of the members of the public, in a hangover from the Cold War years, to accept an army to look after the good of all.⁴⁰

...

The RFMF has the capacity to invoke certain human rights and welfare powers under section 94 of the 1990 Constitution and section 112 of the 1997 Constitution Amendment Act.⁴¹

While some of those involved with drafting the 1990 Constitution may have felt that s 94 gave the military some degree of independence, it is unwise to read ss 94 and 112 in this manner, and also highly dangerous. The Commission is itself arguably encouraging the development (if, indeed, it needs any encouragement, in a country that has had four coups since 1987) of the "coup cycle", by giving support to the military, whose leaders could indeed be charged with high treason.

The Commission even goes so far as to suggest that the military should have a stronger institutional involvement in politics:

But there should be no vagueness about the expression of duty and responsibility of a military in the public domain. The Constitution should expressly state the agreed duty of the military, for example importing section 94 (3) of the 1990 Constitution into section 112 of the 1997 Constitution. An example of how this could be exercised is in exactly the way the RFMF mobilized to provide water to people who had gone without for days, the resolution of the Emperor Gold Mine issues for the workers, stopping armed home invasions, and so on. On the other hand, the military could itself become more knowledgeable [sic] about governance and politics, so that its force is seen to be exercised for the people rather than against them as Fiji has experienced in the past.⁴²

⁴⁰ Fiji Human Rights Commission, p. 29.

⁴¹ Fiji Human Rights Commission, p. 31.

⁴² Fiji Human Rights Commission, p. 30.

This would give the military carte blanche to intervene from time-to-time, as it sees fit, and transform it from being the military servant of the state to a political organ effectively at least co-equal with Parliament, Cabinet and President; almost an authority of final appeal, like the Supreme Leader in Iran. The Commission elaborates on the “limits” it envisaged for such an arrangement:

Since it has the constitutional power to ensure security and protect people, the military does not act unlawfully as long as it keeps to this objective. In view of the rampant abuse of power, privilege, illegalities and wastage of wealth of the Qarase regime, as well as its proposed discriminatory legislation which, if enacted, would have constituted a ‘crime against humanity’ under the International Law Commission’s definition, and limited scope for an immediate judicial solution, there appear to be few options remaining to protect the people of Fiji from an illegal, unconstitutional, anti-human rights, and despotic regime. The Qarase Government relied on majoritarianism, and collaboration with some powerful members of the international community including close neighbours as well as some NGOs, to shield its extensive human rights violations in Fiji from scrutiny.⁴³

It is probably reasonable to expect the military to intervene in the event of an “illegal, unconstitutional, anti-human rights, and despotic regime”, but it is questionable that the Qarase Government amounted to this. It is beyond the scope of this paper to discuss whether the actions of the Qarase Government might have constituted “crime against humanity”, but such claim is *prima facie* improbable. To allow the military oversight of the actions of government in this manner is highly irregular, and a rejection of the principles of the rule of law, ironic enough given the great reliance placed on the ostensible legality of the military’s actions.

The rule of law

While the acquisition of power may be legitimated by the passage of time, by election, treaty or similar action, the subsequent conduct of a regime must also conform to appropriate standards to maintain that legitimacy. This constitutional principle, which is part of the concept of the rule of law, is based upon the practice of liberal democracies of the Western world.⁴⁴ It means that what is done officially must be done in accordance with law.⁴⁵ In Europe, where an entrenched Constitution is the touchstone for legitimacy of government,⁴⁶ there might be a general grant of power to the executive, and a bill of rights to protect the individual.

In the British tradition, and those countries which derive from it, public authorities must point to a specific authority to act as they do,⁴⁷ and in some respects the government in such a system has little more inherent formal authority than do individuals.⁴⁸ The State sees itself as the source of both law and power; legality prevails.⁴⁹ Thus the emphasis lay on formal, objective, laws rather than subjective justice. Procedure rather than substance dominates. In

⁴³ Fiji Human Rights Commission, p. 31.

⁴⁴ R. Heuston, *Essays in Constitutional Law* (2nd ed, London, Stevens & Son, 1964) pp 40-41.

⁴⁵ *Arthur Yates and Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37 at 66 per Latham CJ.

⁴⁶ I. Hardin and N. Lewis, *The Noble Lie: The British Constitution and the Role of Law* (Hutchinson, London, 1987) p 7.

⁴⁷ *Entick v Carrington* (1765) 19 State Tr 1030 per Lord Camden.

⁴⁸ B. V. Harris, “The ‘Third Source’ of Authority for Government Action” (1992) 109 Law Quarterly Review 626.

⁴⁹ R. J. Rushdoony, *The Institutes of Biblical Law* (Presbyterian and Reformed Publishing, San Francisco, 1973) p 61.

Fiji since 1987 there have been some upheavals, but the courts recognised the re-establishment of constitutionality with the adoption of the 1997 Constitution. All subsequent actions by the organs of the state should be in accordance with the *Grundnorm* thus established. The unilateral action of the military is not consistent with that standard. This gives the courts, not the civil or military servants of the state, the arbitral role.

This is done not merely because the courts operate in a neutral and dispassionate manner, but because the proper application of legal principles requires skill and training. As Sir Edward Coke, Lord Chief Justice of the Court of Common Pleas, said in *Prohibitions del Roy*, almost 400 years ago:

... causes which concern the life, or inheritance, or goods or fortunes of his subjects, are not to be decided by natural reason, but by artificial reason and judgment of law, which law is an art which requires long study and experience, before that a man can attain to the cognizance of it. The law is the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace.⁵⁰

Neither Ministers, nor the President – and certainly not the Commander of the RFMF – can unilaterally decide what action is legal and what is illegal.

Much of the legitimacy of a political system derives from the impartiality and objectivity with which it is administered.⁵¹ Thus the very exercise of authority legitimates that authority.

Dicey defined rule of law to encompass the liberty of the individual, equality before the law, and freedom from arbitrary government.⁵² The scope of the concept is however rather fluid. As Joseph observed, it includes such meanings as government according to law; the adjudicative ideal of common law jurisdictions; a minimum of State intervention and administrative power. It also includes the need for fixed and predictable rules of law controlling government action; standards of common decency and fair play in public life; and the “fullest possible provision by the community of the conditions that enable the individual to develop into a morally and intellectually responsible person”. It also includes the principles of freedom, equality, and democracy.⁵³

Most writers now distance themselves from Dicey, and believe that his ideas of the rule of law should be subject to reappraisal.⁵⁴ But the subjugation of the military to the control of the civil government is a principle that has long been established in Commonwealth jurisprudence. To allow – nay to encourage – the armed forces of a country to assume a political oversight role, is highly dangerous and a retrograde step. It is depressing that a statutory human rights body could advocate such an approach, and a warning to the rest of the Commonwealth. The precise nature of democracy, and “majoritarianism” (used in the report almost as it were something to be avoided) may be negotiable in Fiji, but without adherence to the principle of government according to law, then the country is in danger of declining into lawlessness.

The specious use of legal arguments to justify what is actually a military coup is not helpful, and no statutory body, least of all a human rights commission, ought to give support

⁵⁰ (1607) 12 Co Rep 63; K&L 108; 77 ER 1342.

⁵¹ Royal Commission on the Electoral System, *Report of the Royal Commission on the Electoral System “Towards a better democracy”* (Government Printer, Wellington, 1986) p 27.

⁵² *Introduction to the Study of the Law of the Constitution* introduction & appendix by Wade ECS (10th ed Macmillan, London, 1959).

⁵³ P. Joseph, *Constitutional and Administrative Law in New Zealand* (The Law Book Co, Sydney, 1993).

⁵⁴ I. Hardin and N. Lewis, *The Noble Lie: The British Constitution and the Role of Law* (Hutchinson, London, 1987) p 3.

to such action. If the Human Rights Commission will not take a stand in favour of the rule of law, then it is up to the legal profession collectively, and its members individually, to do so.

Conclusion

One can understand the Realpolitik motive for wanting to ensure strong and stable government, but for the Fiji Human Rights Commission to recognise – and indeed encourage – a political oversight role for the military is imprudent, as experience in Latin America and elsewhere has shown. Condemnation of a Government for its actions is one thing, but to encourage the military to adopt the role of final arbiter is fraught with dangers.

The military owes its allegiance to the duly constituted civil authorities, and it is not for the armed forces to question the actions of the political leadership, or to purport to sit in judgement upon them. In an environment of the increasing politicisation of the military, the actions of Commodore Bainimarama are not particularly surprising. But for the Commission to back the military is a serious blow for the long-term development not merely of democracy, but of the rule of law, in Fiji. It remains to the legal profession to educate the population – and perhaps most importantly, the military and political leadership – on questions of basic constitutional principles.

[Noel Cox is Professor of Constitutional Law and Head of the Department of Law at the Auckland University of Technology, New Zealand, and a Barrister of the High Court of New Zealand]