Republic of Fiji v Prasad: A military government on trial

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Since 1987 Fiji has exhibited signs of a serious decline in political stability. Though by no means irreversible, this instability threatens both the international standing of the country and its economy. The latest chapter, a court challenge to the legitimacy of the present government, offers an opportunity for a return to normalcy, but also presents potentially grave dangers.[1] It also illustrates the difficulties inherent when the armed forces of a country become involved in the political process.

In a situation where there has been a purported overthrow of a Constitution but where the Court system has survived virtually unscathed, the Court has two options, as the cases show. First, it can say that the usurping government, by abrogating the Constitution or by changing it in an illegitimate manner, has succeeded in changing permanently the previous legal order and that the new order is legally valid. There is always the danger that such a finding is seen as giving the stamp of legitimacy to a usurper. As against that perception, a Court cannot be blind to reality, however unfair or unfortunate that reality may be. The other option for the Court is to declare the usurpation invalid. It was this latter option which the Court chose.

The circumstances of the country

Politically, the current unrest may be blamed largely on the racial mix that characterises the population. Fijians of Indian descent are amongst the leaders of the national economy. But the indigenous Fijians of mixed Melanesian and Polynesian ancestry, a bare minority of the population, own the land and have felt that they should have political control as well.

Until 1987 they did exercise broad political control, under the 1970 Constitution which enshrined certain rights of indigenous Fijians.[2] Until 1987 the Government was dominated by native Fijians, but in that year a new Government, headed by Dr Timoci Bavadra, entered office. This was subsequently overthrown by Lt-Col Sitiveni Rabuka, principally because the advent of the new Government augured greater political rights for Fijians of Indian origin.

The constitutional development of Fiji since 1987 has seen on-going attempts to reconcile the expectations of the Indians and the rights of the indigenous Fijians. The first constitution after the 1987 coups provided for greater protection and enhancement of indigenous Fijian voting rights and land tenure and other interests, beyond the protection that had been afforded in the 1970 constitution. This was criticised for entrenching native rights, including the requirement that the Prime Minister be of native Fijian ancestry.

In September and October the House of Representatives respectively resolved unanimously that the President should appoint a commission to review the constitution of 1990. In 1995 a commission, chaired by Sir Paul Reeves, was appointed to frame a new

[1] *Republic of Fiji v Prasad* (Unreported, Court of Appeal of Fiji, 1 March 2001, Civil Appeal No. ABU0078/2000S).

[2] Though not the customary law; Jennifer Corrin Care, 'The Status of Customary Law in Fiji Islands after the Constitutional Amendment Act 1997' (2000) 4 Journal of South Pacific Law 1.

constitution.[3] The 1997 Constitution, which came into effect a year later,[4] went some way towards meeting the expectations of much local and international opinion that the ethnically discriminatory provisions of the 1990 constitution should be reduced.[5] Particularly, the new House of Representatives would not have a built-in majority of indigenous Fijians, nor would the Prime Minister necessarily be an indigenous Fijian. The President is, however, appointed by the Great Council of Chiefs, which represents native Fijian interests.[6]

The current (1997) Constitution provides for the preservation, development and co-existence of ethnic communities and the equitable sharing of power amongst all of them. Unfortunately, this has proven unsuccessful. The title of the report of the Reeves commission, entitled 'The Fiji Islands: Towards a United Future', has thus far proved tragically ironic.

The seizure of power by the armed forces

Neither the 1997 Constitution, nor general principles of constitutional law, permit the armed forces to assume executive authority in such a way.[7] 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.[8] When this is implemented by the military, without the consent of political leaders, and indeed against their wishes, it is nothing less than a military coup. In no circumstances can the military abrogate the Constitution,[9] and

[3]Fiji Constitutional Review Commission, *Towards a United Future*, Parliamentary Paper No 34/96 (1996). Other members were Tomasi Rayalu Vakatora and Dr Brij Vilash Lal. The 38 research papers commissioned by the Commission were published in two volumes as B V Lal and T R Vakatora (eds), *Fiji in Transition* and *Fiji and the World* (1997).

[4]On 27 July 1998, the Constitution Amendment Act 1997 (assented to by the President 25 July 1997), came into force, repealing the 1990 Constitution, and establishing the Constitution of the Republic of the Fiji Islands 1997 in its place; s 193(2). The Constitution (Amendment) Act 1998 was subsequently passed, to clarify certain doubts, tidy up drafting difficulties, and to emphasise that the country's name is "the Republic of the Fiji Islands".

[5]Jennifer Corrin Care, 'The Status of Customary Law in Fiji Islands after the Constitutional Amendment Act 1997' (2000) 4 Journal of South Pacific Law 1. In particular, this saw new chapters covering a compact (chapter 2), social justice (4), the Bose Levu Vakaturaga (Great Council of Chiefs, chapter 8), accountability (11), and group rights (13).

[6]s 90.

[7]New emergency powers provisions in the 1997 Constitution (chapter 14) envisage that Parliament will provide by statute for the power of the President, acting on the advice of the Cabinet, to proclaim a state of emergency (s 187).

[8]The 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; Smart, PStJ 'Revolution, Constitution and the Commonwealth: Grenada' (1986) 35 ICLQ 950.

[9]According to the Constitution, emergency measures may not derogate from certain Bill of Rights provisions (chapter 4), unless certain conditions are met. These include such matters as the Cabinet's 'reasonable grounds' for belief in the necessity of emergency measures, confirmation of the proclamation by the House of Representatives within five sitting days, and a limitation on its initial period to three months. The protected provisions include ss 23 (personal liberty), 24 (freedom from servitude and forced labour), 30 (freedom of expression), 31 (freedom of assembly), 32 (freedom of association), 33 (labour relations), 34 (freedom of movement) and 37 (privacy).

it was patently absurd for Commodore Bainamerana to say that he had 'done so by virtue of the powers vested in me'.[10]

Legally, the present situation in Fiji may be seen as a series of interconnected events. The 19 May 2000 seizure of Prime Minister Mahendra Chaudhry- the first Prime Minister of Indian blood- and members of the Government and Parliament, was an attempted coup. Although George Speight lacked military backing, his action was designed to overthrow the lawfully appointed Government. Although Ratu Mara did not capitulate immediately to the demands of the coup leader, his ability to quell the coup attempt was limited by his fear of harm coming to the captives, and perhaps by a lack of confidence in the loyalty of the armed forces.

Executive authority in emergencies

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.[11]

This principle has been applied also in Grenada, where the Governor-General powers in this respect were approved by the Grenada Court of Appeal.[12] This limited necessity doctrine has also been applied in Canada, to validate a body of legislation which had been unconstitutionally enacted.[13] 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.[14] This illustrates the role of the Crown as ultimate guarantor of the constitutional order.

A similar challenge to the authority of the lawful executive arose in Fiji in 1987. 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".[15] Under s 72 (2) that authority may 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 1987[16] in dissolving Parliament and declaring all ministerial offices vacant.[17]

As the Governor-General was bound to dissolve Parliament only on the advice of the Prime Minister,[18] 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

[10]The President is the Commander-in-Chief of the military forces (s 87), as well as having the executive authority of the state vested in him (s 85). The Commander of the Republic of Fiji Military Forces, who is appointed by the President on the advice of the Minister, is to exercise military command of the forces, subject to the control of the Minister; s 112.
[11]F M Brookfield, 'The Fiji revolution of 1987' [1988] NZLJ 250-56, 251.
[12]*Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 35; [1987] LRC (Const) 127; Smart, above n 8.
[13]*Reference Re Language Rights under the Manitoba Act 1870* (1985) 19 DLR (4th) 1 (SCC).
[14]Brookfield, above n 11.
[15]Fiji Independence Act 1970, Fiji Independence Order 1970.
[16]Fiji Royal Gazette, vol 114, No 38, of that day.
[17]Brookfield, above n 11.
[18]s 70 (1).

itself precluded relying on the prerogative,[19] the second must be relied on. In the circumstances a prorogation rather than a dissolution would have been more appropriate. It would appear however[20] that a merely de facto dissolution, done in excess of his power by the Governor-General, may still be legally effective to bring a Parliament to an end.[21]

The potential weakness of the Governor-General in the face of entrenched opposition was also illustrated in Southern Rhodesia in 1965, and in Grenada in 1978 and 1983. Southern Rhodesia in 1965 was not technically a Dominion, but nor was it a normal colony.[22] The Governor, Sir Humphrey Gibbs, had only limited responsibilities as the representative of the Queen. Due to the long-running dispute with the United Kingdom over the policies of the Rhodesian Government, formal recognition as a Dominion was withheld. In 1961 a British Order in Council amended the constitution of Rhodesia, giving the Commonwealth Secretary executive powers in Rhodesia, but this was ignored.

After the Unilateral Declaration of Independence every effort was made to undermine the position of the Governor. He was deprived of his official guards and transport, and his telephone was disconnected.[23] With the help of a declaration of a state of emergency, issued by the Governor immediately before UDI, the Rhodesian Government was able, through its control of the police and military, to consolidate its power base. Gibbs considered his function to be to give constitutional recognition to a successful opposition rather than help create one. He rejected the legality of the UDI, but accepted Ian Smith as Prime Minister.[24]

In Grenada in 1978 and 1983, the Governor-General, Sir Paul Scoon, was faced with political crises. In 1978 the government of Sir Eric Gairy was overthrown, but Scoon accorded the new regime de facto recognition and they studiously ignored him. They did not, however, attempt to remove him from office.

In 1983, after the collapse of the New Jewel Movement Scoon was forced to act, as the sole legal, or de facto, governmental authority in Grenada. In practice this action took the form of ex post facto approval of an invasion by Caribbean and American military forces. On his own the Governor-General had been powerless to greatly influence the course of the crisis, though he retained a certain legal and moral authority.

In Fiji in 1987, after the second coup led by Lieutenant-Colonel Sitiveni Rabuka, the Governor-General, Ratu Sir Penaia Ganilau, resigned after failing to persuade the army to return to barracks. Unlike Gibbs, Ganilau quickly accepted the reality of the political situation, and became president in the new regime later that year.[25]

In each of these cases, the fact that the Governor-General could be removed, and the absence of any significant personal staff, limited their ability to resist pressure from the

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

[20] *Victoria v The Commonwealth* (1975) 134 CLR 81, 120, 178.

[21] Brookfield, above n 11, 252. The abrogation of the Constitution in 1987 was implicitly recognised in the Preamble to the 1997 Constitution, which states *inter alia* that "acknowledging our unique constitutional history … the abrogation of that Constitution [of 1970] in 1987 by the Constitution Abrogation Decree 1987".

[22] The Governor was appointed on the recommendation of the Rhodesian Prime Minister, and was not responsible to the Secretary of State for Colonial Affairs.

[23] Frank Clements, *Rhodesia: the Course to Collision* (1969) 232-250.

[24] With the usurpation of authority by the Smith regime, the British Government reasserted its legal supremacy, as it was entitled to do, given that Rhodesia had never formally been granted independence. Gibbs, as the representative of the Queen, represented constitutional legitimacy.

[25] Peter Larmour *Legitimacy, Sovereignty and Regime Change in the South Pacific*: *Comparisons Between the Fiji Coups and the Bougainville Rebellion* (1992).

Government. But each exercised, or attempted to exercise, an authority which owed as much to ancient concepts of sovereignty as to modern constitutions.[26]

One counter-balance to this danger is that a quite special relationship traditionally exists between the office of Governor-General and the armed services.[27] On formal and informal occasions when visiting military installations, successive Governors-General of New Zealand have been accorded the respect and support not always forthcoming from their Ministers.[28] The armed forces appeared to be eager to preserve the symbolic role of the Crown as non-political head of the armed forces.[29]

The Governor-General of New Zealand is styled "Governor-General and Commander-in-Chief in and over our realm of New Zealand", in the letters patent constituting the office of Governor-General. The Defence Act 1990 also styles the Governor-General Commander-in-Chief. The Sovereign possesses "the sole government command and disposition of the militia, and of all forces by sea and land",[30] but is not Commander-in-Chief. The supreme command probably cannot be fully delegated. But a Commander-in-Chief will be given the power to raise armed forces for the Crown.[31]

Whilst always acting upon ministerial advise in respect of the armed forces, the relatively close personal relationship fostered between the armed forces and the Governor-General serves as a reminder that the armed forces are above party politics, in a similar way to the Crown.

A similar link existed between the Crown and the armed forces of Fiji before 1987. Since then, although nominally preserved, the increasing politicisation of the Republic of Fiji Armed Forces was to put an intolerable strain upon the loyalty of those forces to the regime.

History shows that were a coup fails to achieve its objectives- usually by winning the support of the military, it will usually collapse within a few days. But here the coup attempt waivered between success and failure for over a week, simply because of the lack of a firm response from the President. This failure was unsurprising, given that a significant number of members of the police and army favoured the aims of Speight, if not his methods.[32]

This lack of confidence in the reliability of the military has been shown to have been justified. The Commander of the Republic of Fiji Military Forces, Commodore Frank

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[26]Indeed, there is also a residual legislative function remaining to the Crown; *Tamizuddin Khan's Case* reprinted in Sir Ivor Jennings, *Constitutional Problems in Pakistan* (1957) 79 *et seq* (Federal Court of Pakistan).

[27]Sir Zelman Cowen, 'Understanding the office of Governor-General of Australia' (1994) 108 Australian Defence Force Journal 47-51 and (2001) 148 Australian Defence Force Journal 21-26; Interview with Sir David Beattie, 15 April 1998; Interview with Dame Catherine Tizard, 19 May 1998.

[28]Interview with Sir David Beattie, 15 April 1998; Interview with Dame Catherine Tizard, 19 May 1998.

[29]This is of course a reflection of the role of the Queen, who maintains a close relationship with the armed forces of her realms, and, especially with the troops of the Household Division in the United Kingdom.

[30]Militia Act 1662 (13 Chas II St 1 c 6).

[31]The Governor-General, although also Commander-in-Chief, does not raise troops in his or her own name. Section 5 of the Defence Act 1990 provides that: The Governor-General may from time to time, in the name and on behalf of the Sovereign, continue to raise and maintain armed forces, either in New Zealand or elsewhere, for the following purposes ...

[32]On 29 May the Commissioner of Police wrote to the President to advise "that the Fiji Police Force can no longer guarantee the security of the nation". He requested the President to invoke the Public Emergency Regulations and ask the Armed Services to perform all duties and functions of police officers; *Republic of Fiji v Prasad*.

Bainamerana, in declaring martial law, acted without lawful authority.[33] In so doing he completed what George Speight had been unable to do, namely to overthrow the lawful authority of Fiji. Commodore Bainamerana had no more right to declare himself Prime Minister, or to appoint another to the post, than George Speight had.[34]

The litigation

The Court of Appeal of Fiji, a court constituted under the 1997 Constitution and untouched by the military regime, was comprised of a bench of five judges, led by the Rt Hon Sir Maurice Casey, as Presiding Judge.[35] The Court heard four days of arguments from Nicholas Blake QC, Anthony Molloy QC, Michael Scott, Savenaca Banuve and Jai Udit for the Appellants, the Republic of Fiji and the Attorney-General of Fiji, and Geoffrey Robertson QC, George Williams, Anu Patel and Neel Shivarn for the Respondent, Chandrika Prasad.

On 4 July 2000 Mr Prasad, a citizen of Fiji, who had not held any office or appointment under the 1997 Constitution, filed an originating summons in the High Court at Lautoka seeking a Court ruling that the 1997 Constitution was still in force as the supreme law of Fiji.

Gates J decided that Mr Prasad had standing to bring the proceedings. His Lordship held that the Speight coup had not succeeded and went on to consider the legality of the Commander's actions in the light of the doctrine of necessity as applied in the field of constitutional law. He concluded that while the Commander had acted in accordance with that doctrine to secure the safety of the State, he had no genuine desire to remove the 1997 Constitution, and no need to pass the decree abrogating it (a point on which the Court of Appeal was to differ from the High Court). Accordingly, the Judge held the 1997 Constitution was still in force.

On appeal, the Court of Appeal concluded that the 1997 Constitution remains in force. This is an unexceptional conclusion based on long-standing principals of constitutional law. A revolutionary seizure of power will eventually be legitimated. This, the Court found, has not occurred. Consequently, the former Constitution, and any government properly appointed under it, remains in force. Prime Minister Laisenia Qarase, appointed after the coup, is not in this category. President Ratu Josefa Iloilo was however the Vice-President, and remains legally interim President.

In one respect the judgement of the Court of Appeal appears suspect. The affidavit of Mr Qarase, the Interim Prime Minister, of 10 January 2001 annexed a letter from Ratu Mara dated 15 December 2000 which letter states:

> Dear Prime Minister
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> "Pension Options
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> This is to confirm that I have retired and have elected my pension entitlements under the existing laws ... Should you require further information or clarification please do let me know.

[33]Ratu Mara deponed in an affidavit of 6 November 2000 that, "I indicated that if the Constitution were to be abrogated, I would then not return to the Office of President". The Commander then assumed executive authority as "Commander and Head of the Interim Military Government of Fiji"; *Republic of Fiji v Prasad*.

[34]The (1997) Constitution provides that the Prime Minister shall be "the member of the House of Representatives who, in the President's own judgment, can form a government that has the confidence of the House of Representatives" (s 98).

[35]The Rt Hon Sir Maurice Casey, and the Hon Sir Ian Barker, the Hon Sir Mari Kapi, the Hon Mr Justice Gordon Ward, the Hon Mr Justice Kenneth Handley, Justices of Appeal.

Yours sincerely,
Ratu Kamisese Mara".

Mr Qarase replied on 20 December:

> "I write to acknowledge receipt of your letter dated 15 December 2000 informing me of your decision to take reduced pension and gratuity as retired President ... I wish to inform you. Sir, that in accordance with section 5(2) of the President's Pension Act, Cabinet, at its special meeting earlier today, has approved the pension entitlements that you have opted for... This would take effect from 15 December ... Following our Cabinet meeting earlier today, our Office is issuing the attached Press Release in relation to your decision on this matter..".

The press release stated:

> "The Interim Prime Minister, Mr Laisenia Qarase, announced today that he has received communication from the Right Hon. Ratu Sir Kamisese Mara confirming his decision to retire as President. His retirement is effective from 29th May 2000. The Prime Minister has acknowledged the communication from the retired President."

In the words of the Court of Appeal, "[t]his correspondence makes it clear that Ratu Mara did not resign until 15 December when he wrote to the Interim Prime Minister". In the respectful opinion of the writer this reading of the correspondence is not necessarily the correct one. It would appear a more natural interpretation that Ratu Mara was simply averring that by the 15th her had accepted that he was no longer President, not that his resignation necessarily became effective that day. The import of this distinction is, however, comparatively slight, and does not go to the heart of the matter, which was the legitimacy of the purported abrogation of the 1997 Constitution by the Commander of the Republic of Fiji Military Forces.

The actions of the military

On 29 May the Commander promulgated a decree purporting to abrogate the Constitution (Interim Military Government Decree No. 1). Decree No. 3 was also promulgated to establish an Interim Military Government. Clause 5(2) stated that the executive authority of the Republic of Fiji was vested in the Commander as the head of the Military Government.

On Sunday 11 June an advertisement by the Military Council appeared in the Fiji press "to explain the Martial Law currently imposed on the people of Fiji". The advertisement stated:

> "Martial Law may be defined as a temporary rule by Military authorities on a civilian population when the Civil Authority is unable to preserve public safety. The authority to declare and impose Martial Law may be derived from the constitution, in which case the constitution will still be in place when Martial Law is declared. In our case (Fiji) there is no provision in the constitution for the declaration and imposition of Martial Law, hence the Military Authorities, amongst other reasons have found it fit to set aside the constitution in its quest to restore public safety and law and order."

Subsequently, the military authorities established a new government, and on 14 July the Great Council of Chiefs appointed Ratu Josefa Iloilo, the Vice-President under the 1997 Constitution,[36] as Interim President and Ratu Jope Seniloli as Interim Vice President. On 28

[36]This was a new position under the 1997 Constitution; s 88. As with the President, the appointment was to be made by the Great Council of Chiefs (Bose Levu Vakaturaga), after consultation with the Prime Minister.

July the Interim Civilian Government Ministers were sworn in by the Interim President and took office under the Interim Civilian Government (Transfer of Executive Authority) Decree. The Interim Civilian Government remained the *de facto* Government of Fiji until the recent elections.

The Court of Appeal quoted with approval Professor FM Brookfield's *Waitangi and Indigenous Rights Revolution. Law and Legitimation*:[37]

> "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 necessity. ..... "

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.

The Court believed that the Commander quite properly contemplated executive action by way of martial law to restore and/or maintain law and order. This was appropriate, so long as the extraordinary and frightening situation lasted.

However, the Commander purported to change the legal order when he decided to abrogate rather than suspend the Constitution on 29 May; he reinforced this change when he later chose to install the Interim Civilian Government which has purported to govern ever since.

The authority on necessity and the assumption of extra-constitutional power

The starting-point for any consideration of authority on this point is the Privy Council decision in *Madzimbamuto v Lardner-Burke*[38] which held as illegal the regime of Ian Smith in Southern Rhodesia set up under the 'Unilateral Declaration of Independence'.

Lord Reid said at pp 723-4:

> "It is an historical fact that in many countries - and indeed in many countries which are or have been under British Sovereignty - there are now regimes which are universally recognised as lawful but which derive their origins from revolutions or coups d'état. The law must take account of that fact. So there may be a question how or at what stage the new regime became lawful. A recent example occurs in *Uganda v Commissioner of Prisons, Ex parte Matovu* [1966] EA 514. On February 22, 1966, the Prime Minister of Uganda issued a statement declaring that in the interests of national stability and public security and tranquillity he had taken over all powers of the Government of Uganda. He was completely successful, and the High Court had to consider the legal effect. In an elaborate judgment Sir Udo Udoma C.J. said:
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> > ". . . our deliberate and considered view is that the 1966 Constitution is a legally valid constitution and the supreme law of Uganda; and that the 1962 Constitution having been

[37](1999), 20.

[38][1969] AC 645 (PC).

> abolished as a result of a victorious revolution in law does no longer exist nor does it now form part of the Laws of Uganda, it having been deprived of its de facto and de jure validity." (at 539)

Pakistan affords another recent example. *In The State v Dosso* [1958] 2 PSCR 180 the President had issued a proclamation annulling the existing Constitution. This was held to amount to a revolution. Muhammed Munir CI said at 184:

> "It sometimes happens, however, that a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order."

Their Lordships would not accept all the reasoning in these judgments but they see no reason to disagree with the results. The Chief justice of Uganda (Sir Udo Udoma Cf) said at 533: "The Government of Uganda is well established and has no rival." The court accepted the new Constitution and regarded itself as sitting under it. The Chief Justice of Pakistan (Sir Muhammed Munir Cf) said at 185: "Thus the essential condition to determine whether a Constitution has been annulled is the efficacy of the change." It would be very different if there had been still two rivals contending for power. If the legitimate Government had been driven out but was trying to regain control it would be impossible to hold that the usurper who is in control is the lawful ruler, because that would mean that by striving to assert its lawful right the ousted legitimate Government was opposing the lawful ruler.

In their Lordships' judgment that is the present position in Southern Rhodesia. The British Government acting for the lawful Sovereign is taking steps to regain control and it is impossible to predict with certainty whether or not it will succeed. Both the judges in the General Division and the majority in the Appellate Division rightly still regard the "revolution" as illegal and consider themselves sitting as courts of the lawful Sovereign and not under the revolutionary Constitution of 1965. Their Lordships are therefore of opinion that the usurping Government now in control of Southern Rhodesia cannot be regarded as a lawful government."

Relying on later cases, particularly *Vallabhaji v Controller of Taxes*,[39] *Mitchell v Director of Public Prosecutions*, *Mokotso v H M King Moshoeshoe II*,[40] *Makenete v Lekhanya*,[41] the Court of Appeal defined the 'efficacy' test, in the context of the common law of Fiji, as follows:

> (a) The burden of proof of efficacy lies on the de facto government seeking to establish that it is firmly in control of the country with the agreement (tacit or express) of the population as a whole.[42]
>
> (b) Such proof must be to a high civil standard because of the importance and seriousness of the claim.
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> (c) The overthrow of the Constitution must be successful in the sense that the de facto government is established administratively and there is no rival government.
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> (d) In considering whether a rival government exists, the enquiry is not limited to a

[39](Unreported, Court of Appeal of the Seychelles, 11 August 1981).

[40][1989] LRC (Const) 24 (High Court of Lesotho).

[41][1993] 3 LRC 13 (Lesotho Court of Appeal).

[42]Seymour Martin Lipset, 'Social Conflict, Legitimacy, and Democracy' in William Connolly (ed), *Legitimacy and the State* (1984) 88-103, 92.

rival wishing to eliminate the de facto government by force of arms. It is relevant in this case that the elected government is willing to resume power, should the Constitution be affirmed.

(e) The people must be proved to be behaving in conformity with the dictates of the de facto government. In this context, it is relevant to note that a de facto government (as occurred here) frequently re-affirms many of the laws of the previous constitutional government (e.g. criminal, commercial and family laws) so that the population would notice little difference in many aspects of daily life between the two regimes. It is usually electoral rights and personal freedoms that are targeted. As one of the deponents said, civil servants such as tax and land titles officials worked normally throughout the coup and its aftermath. Their functions were established and needed no ministerial direction. We derive little proof of acquiescence from facts of that nature.

(f) Such conformity and obedience to the new regime by the populace as can be proved by the de facto government must stem from popular acceptance and support as distinct from tacit submission to coercion or fear of force.[43]

(g) The length of time in which the de facto government has been in control is relevant. Obviously, the longer the time, the greater the likelihood of acceptance.

(h) Elections are powerful evidence of efficacy. It follows that a regime where the people have no elected representatives in government and no right to vote is less likely to establish acquiescence.

(i) Efficacy is to be assessed at the time of the hearing by the Court making the decision.

Time, and fresh elections, can confer new legitimacy upon usurpers.[44]

The conclusions reached by the Court of Appeal

The Court of Appeal then had to determine whether, on the evidence presented before us, we can be satisfied that (a) the Interim Civilian Government is firmly established and there is no rival government and (b) the people are behaving in conformity with the dictates of the Interim Civilian Government in such circumstances that their acquiescence can be inferred.

In respect of the first criteria, the Court was satisfied that there was evidence that demonstrates that there was a rival government seeking through the Courts to assert its authority to govern.

The evidence suggested that a significant proportion of the people of Fiji believed that the 1997 Constitution embodies and protects the ideals and aspirations of the different ethnic groups in Fiji. The material also indicated a widespread belief that there was no proper justification for its abrogation. The Interim Civilian Government faced an almost impossible task in demonstrating real acquiescence on the part of the people.

The Court of Appeal held that the burden of proving that the 1997 Constitution had been superseded lay on the Interim Civilian Government, and the standard of proof was a high one, having regard to the great public importance of the issues involved. In the absence of any convincing evidence of real acquiescence, they held that the Interim Civilian Government had

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[43]The principle of popular sovereignty, hitherto vague, has acquired sufficient determinacy to serve, in a limited range of circumstances, as a basis for denial of legal recognition to putative governments; Roth, Brad, *Governmental illegitimacy in international law* (PhD thesis University of California, Berkeley, 1996).

[44]See F M Brookfield, *Some aspects of the Necessity Principle in Constitutional Law* (DPhil thesis, University of Oxford, 1972).

not discharged the burden of proving acquiescence and had accordingly failed to establish that it is the legal government of Fiji. The purported abrogation of the 1997 Constitution had not been justified and it remained in place.

In conclusion, the Court held that:

(a) The 1997 Constitution remained the supreme law of the Republic of The Fiji Islands and has not been abrogated;

(b) Parliament had not been dissolved. It was prorogued on 27 May 2000 for six months;

(iii) The office of the President under the 1997 Constitution became vacant when the resignation of Ratu Sir Kamisese Mara took effect on 15 December 2000. In accordance with section 88 of that Constitution, the Vice-President could lawfully perform the functions of the President until 15 March 2001 unless a President is sooner appointed under section 90.

However, it is doubtful whether legal principles which themselves largely reflect a European heritage can alone provide a solution for Fiji's problems.[45] It is also questionable whether political disputes can and ought to be resolved in a court of law.

Whenever there is an introduction of foreign laws that challenges the special privileges of the elite, there is always opposition. Customary law is based on hierarchy and discriminates in the sense that power is bestowed upon the hands of a few members of society.[46]

Although Mr Qarase and Commodore Frank Bainamerana had said that they would abide by the decision of the Court, it remains to be seen whether they will feel able to do so, given the attitudes of their supporters.

Conclusions

We have now seen a return to democracy and to the rule of law in Fiji. But considerable harm has been done to the reputation of the country. In particular, great harm was done to the reputation of the Fijian military. Their responsibility was to uphold the Constitution and the political leadership of the country, not assume power in their own right. It is to be hoped that they, and the interim government, acquiesce in the Court of Appeal's decision. Matters will doubtless also he help if Mahendra Chaudhry keeps a low profile and refrains from asserting his own claim to the office of Prime Minister.

Legally, the decision of the Court of Appeal of Fiji in *Republic of Fiji v Prasad* is unexceptional. The function of the Court in deciding whether the Constitution remained in force was the purely legal one of deciding, as a matter of law, whether its purported abrogation by Commodore Bainimarama on 29 May 2000 achieved that result, or had done so since. It canvassed the authorities on revolutionary governments, and concluded that the Fijian government had failed to become established. The Court therefore upheld the previous Constitution, and, by extension, the office-holders under that Constitution.

What was unusual was that the respondent was not seeking to overturn a conviction imposed by a revolutionary court, or even avoid taxes levied by a usurping power. He was simply seeking the confirmation of a court that the former Constitution remained in force. It is also unusual that the very Government whose authority he was questioning chose to abide by the decision of a court. It is indeed promising that the example Fiji has set has not been totally negative. Political disputes can be resolved in peaceable ways.

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[45]In his affidavit of 6 November 2000 sworn in other proceedings, but included by consent in material filed in Court at the start of the hearing, Ratu Sir Kamisese Mara (the President of Fiji at the time of the coup attempt by George Speight) recorded that the Commander had informed him that in his opinion the 1997 Constitution did not provide a framework for resolving the crisis and should be abrogated.

[46]Laitia Tamata, 'Application of Human Rights Conventions in the Pacific Islands Courts' (2000) 4 Journal of South Pacific Law Working Papers 4.

An important lesson for the military forces of other Pacific countries should be learnt. An armed forces reflects, to a greater or lesser extent, the racial composition of the wider population, and must be taken to share their political aspirations. But their loyalty lies to the civilian government, and they should never presume to impose their own views on how the country should be run. Even where civilian government has collapsed (as arguably it had not in Fiji), the appropriate course of action is to assist the surviving legal authorities to regain control.