

A VICTORY FOR DEMOCRACY? AN ALTERNATIVE ASSESSMENT OF *REPUBLIC OF FIJI V PRASAD*

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CONTENTS

- I Introduction
- II A Political Balancing Act
- III How the Doctrines of Revolution and Necessity Were Applied
 - A Necessity
 - B Successful Revolution
- IV How the Doctrines Have Evolved Historically
- V What is New in *Prasad*?
- VI Conclusion

I INTRODUCTION

In his introduction to the Respondent's Brief from *Republic of Fiji v Prasad* ('*Prasad*'),¹ published in the June edition of this journal, George Williams contends that the case 'may prove decisive in restoring democracy to the Republic of the Fiji Islands in accordance with the 1997 *Constitution*'.² He concludes that *Prasad* represents 'a legal landmark'.³

The Court of Appeal of Fiji declared that the military-appointed Interim Government failed to establish that it was the legal government.⁴ It ruled that the *Constitution Amendment Act 1997* (Fiji Islands) ('1997 *Constitution*') remained the supreme law of the country and had not been lawfully abrogated by the military commander, Commodore Frank Bainimarama, when he effectively took power on 29 May 2000, ten days after businessman George Speight's seizure of Parliament.

Williams suggests that, while the Court did not accept all of the respondent's submissions, it did incorporate a 'normative element' into the effectiveness test for the legitimacy of a new regime.⁵ He states that '[w]here adopted by other courts, this criterion will make it extremely difficult for a tyrannical regime

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¹ (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001) <http://www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/Volume_Q-R/Republic_v_Prasad.html> at 2 August 2001.

² George Williams, '*Republic of Fiji v Prasad*: Introduction' (2001) 2 *Melbourne Journal of International Law* 144.

³ *Ibid* 150.

⁴ *Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001) 32.

⁵ Williams, above n 2, 149.

which violates basic human rights recognised at international law to gain judicial recognition'.⁶

The judgment in *Prasad* does not substantiate these contentions. Rather, as I shall argue in this commentary, the Court left the way open for the military's administration to remain in office. Moreover, it rejected the argument that a usurping regime must be judged by its acceptance of international human rights obligations and it declined to require observance of democratic norms. Arguably, the most significant new criterion suggested by the Court was the acceptance of a new regime by the 'international community' which, in this case at least, refers to the stance taken by major Western nations, notably Australia, New Zealand, Britain and the United States.

Before turning to these arguments, it must be noted that Fiji's Court of Appeal is an unlikely forum for the establishment of a genuinely democratic precedent. Having unilaterally abolished the country's Supreme Court without explanation,⁷ the military regime retained the Court of Appeal, making it Fiji's highest appellate court. Reflecting the continuing legacy of nearly a century of British colonial rule in Fiji between 1874 and 1970, the five judges in *Prasad*, headed by New Zealand's Sir Maurice Casey, were drawn from the two major regional powers, Australia and New Zealand, and from two other former British colonies or protectorates, namely Papua New Guinea and Tonga. Thus, despite being constituted as a court of Fiji, the Court of Appeal continues to embody aspects of colonialism, a relationship that mirrors Fiji's substantial economic dependence on Western powers and international financial institutions such as the World Bank.⁸

It is also apparent that, while claiming to be ruling only on questions of law, the Court based its decision on a number of political conclusions. One such conclusion was based on an assessment of the voting patterns in the May 1999 election that resulted in victory for ousted Prime Minister Mahendra Chaudhry's Labour Party-led People's Coalition. Another was a strident endorsement of the deposed Government's moves to resolve disputes over the renewal of sugar farmers' leases under the *Agricultural Landlord and Tenant Act* (Fiji Islands).⁹

⁶ Ibid 149.

⁷ Interim Civilian Government Decree No 22, *Judicature Decree 2000*. See also Geoffrey Robertson et al, 'Republic of Fiji v Prasad: Respondent's Brief' (2001) 2 *Melbourne Journal of International Law* 151, 162.

⁸ Fiji's dependence on Western aid, investment and imports is well documented. See, eg, East Asia and Pacific Regional Office, World Bank, *Pacific Regional Strategy* (2000) <[http://wbln0018.worldbank.org/eap/eap.nsf/Attachments/Pacific+Regional+Strategy/\\$File/Pacific+Regional+Strategy.pdf](http://wbln0018.worldbank.org/eap/eap.nsf/Attachments/Pacific+Regional+Strategy/$File/Pacific+Regional+Strategy.pdf)> at 2 August 2001.

⁹ The Court asserted:

The problems over the Agricultural Landlord and Tenant Act (ALTA), including expiring leases, had to be faced. Previous governments had failed to address them adequately or at all and time was running out. Whichever government had been elected, it could no longer ignore the problem and difficult policy decisions and legislative steps were urgently required.

Prasad (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001) 13.

The Court's most critical political assessment was that Interim Prime Minister Laisenia Qarase's regime had, in effect, failed to establish firm control over the population. The Court concluded that '[t]he interim civilian government has not discharged the burden of proving acquiescence and has accordingly failed to establish that it is the legal government of Fiji'.¹⁰ It referred to emergency legislation that had been used to 'inhibit public expressions of dissent',¹¹ numerous affidavits expressing disapproval of the government,¹² and the declared readiness of the ousted Chaudhry Government to resume office.¹³ The Court also relied upon a report compiled by the Commonwealth Human Rights Initiative, a semi-official coalition of professional organisations spanning the former British Empire,¹⁴ which concluded, after consulting Fijian civil society organisations, that 'there is little public support for the military-backed interim administration'.¹⁵

Another crucial political judgment made by the Court was that the *1997 Constitution* was 'a reliable expression of the hopes and aspirations of the whole population',¹⁶ and provided 'substantial safeguards' of the rights and interests, including land titles, of indigenous Fijians.¹⁷ The Court placed great store in the *1997 Constitution* because it had been adopted after a lengthy period of consultation involving former New Zealand Governor-General Sir Paul Reeves. The Court asserted that this consultative process provided strong evidence that the Constitution 'reflected the will of the great majority of the people of Fiji'.¹⁸

In reality, Major General Sitiveni Rabuka, who seized power in a military coup in 1987 and later became Prime Minister, in the name of restoring the political supremacy of indigenous Fijians, agreed to Reeves' appointment to head a constitutional review panel under pressure from Australia, New Zealand and other Commonwealth countries.¹⁹ As one expression of that pressure, the Commonwealth expelled Fiji until the enactment of the *1997 Constitution*.²⁰ These countries called for the adoption of a constitution that was less overtly racist than Rabuka's 1990 version, which barred Indo-Fijians from the Prime Ministership,²¹ reserved a majority of parliamentary seats for ethnic Fijians,

¹⁰ Ibid 32.

¹¹ Ibid 31.

¹² Ibid 30.

¹³ Ibid.

¹⁴ Commonwealth Human Rights Initiative, *Crisis in Fiji: Democracy and Human Rights Under Threat in the South Pacific* (Submission presented to the Commonwealth Ministerial Action Group on the Harare Declaration, 2000) <<http://www.humanrightsinitiative.org/the%2Dcommonwealth/engage/cmagfiji.htm>> at 2 August 2001.

¹⁵ Ibid [1.3].

¹⁶ *Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001) 28.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ See Isikeli Mataitoga, 'Constitution-Making in Fiji: The Search for a Practical Solution' (1991) 21 *Victoria University of Wellington Law Review* 221, 230.

²⁰ Williams, above n 2, 145, fn 6.

²¹ *Constitution Act 1990* (Fiji Islands) s 83(2).

discriminated in favour of ethnic Fijian business entrepreneurs,²² and gave the Great Council of Chiefs power to nominate 24 of the 34 upper house Senators.²³

With Reeves' assistance, Rabuka fashioned a compromise of sorts. The *1997 Constitution* preserved most of the political and economic privileges afforded to the chiefs and ethnic Fijians, but reduced the number of parliamentary seats reserved for them and made it possible for an Indo-Fijian to head the government.²⁴ It preserved the allocation of parliamentary seats by race — allowing for 46 communal seats and 25 open seats in the House of Representatives. Of the 46 communal seats, 24 were reserved for Fijian and Rotuman politicians, 19 for Indo-Fijian politicians and three for remaining groups.²⁵ As the Court of Appeal noted, the *1997 Constitution* entrenched the rights of ethnic Fijians.²⁶

While it removed some of the racially-based privileges afforded to ethnic Fijian leaders by Rabuka, thus weakening their grip on the political system and sections of the economy, the *1997 Constitution* retained key concessions, including the right of the Great Council of Chiefs to select the President and Vice President.²⁷ Indo-Fijians, who make up nearly half the country's estimated 840 000 people,²⁸ were still discriminated against.

II A POLITICAL BALANCING ACT

Given this background, the Court of Appeal appears to have performed a delicate political balancing act between the clearly indicated requirements of the Western powers and the interests of the traditional Fijian political establishment, which substantially aligned itself behind the armed forces.

Following Speight's taking hostage of parliament and the subsequent military takeover, the Western powers imposed limited economic and sporting sanctions on Fiji and demanded a return to constitutional government.²⁹ Australia and other countries rejected the Qarase administration's plans to delay elections for up to two years. They sought earlier elections and the formation of a more stable and popularly accepted government that could restore order and reopen the Fijian economy to foreign investment.³⁰ But the obvious support in Fijian ruling circles for Speight's dispersal of Parliament made it plain that any reinstatement

²² *Constitution Act 1990* (Fiji Islands) s 21(2)(b).

²³ *Constitution Act 1990* (Fiji Islands) s 55(1).

²⁴ *1997 Constitution* ss 51, 89.

²⁵ *1997 Constitution* s 51.

²⁶ *Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001) 13.

²⁷ *1997 Constitution* s 90.

²⁸ *SBS World Guide 2001* (9th ed, 2001).

²⁹ See, eg. Alexander Downer, *Fiji*, Press Release, No FA57 (29 May 2000) <http://www.dfat.gov.au/media/releases/foreign/2000/fa057_2000.html> at 2 August 2001.

³⁰ For an unusually frank presentation of the problems of defending the Australian Government's security and economic interests in the South Pacific, without wishing to appear as a regional policeman, see Alexander Downer, 'Australia's Strong Pacific Commitment' (Speech delivered at the Pacific Economic Outlook Seminar, Sydney, 2 November 2000).

of Chaudhry's People's Coalition would provoke intense opposition and trigger fresh incitement of nationalist and racist sentiments.

Employing two relatively little known legal doctrines — those of successful revolution and necessity — the Court took what amounted to a middle course, declaring the Interim Government unlawful but not ordering a recall of the Parliament broken up by Speight's thugs. As I shall demonstrate, its decision effectively permitted the military's hand-picked administration to cling to office and to supervise supposedly democratic elections six months later.

The Court ruled that the elected Parliament, violently dispersed by Speight, had not been dissolved, merely prorogued for six months.³¹ This ruling differed significantly, however, from that of the court below — Gates J, sitting as a single member of the High Court, originally declared the regime illegal on 15 November 2000.³² He ordered that 'Parliament should be summoned by the President at his discretion but as soon as practicable'³³ and that, in the meantime,

it will remain for the President to appoint as soon as possible as Prime Minister, the member of the House of Representatives who in the President's opinion can form a government that has the confidence of the House of Representatives pursuant to Sections 47 and 98 of the Constitution, and that government shall be the government of Fiji.³⁴

The Court of Appeal rejected the respondent's submission that Parliament should be summoned in accordance with Gates J's ruling.³⁵ Despite ruling that the Parliament had been prorogued for a period that had already expired,³⁶ the Court remained silent on the question of its recall. Instead, it declared that Acting President Ratu Josefa Iloilo — who was appointed by the military with Speight's support — could lawfully remain President until 15 March, three months after the supposed formal resignation of his predecessor, Ratu Sir Kamisese Mara.³⁷ The Court's finding that President Mara's resignation only took effect on 15 December 2000 was one of the least plausible features of the judgment. Certainly, according to the Interim Government, and it seems Ratu Mara himself, he vacated the post on 29 May 2000.³⁸ Furthermore, the Fijian

³¹ *Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001) 33.

³² *Prasad v Republic of Fiji* [2001] New Zealand Administrative Reports 21.

³³ *Ibid* 48.

³⁴ *Ibid*.

³⁵ *Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001) 32.

³⁶ *Ibid* 33.

³⁷ *Ibid*.

³⁸ According to a statement issued by Interim Prime Minister Laisenia Qarase on 20 December 2000, former President Mara wrote to him to confirm that '[h]is retirement is effective from 29 May, 2000': Ministry of Information, Republic of the Fiji Islands, *Rt Hon Ratu Sir Kamisese Mara Retires as President*, Press Release (20 December 2000) <http://www.fiji.gov.fj/press/2000_12/2000_12_20%20-01.shtml> at 2 August 2001. This statement was released after receipt of a letter dated 15 December 2000 from the former president. On the face of it, Ratu Mara's letter did not communicate his formal resignation, but related to the payment of his pension entitlements — backdated to 29 May.

authorities, including the Great Council of Chiefs, which appoints the President under the *1997 Constitution*, accepted that Ratu Mara resigned on 29 May.³⁹

The significance of the Court's ruling on the timing of Ratu Mara's resignation is that under the *1997 Constitution*, Ratu Iloilo, as Acting President, was afforded 14 days in which he could declare the Parliament dissolved. This he did, apparently on 15 March, the last day available to him under the *Prasad* ruling.⁴⁰ Twenty-four hours earlier, in an apparent attempt to fulfil the constitutional requirement to act on the advice of a Member of Parliament who could claim the support of a parliamentary majority, Iloilo accepted Qarase's resignation and appointed Ratu Tevita Momoedonu as Acting Prime Minister.⁴¹ Momoedonu, Iloilo's nephew and a Labour Party Minister in Chaudhry's ousted Government, then formally advised Iloilo, under the *1997 Constitution*, to dissolve Parliament. Having done so, Momoedonu promptly resigned to make way for Qarase's eight-month-old unelected Cabinet of businessmen, ex-military commanders, landed chiefs and senior government bureaucrats to return, ostensibly as a caretaker government.

³⁹ Eg, on 1 September 2000, the Interim Government and the Great Council of Chiefs announced a traditional farewell function for the 'former President' in order to thank him for his past services. See Ministry of Information, Republic of the Fiji Islands, *Ratu Mara's Farewell*, Press Release (1 September 2001) <http://www.fiji.gov.fj/press/2000_09/2000_09_01-02.shtml> at 2 August 2001.

⁴⁰ According to the Interim Government's media release of 16 March 2001,

The House of Representatives was dissolved by the President, Ratu Josefa Iloilovatu Uluivuda, effective from yesterday March 15, 2001. After he was sworn in yesterday as Fiji's President, Ratu Iloilo dissolved Parliament in accordance with section 59(2) of the 1997 Constitution and acting upon the advice of the Caretaker Prime Minister[.]

Ministry of Information, Republic of the Fiji Islands, *President Dissolves House of Representatives*, Press Release (16 March 2001) <http://www.fiji.gov.fj/press/2001_03/2001_03_16-08.shtml> at 2 August 2001.

⁴¹ In his statement of 15 March 2001, Ratu Iloilo explained his actions as follows:

In view of the political disarray and confusion, I have decided that neither a resumption of the People's Coalition government, nor a broader coalition government, would be viable ...

The most judicious course was, therefore, to exercise my powers under section 109 of the constitution to dismiss Mr Chaudhry and to appoint a caretaker Prime Minister.

This I have done, and out of practical necessity, I appointed Ratu Tevita Momoedonu from the majority Fiji Labour Party to be caretaker Prime Minister. We have duly discussed the situation confronting our country, and in particular, the absolute imperative of returning it to full constitutional rule at the earliest opportunity.

The caretaker Prime Minister has fully concurred with my own judgement that this objective can best be attained by going back to the people through general elections.

I am grateful to him for that, just as I am grateful to the Prime Minister in the interim government, Mr Laisenia Qarase, for tendering his resignation and that of his ministers yesterday, to facilitate the decisions I have taken.

See His Excellency Ratu Josefa Iloilovatu, *Address to the Nation Following His Swearing-In Ceremony, Borron House, Suva*, Press Release (15 March 2001) <http://www.fiji.gov.fj/press/2001_03/2001_03_15-06.shtml> at 2 August 2001.

These actions were the culmination of a series of political manoeuvres by which the Fijian authorities formally accepted the Court of Appeal verdict and the continued operation of the *1997 Constitution*, but in practice exploited the Court's ruling to hold onto power. First, in response to the ruling, Qarase declared that his Cabinet would remain in place, consider legal advice and confer with the Acting President. Iloilo announced that he would consult the Great Council of Chiefs, the unelected assembly of 52 land-owning chiefs who backed the ouster of Chaudhry's Government and the installation of Qarase.

After some days of debate, the Great Council of Chiefs unanimously accepted the *1997 Constitution* as the supreme law. Then, purporting to act with constitutional authority, the chiefs reappointed Iloilo as President and Ratu Jope Seniloli as Vice President.⁴² Iloilo and Seniloli are both direct beneficiaries of last year's racist coup attempt. The chiefs initially installed them during the hostage crisis, following Mara's departure. Seniloli, who has been implicated as a close supporter of Speight, has been under police investigation over his role in the hostage-taking.⁴³

Having reaffirmed Iloilo's presidency, the chiefs called on him to dissolve the disbanded Parliament and appoint Qarase's Government as a caretaker administration. The chiefs also insisted that the Government continue to implement its *Blueprint for the Protection of Fijian and Rotuman Rights and Interests and the Advancement of Their Development*⁴⁴ — a scheme of concessions and subsidies favouring ethnic Fijian businesses over those run by Indo-Fijians — and to resume a constitutional review designed further to entrench ethnic Fijian privileges.

These manoeuvres were hardly unexpected. They replicated events after Speight's seizure of Parliament. Momoedonu, who was not in Parliament on 19 May 2000 and so not taken hostage, was appointed Prime Minister on 27 May by then President, Ratu Mara. In doing so, Mara sacked the Chaudhry Government and accepted Momoedonu's advice to suspend Parliament for six months. Momoedonu then resigned immediately in order to hand executive power to Mara.

Backed by the chiefs, Mara acceded to most of Speight's demands to strip Indo-Fijians of basic political rights, but he attempted to do so within the framework of the *1997 Constitution*. When Speight and his backers demanded Mara's removal, the military, led by Commodore Bainimarama, ousted Mara, declared emergency rule, abrogated the *1997 Constitution* and installed Qarase's Government.

⁴² See Ministry of Information, Republic of the Fiji Islands, *Swearing-in Ceremony*, Press Release (15 March 2001) <http://www.fiji.gov.fj/radio/2001_03/R2001_03_15-01.shtml> at 7 September 2001.

⁴³ See Ministry of Information, *News Breif* [sic], Press Release (27 October 2000) <http://www.fiji.gov.fj/news/N2000_10/N2000_10_30.shtml> at 7 September 2001.

⁴⁴ See Laisenia Qarase, *Blueprint for the Protection of Fijian and Rotuman Rights and Interests and the Advancement of Their Development*, Press Release (13 July 2000) <<http://www.fijivillage.com/crisis/blueprint.php3>> at 7 September 2001.

After more than a month of negotiations with Speight's group, the military signed an accord with the hostage-takers. The accord granted the hostage-takers immunity from prosecution and provided for the swearing in of a revamped Qarase Cabinet, titled the Interim Government. The Interim Government pledged to implement Speight's program, which included the drafting of a new constitution and other measures politically and economically disadvantageous to Indo-Fijians.⁴⁵

Acting President Iloilo was a key protagonist in these events. Given this pattern of conduct, outlined to some extent in *Prasad*,⁴⁶ the Court's decision to declare Iloilo the legitimate President until 15 March 2001 led to a reasonably predictable outcome. In effect, the Court's ruling permitted the regime to meet, substantially, the demands of the Western powers for a return to constitutional rule, without disrupting the prevailing order. In general, Western governments expressed satisfaction with the outcome, while retaining some sanctions against Fiji until an election was held.⁴⁷

III HOW THE DOCTRINES OF REVOLUTION AND NECESSITY WERE APPLIED

In *Prasad*, the five Court of Appeal judges applied doctrines that British and American courts have fashioned over several centuries to determine whether to uphold the imposition of dictatorial measures ('necessity'), or the outright seizure of power by the military or other authorities ('successful revolution').

A Necessity

The Court was of the opinion that, while the doctrine of necessity allowed military rulers to suspend a constitution temporarily, it did not permit the scrapping of a constitution. It stated:

The doctrine of necessity enables those in de facto control, such as the military, to respond to and deal with a sudden and stark crisis in circumstances which have not been provided for in the written Constitution or where the emergency powers machinery in that Constitution was inadequate for the occasion. The extra-territorial action authorised by that doctrine is essentially of a temporary character and it ceases to apply once the crisis has passed.⁴⁸

Yet the judgment gave wide scope to the necessity principle, insisting that the maintenance of 'law and order' and the prevention of anarchy justified the

⁴⁵ Later, under Western pressure, the military repudiated its accord with Speight and charged him with treason, but there are reasons to doubt that Speight will ever stand trial.

⁴⁶ *Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001) 5.

⁴⁷ Australian Foreign Minister Alexander Downer welcomed the Great Council of Chiefs' acceptance of the court decision and described Iloilo's moves as being 'in the right direction'. Nevertheless, he questioned the legality of the measures and stated that sanctions would remain until an election date was set: Alexander Downer, *Fiji*, Press Release, No FA37 (15 March 2001) <http://www.dfat.gov.au/media/releases/foreign/2001/fa037_01.html> at 2 August 2001.

⁴⁸ *Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001) 18.

suspension of democratic and legal rights.⁴⁹ While declaring that Bainimarama had exceeded the bounds of necessity by abrogating the *1997 Constitution*,⁵⁰ the judges nonetheless strongly supported most of the military's repressive actions, which included roadblocks, curfews and a ban on all political gatherings:

[A]s the hostages continued to be confined and anarchy was developing, 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. The crisis did not end until all the hostages had been released and some calm restored.⁵¹

The Court reached its conclusion even though s 187 of the *1997 Constitution* provided that only Fiji's President could proclaim a state of emergency, on the advice of Cabinet. The Court argued:

Clearly, the President could not act under this section if almost all the members of the Cabinet were held hostage by the kidnappers. The imperative necessity for prompt action arose out of exceptional circumstances not provided for in the Constitution. These circumstances called for immediate action. There was no other course reasonably available to the President at the time the hostage crisis began.⁵²

The Court disagreed with Gates J's assessment that Commodore Bainimarama had no intention to remove the *1997 Constitution*,⁵³ but it was prepared to give the military chief far-reaching powers:

The doctrine of necessity would have authorised him to have taken all necessary steps, whether authorised by the text of the 1997 Constitution or not, to have restored law and order, to have secured the release of the hostages, and then, when the emergency had abated, to have reverted to the Constitution.⁵⁴

B *Successful Revolution*

The judges went on to conclude that no successful revolution had occurred, primarily because the military and the Qarase Government had failed to suppress public opposition, despite their emergency decrees.⁵⁵ The Court also declared that a rival government existed — that of ousted Prime Minister Chaudhry.⁵⁶ After reviewing the authorities, the Court applied the following test:

(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

⁴⁹ *Ibid.*

⁵⁰ *Ibid* 19.

⁵¹ *Ibid* 17.

⁵² *Ibid.*

⁵³ *Ibid* 18.

⁵⁴ *Ibid.*

⁵⁵ *Ibid* 30.

⁵⁶ *Ibid.*

Interim Civilian Government in such circumstances that their acquiescence can be inferred.⁵⁷

The formulation ‘firmly established’ suggests that had the Qarase Government remained in power for a longer period, the Court may have been inclined to accept its legality. Earlier, the Court cited with approval Hogan P’s view in a 1981 Seychelles case⁵⁸ that, while elections provide the most convincing proof of acceptance of a regime, manifest obedience has also been recognised as a form of ratification. The Court cited Hogan P’s conclusion that

[i]n any event whether the term chosen is success or submission, consent or acceptance, efficacy or obedience, there appears to be a consensus or at least a strong preponderance of opinion that *once the new regime is firmly or irrevocably in control it becomes a lawful or legitimate government and entitled to the authority that goes with that status*.⁵⁹

The Court further noted, without disagreement, that in a 1989 Lesotho case,⁶⁰ ‘[t]he Court took “judicial notice” of the notorious fact’⁶¹ that the 1970 coup had been successful. The Court in *Prasad* took this finding to be ‘hardly surprising given that this regime, however unlovely, had remained in place for 16 years’.⁶²

IV HOW THE DOCTRINES HAVE EVOLVED HISTORICALLY

The doctrine of revolution was primarily shaped by the English civil war of the 17th century and the American War of Independence of the 18th century. Both overturned the previous legal order. The civil war of the 1640s initially overthrew the British monarchy. It was followed by the so-called Glorious Revolution of 1688, in which Parliament installed a new royal lineage, the House of Orange, on the condition of power-sharing between the Crown and the Parliament. The War of Independence established a new nation, the United States, through the defeat of the British.

In these revolutions, the British and American courts recognised the legitimacy of the victorious side and generally sanctioned acts done in the name of their revolutions, dating back to the dates on which their rebellions commenced.⁶³ These revolutions were fundamentally progressive eruptions, breaking up the old feudal-monarchical forms of rule and signalling the rise to ascendancy of the emerging capitalist classes.

⁵⁷ *Ibid.*

⁵⁸ *Valabhaji v Controller of Taxes* (Unreported, Court of Appeal of the Seychelles, Hogan P, 11 August 1981), noted in (1981) 7 *Commonwealth Law Bulletin* 1249.

⁵⁹ *Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001) 20 (emphasis added by Fiji Court of Appeal).

⁶⁰ *Mokotso v H M King Moshoeshoe II* [1989] LRC (Const) 24 (‘*Mokotso*’).

⁶¹ *Ibid* 27.

⁶² *Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001) 25.

⁶³ *Mokotso* [1989] LRC (Const) 24, 96 (Cullinan CJ). See also *Mitchell v Director of Public Prosecution* [1986] LRC (Const) 35, 52 (Haynes P) (‘*Mitchell*’).

During the second half of the 20th century, however, the doctrine of revolution was utilised to justify anti-democratic, military-backed coups, invariably directed against the working class, at least so long as the new regime accommodated the interests of British and global capital. Much of this modern history draws upon a 1951 parliamentary speech by the British Secretary of State for Foreign Affairs, Herbert Morrison, setting out the practice of the British Government in deciding whether to recognise the outcome of a coup d'état.⁶⁴

The speech, cited in the leading House of Lords decision,⁶⁵ stipulates that a new regime must have 'effective control' over most of the state's territory, where that control 'seems likely to continue' and is 'firmly established'.⁶⁶ This approach has been used to uphold the legality of various military or military-backed coups, including those in Pakistan (1958), Uganda (1966), Lesotho (1986 and 1990), the Seychelles (1977) and Grenada (1979).⁶⁷ In Pakistan the Supreme Court has validated successive alternations between civilian rule and military coups.⁶⁸

Little regard was paid to democratic rights in these cases. In the 1989 Lesotho case, after exhaustively reviewing the authorities, Cullinan CJ concluded that a military coup was legal because,

[i]f the judge is satisfied that the new regime is firmly established and there is no opposition thereto, and that the people are acting by and large in conformity with the new legal order, signifying their acceptance thereof, for whatever reason, I do not see that the judge can hold that regime to be other than legitimate ... If the people ultimately acquiesce, then the new regime is entitled to recognition by the courts.⁶⁹

By contrast, where the usurpation of power cut across Britain's strategic interests, as happened when Rhodesia's Ian Smith's unilaterally declared independence from Britain in 1965, the Privy Council ruled that the regime failed the test of 'successful revolution'.⁷⁰ It insisted that Britain remained the lawful power, ready and willing to resume control over Rhodesia⁷¹ — a stance

⁶⁴ United Kingdom, *Parliamentary Debates*, House of Commons, 21 March 1951, 2410 (Herbert Morrison, Secretary of State for Foreign Affairs).

⁶⁵ *Carl-Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1966] 2 All ER 536, 548 (Lord Reid).

⁶⁶ Morrison, above n 64.

⁶⁷ See respectively *State v Dosso* [1958] 2 PLD SC (Pak) 533 ('*Dosso*'); *Uganda v Commissioner of Prisons, ex parte Matova* [1966] EA 514; *Mokotso* [1989] LRC (Const) 24; *Makenete v Lekhanya* [1993] 3 LRC 13; *Valabhaji v Controller of Taxes* (Unreported, Court of Appeal of the Seychelles, Hogan P, 11 August 1981), noted in (1981) 7 *Commonwealth Law Bulletin* 1249; *Mitchell* [1986] LRC (Const) 35.

⁶⁸ *Dosso* was overruled in *Jilani v Government of the Punjab* [1972] PLD SC (Pak) 139. The Supreme Court of Pakistan rejected Hans Kelsen's 'effectiveness' theory in the course of recognising the restoration of civilian rule in December 1971 under Prime Minister Ali Bhutto. In May 2000 the Supreme Court of Pakistan validated the October 1999 coup by General Pervez Musharraf.

⁶⁹ *Mokotso* [1989] LRC (Const) 24, 131–3.

⁷⁰ *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 725 ('*Madzimbamuto*').

⁷¹ *Ibid* 722–3.

backed by British economic and diplomatic sanctions designed to bring Smith to the bargaining table.

In most post-World War II cases on coups d'état, the courts made reference to the 'principle of effectiveness' enunciated by Austrian legal philosopher Hans Kelsen in his work *General Theory of Law and State*.⁷² Not to put too fine a point on it, Kelsen's theory justified the seizure of power by force. Quoting his writings, judges ruled that coups did not need to command 'universal adherence', simply 'a minimum of support'.

Even where judges expressed concern about the authoritarian conclusions of Kelsen's principle, they ultimately drew similar conclusions. In the Lesotho case, Cullinan CJ rejected any requirement for a usurping regime to prove popular acceptance, stating:

Throughout the course of history there have been regimes, indeed dynasties, holding sway for many years, indeed centuries, whose rule could not be said by any manner of means to be popular and could even be described as oppressive; but who is going to say that a new legal order was not created with their coming and going?⁷³

Lest this be considered anachronistic, the Privy Council made a similar observation in the Rhodesian case:

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 régimes 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.⁷⁴

Likewise, the doctrine of necessity — the history of which can also be traced back to the British and American revolutions of the 17th and 18th centuries — has predominantly become a means of justifying the suspension of legal rights. Most of the early cases on necessity arose from the American Civil War, in which the northern industrialists defeated the secessionist southern governments based on a slave-owning form of capitalism.

The US Supreme Court upheld the legality of measures taken by the southern states to maintain order and economic life, even though these governments were engaged in rebellion against the US Government. In 1868 the Court declared that

acts necessary to peace and good order among citizens ... which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government[.]⁷⁵

These acts therefore had to be obeyed, even if they infringed the US Constitution.

⁷² Hans Kelsen, *General Theory of Law and State* (1946) 118–9.

⁷³ *Mokotso* [1989] LRC (Const) 24, 130.

⁷⁴ *Madzimbamuto* [1969] 1 AC 645, 724.

⁷⁵ *Texas v White* (1868) 7 Wallace 700, 733.

In 1969, in the Rhodesian case, the Privy Council applied this doctrine to rule on the legality of the Smith regime's indefinite detention of political opponents under emergency powers. With Lord Pearce dissenting, a majority of the Court held the detention invalid — but only on the ground that Britain remained the only legal authority.⁷⁶ In principle, the law lords were prepared to sanction the use of emergency powers to override democratic rights, observing that '[u]nder pressure of necessity the lawful Sovereign and his forces may be justified in taking action which infringes the ordinary rights of his subjects'.⁷⁷

V WHAT IS NEW IN *PRASAD*?

In *Prasad* the judges expressed concern that Kelsen's 'principle of effectiveness' might too readily reward a usurping regime. The judgment also spoke of a new regime having to prove that its rule was based on 'popular acceptance and support' as distinct from 'tacit submission to coercion or fear of force'.⁷⁸ The holding of elections would be 'powerful evidence of efficacy'.⁷⁹

It would be rash, however, to interpret this emphasis as evidence of a more democratic approach. It is, we should recall, in line with the Western powers' demands for earlier elections in order to establish a more reliable regime that can command popular respect.

Far from laying down any new principle of democracy, the Court disagreed with a passage in the 1986 Grenada case that listed as one criterion for a successful revolution that 'it must not appear that the regime was oppressive and undemocratic'.⁸⁰ The Court stated that this condition 'went too far',⁸¹ without offering any explanation except to cite F M Brookfield's view that the condition goes 'to the legitimacy of a regime rather than its legality'.⁸²

This distinction is unconvincing. As many commentators have pointed out, it is, in reality, impossible to separate legality from legitimacy. Against the view that courts can avoid making 'political judgments', John Finnis, for instance, has argued that questions of legal validity must also be questions about legitimacy. In his words:

The problem for the jurist is the same as the problem for the historian or for the good man wondering where his allegiance and his duty lie. From neither

⁷⁶ *Madzimbamuto* [1969] 1 AC 645, 721–2, 731.

⁷⁷ *Ibid* 726.

⁷⁸ *Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001) 29, citing *Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 35 (Haynes P).

⁷⁹ *Ibid*.

⁸⁰ *Ibid* 26.

⁸¹ *Ibid*.

⁸² *Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001) 26, citing F M Brookfield, *Waitangi & Indigenous Rights: Revolution, Law and Legitimation* (1999) 28.

perspective is the thesis of discontinuity, as expressed by Kelsen, persuasive or acceptable.⁸³

In any event, the fact remains that the Court of Appeal of Fiji refused to require democracy before upholding the legal authority of a coup d'état.

Furthermore, the judges rejected the respondent's argument that an additional criterion be added, namely, 'whether the new regime acknowledges basic human rights as evidenced by international obligations assumed by the nation'.⁸⁴ They stated: 'We do not think it necessary to include a requirement that a usurping regime has to show adherence to international human rights treaties'.⁸⁵ Their reasons were revealing:

The 1997 Constitution was made in Fiji for Fiji by the Parliament and people of Fiji. It contains many of the rights and freedoms mandated by international instruments. It protects the rights of the indigenous people and entrenches some of those rights as we have detailed earlier.⁸⁶

This passage is self-contradictory. On the one hand, it presents the *1997 Constitution* as a guarantor of internationally recognised human rights. On the other, it emphasises the protection of the racially defined interests of ethnic Fijians. It is submitted that, while the *1997 Constitution* purports to recognise 'human rights and fundamental freedoms' as well as 'respect for human dignity',⁸⁷ these commitments are at odds with the preservation of privileges for an indigenous ruling elite.

VI CONCLUSION

Potentially, the most far reaching new ground broken by the Court of Appeal was to nominate the unfavourable reaction of the 'international community' as a reason for concluding that the Fijian military had failed to execute a successful revolution.⁸⁸ Indeed, the Respondent's Brief invited the Court to do so.⁸⁹ The respondent submitted that the Court should take into account a list of factors, including the stances taken by the army and police force, non-governmental organisations, the judiciary and the legal profession.⁹⁰ Point (v) of the factors was as follows:

⁸³ John Finnis, 'Revolutions and Continuity of Law' in A Simpson (ed), *Oxford Essays in Jurisprudence* (2nd series, 1973) 75; John Eekelaar, 'Principles of Revolutionary Legality' in A Simpson (ed), *Oxford Essays in Jurisprudence* (2nd series, 1973) 29.

⁸⁴ *Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001) 28. For a list of the international obligations that the respondent sought to incorporate into the effectiveness test, see Robertson et al, above n 7, 187-8.

⁸⁵ *Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001) 28.

⁸⁶ *Ibid.*

⁸⁷ *1997 Constitution* preamble.

⁸⁸ *Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001) 26.

⁸⁹ Robertson et al, above n 7, 178.

⁹⁰ *Ibid.*

[T]he extent to which the usurping regime has become regarded as having become the settled, unquestioned and legitimate successor of its predecessor. In this case, it is noted that organisations as diverse as the European Parliament, the Commonwealth, the CERD [a United Nations committee that monitors the 1969 Convention on the Elimination of Racial Discrimination] and numerous foreign governments have questioned the legitimacy of the usurping regime.⁹¹

These organisations are not diverse. They reflect, directly or indirectly, the hegemonic position of the major powers.

The Court did not, it is true, incorporate this factor, or the others mentioned, in its list of criteria. It did, however, compare the situation of Fiji in 2001 with that of Lesotho in 1986, stating that the African coup had ‘international approval’ but ‘rather the opposite’ applied to Fiji.⁹² According to this line of reasoning, courts should endorse regimes that seize power with diplomatic and economic support in Western capitals. Moreover, as indicated earlier, the judges upheld a sweeping definition of necessity. They cited a New Zealand legal text stating that, although courts were under a duty to uphold a legal order, ‘they may sometimes recognise 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’.⁹³ Finally, the Court upheld the *1997 Constitution* that was drawn up in the mid-1990s in an attempt to satisfy both international investors and the Fijian elite.

The judgment may set an international precedent for assessing repressive military regimes and their actions — but a precedent that will primarily assist the major powers to impose their requirements with the assistance of local elites, not one that will defend the democratic rights of ordinary people.⁹⁴ This is not to suggest support for the nationalist posturing of the continuing undemocratic, racially based regime in Fiji. But *Prasad* is a cautionary tale, indicating the need for a more critical approach to the use of international law in the supposed defence of basic political rights.

⁹¹ Ibid.

⁹² *Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001) 26.

⁹³ Brookfield, above n 82, 20.

⁹⁴ Moreover, it seems that the outcome of the case did not assist Chandrika Prasad, the displaced Indo-Fijian farmer who initiated the proceedings. Williams described the decision as a Pyrrhic victory for Prasad: see George Williams (Keynote address delivered at the Australasian Law Teachers’ Association Conference, Port Vila, 4 July 2001) (copy on file with author).