FEATURE

REPUBLIC OF FIJI V PRASAD

INTRODUCTION

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The law, and the judges who apply and make it, normally have little or no role to play in the midst of a coup d'état. The reasoning behind a coup is the antithesis of the rule of law; particularly in the Fiji Islands, where the coup of May 2000 overthrew a democratically elected Parliament and a multi-racial Constitution[1] founded upon the protection of basic rights. It is surprising then that in Fiji the judiciary did play an important role. Moreover, it is a role which may prove decisive in restoring democracy to the Republic of the Fiji Islands in accordance with the *1997 Constitution*. In this sense, the decisions of the High Court[2] and Court of Appeal of Fiji[3] are unique.

On 19 May 2000, a year into the term of Prime Minister Mahendra Chaudhry, a group of armed men led by George Speight seized the Parliament building and took the Prime Minister and many members of Parliament hostage. Speight and his followers demanded the abolition of the *1997 Constitution* and asserted indigenous Fijian supremacy. Ten days later, as the security situation declined, the Commander of the Fiji Military Forces, Commodore Josaia Voreqe Bainimarama, decided to assume power and impose martial law in order to appease Speight and his supporters. He issued Interim Military Government Decree No 1, which stated that the 1997 Constitution 'is with effect from 29th Day of May 2000, wholly removed.'[4]

Interim Military Government Decree No 3 was promulgated soon after.[5] It established an Interim Military Government and declared that executive authority of the Republic of the Fiji Islands was vested in the Commander as the head of a military government. The coup attempt by Speight had been quickly followed by another by the military. Unlike Speight, however, the Commander

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1 *Constitution Amendment Act 1997* (Fiji Islands) ('*1997 Constitution*'). Note that legislation of the Fiji Parliament has been consolidated. Thus the *1997 Constitution* represents a 'new' constitution for the Fiji Islands and as such is not an amending act.

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

3 *Republic of Fiji v Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001). For an analysis of these decisions, see George Williams, 'The Case that Stopped a Coup? The Rule of Law and Constitutionalism in Fiji' *Oxford University Commonwealth Law Journal* (forthcoming).

4 Interim Military Government Decree No 1, *Fiji Constitution Revocation Decree 2000*.

5 Interim Military Government Decree No 3, *Constitution Abrogation — Interim Military Government and Finance Decree 2000*.

had the military might to enforce his will. The taking of power by the military was similar to many other coups around the world. Indeed, the two 1987 coups in Fiji had set such examples not long before.[6]

Not all the actions of the military in taking control of Fiji this time suggested a desire to undermine basic rights. Soon after seizing power, the Commander issued Interim Military Government Decree No 7 ('IMG Decree No 7').[7] This decree substantially reproduced the Bill of Rights set out in the *1997 Constitution*.[8] The Decree even went so far as to provide that the rights set out in it were, like those in the *1997 Constitution*,[9] to be interpreted in accordance with norms of international law and even the 'values that underlie a democratic society based on freedom and equality'.[10] However, IMG Decree No 7 also limited those rights in one important respect: it restated the right to equality, but in s 24(6) made this right '[s]ubject to any law providing for or protecting the enhancement of Fijian or Rotuman interests.'[11]

On 4 July, as the Commodore continued to negotiate with Speight, Interim Military Government Decree No 10[12] was issued, under which the Fijian Military established an 'Interim Civilian Government'. Interim Military Government Decree No 19 provided for the appointment of an Interim President and that the Interim Civilian Government had the power to make laws for the peace, order and good government of Fiji by means of decrees promulgated by the President on the advice of the Cabinet.[13]

The final hostages, including Prime Minister Chaudhry, were released by Speight on 14 July, eight weeks after they had been detained. Despite the arrest of Speight on charges including treason, no attempt was made by the military or

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6 Long-standing tensions between indigenous Fijians and ethnic Indians erupted in 1987, when ethnic Indians gained a majority in the House of Representatives for only the second time since Fiji became an independent sovereign nation. In response, Lieutenant Colonel Sitiveni Rabuka, the Chief of the Fiji Military Forces, staged two coups on 14 May and 25 September 1987 to restore the political supremacy of indigenous Fijians. Consequently, Fiji was expelled from the Commonwealth until the enactment of the 1997 Constitution, which provided for the protection of basic human rights at international law. See Isikeli Mataitoga, 'Constitution-Making in Fiji: The Search for a Practical Solution' (1991) 21 *Victoria University of Wellington Law Review* 221, 230.

7 Interim Military Government Decree No 7, *Fundamental Rights and Freedoms Decree 2000*.

8 Ibid. Cf *1997 Constitution* ch 4.

9 *1997 Constitution* s 43(2): 'In interpreting the provisions of this Chapter, the courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter.' See generally Amelia Simpson and George Williams, 'International Law and Constitutional Interpretation' (2000) 11 *Public Law Review* 205.

10 IMG Decree No 7 s 24(4).

11 IMG Decree No 7 s 24(6). The right to equality was also limited by s 19(7)(g) of the Decree, which provided that it did not extend to laws that provide 'for the prosecution of unnatural offences or indecent practices'.

12 Interim Military Government Decree No 10, *Interim Civilian Government (Establishment) Decree 2000*.

13 Interim Military Government Decree No 19, *Interim Civilian Government (Transfer of Executive Authority) Decree 2000*.

its Interim Civilian Government to restore the *1997 Constitution* or the Fiji Parliament.

On 4 July 2000, the same day that the Interim Civilian Government was created and ten days before the final hostages were released, an action was filed by Chandrika Prasad in the High Court of Fiji in Lautoka against the Republic of Fiji Islands and the Attorney-General of the Interim Civilian Government. Prasad, an Indo-Fijian farmer, was displaced when he and his family were forced off their land in the wake of the Speight coup attempt. His home had been robbed and badly damaged, his livestock butchered, and his crops destroyed. He was threatened with death. Rebuffed by the police, he turned to the courts.

In an affidavit, Prasad stated that he brought the case because he wanted the international community to be aware of the human rights violations occurring in Fiji and because he believed that an affirmation of the rule of law and the *1997 Constitution* might enable him to 'live peacefully in [his] own home and … be treated with respect'.[14] Prasad did not seek damages for his physical suffering, but instead a declaration that the *1997 Constitution* remained in force and that the elected government of Fiji had not been lawfully dismissed.

I was briefed to represent Prasad with two Fijian lawyers, Anu Patel and Neel Shivam. Initially, our position seemed futile — not only were we faced with extremely limited resources and a very tight timeframe, but there was no precedent to suggest that a court action could succeed in overturning a coup.[15] The matter was heard over one day on 23 August 2000 before a single judge of the High Court, Gates J. His Honour handed down his decision on 15 November 2000,[16] finding for Prasad (and affirming that Prasad possessed the standing to bring the matter). Gates J based his decision upon the doctrine of necessity, as set out in our 'Primary Submissions', Part IV(D).[17] He made several orders, including that '[t]he revocation of the 1997 Constitution was not made within the doctrine of necessity and such revocation was unconstitutional and of no effect. The 1997 Constitution is the supreme and extant law of Fiji today.'[18]

There was little to suggest that this decision would affect political developments in Fiji. Given that the military had already sought to abrogate the *1997 Constitution*, why would it or its Interim Civilian Government obey a decision of a court of law? Indeed, no steps were taken to recall Parliament. Nevertheless, the proceedings took a decisive turn after the High Court decision when, instead of ignoring the orders of Gates J, the Interim Civilian Government decided to appeal to the Court of Appeal of Fiji.

On 17 January 2001, a single judge of the Court of Appeal granted the parties leave to produce new evidence. In the context of the new evidence, the

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14 Affidavit of Chandrika Prasad (served 10 July 2000).

15 For a survey of the case law, see Tayyab Mahmud, 'Jurisprudence of Successful Treason: Coups d'Etat and Common Law' (1994) 27 *Cornell International Law Journal* 49.

16 *Prasad v Republic of Fiji* [2001] New Zealand Administrative Reports 21, 31–5, 47–8.

17 Ibid 40–3. All references to headings refer to the text contained under those headings in the 'Respondent's Brief', which follows this introduction.

18 Ibid 48.

submissions set out below were prepared for the appeal by myself and the Fijian lawyers involved, and by a new member of the Prasad legal team, Geoffrey Robertson QC.[19] Before the hearing, counsel for the Appellants, Nicholas Blake QC, indicated that the standing of Prasad would not be contested. Furthermore, during the course of the hearing, counsel did not seek to counter our submissions on the topics of justiciability or sovereignty, as set out in our 'Preliminary Submissions', Part III.

The submissions filed for Prasad sought to introduce a new element into cases of this type. After a coup, the community of nations frequently plays an important role in agitating for a restoration of democracy and for the maintenance of basic human rights. Despite this, international law has traditionally had little or no impact on the judicial decisions that have determined the legality of revolutionary action.[20] It may not be surprising that, until the decisions in the Prasad litigation, domestic courts consistently granted the usurper legal recognition.[21]

It was thus a novel argument that the legality of a coup, as a matter of domestic law, ought to be ascertained by the correspondence between the actions of the revolutionary actors and the international obligations assumed by the nation. The submissions put on behalf of Prasad asserted that the relevant legal doctrines ought to be reconstructed (and thus limited by) norms of international law.[22] In particular, it was stated that the Court ought to have regard to instruments including the *International Convention on the Elimination of All Forms of Racial Discrimination*,[23] the *International Covenant on Civil and Political Rights*,[24] and the *Universal Declaration of Human Rights*.[25] These establish international norms of non-discrimination on account of race, and the basic entitlement of a people to a democratic system of government. It was further submitted that the rights to vote, to be elected, to freely determine political status and to choose governments had crystallised into norms of international law. It was argued that such norms were fundamentally inconsistent with legal recognition of the Fijian coup of May 2000.

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19 It is also necessary to acknowledge London Barrister Sadakat Kadri, from Geoffrey Robertson's Doughty Street Chambers, who, although he did not formally appear in the matter, travelled to Fiji for the hearing in the Court of Appeal and played an important role in the drafting of the submissions.

20 Cf *Mokotso v HM King Moshoeshow II* [1989] LRC (Const) 24, 164 (Cullinan CJ), where a coup was viewed as being 'internationally popular'.

21 Cf the Privy Council decision in *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645.

22 See especially *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, 8 ILM 679, art 27 (entered into force 27 January 1980): 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'

23 Opened for signature 21 December 1965, 660 UNTS 195, 30 ILM 1517 (entered into force 4 January 1969).

24 Opened for signature 16 December 1966, 999 UNTS 171, 6 ILM 368 (entered into force 23 March 1976).

25 GA Res 217A, 3 UN GAOR (183rd plen mtg), UN Doc A/Res/217A (1948).

The appeal was heard by a five judge bench over four days from 19 to 22 February 2001. The Court of Appeal comprised Casey J (Presiding), Barker, Kapi, Ward and Handley JJA. Even though this was a domestic Fijian court, each judge was based outside of Fiji and would come to Fiji to sit as a member of the Court as the need arose. Two members, including the Presiding Judge, were from New Zealand, with one judge each from Australia, Papua New Guinea and Tonga.

The Court handed down its decision on 1 March 2001. It issued a unanimous judgment in which it dismissed the appeal, but made new declarations in lieu of those made by Gates J in order to reflect the new evidence before it. Most importantly, like Gates J, the Court ordered that '[t]he 1997 Constitution remains the supreme law of the Republic of the Fiji Islands and has not been abrogated.'[26] The Court of Appeal reached this result by different reasoning to Gates J. It rejected use of the doctrine of 'necessity',[27] while at the same time achieving an equivalent outcome under the doctrine of 'effectiveness',[28] as set out below in our 'Alternative Submissions', Part V.

The effectiveness doctrine was developed from the writings of legal theorist Hans Kelsen and his conception of the legal order as a pyramid of norms. This pyramid was derived, through successive levels, from the norm-creating powers conferred by the *1997 Constitution*, and ultimately from a *Grundnorm* (or 'basic norm') embodying the axiomatic assumption that the legal order is to be obeyed. The notion that the basic norm might allow a court to recognise a new legal order was first applied by the Supreme Court of Pakistan in 1958 in *State v Dosso*.[29]

In *Dosso*, and other subsequent decisions, the effectiveness doctrine was not seen as having a normative component that might enable a court to assess the legality of a regime according to human rights standards or norms of international law. It was constructed as a purely positivist doctrine. One such test for determining effectiveness was set out by Cullinan CJ of the High Court of Lesotho in *Mokotso v HM King Moshoeshow II*:

> A court may hold a revolutionary government to be lawful, and its acts to have been legitimated ab initio, where it is satisfied that (a) the government is firmly established, there being no other government in opposition thereto; and (b) the

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[26] The Court of Appeal also made the following orders:

(ii) Parliament has 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 may perform the functions of the President until 15 March 2001 unless a President is sooner appointed under section 90.

[27] *Republic of Fiji v Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001), 40.

[28] Ibid 41–3.

[29] [1958] PLD SC (Pak) 533 ('*Dosso*'). This decision was overruled by the Supreme Court of Pakistan in *Jilani v Government of the Punjab* [1972] PLD SC 139. The decision to overrule *Dosso* was affirmed in *Bhutto v Chief of Army Staff* [1977] PLD SC 657.

> government's administration is effective, in that the majority of the people are behaving, by and large, in conformity therewith.[30]

In our submissions, we argued that the Court of Appeal should add three further criteria. The test should also contain the two criteria set out by Haynes P of the Court of Appeal of Grenada in *Mitchell v Director of Public Prosecutions*:

> (c) such conformity and obedience [must be] due to popular acceptance and support and not mere tacit submission to coercion or fear of force; and (d) it must not appear that the regime was oppressive and undemocratic.[31]

In addition, we argued that the test should incorporate reference to international human rights norms, such that a new regime could not be regarded as effective unless the regime acknowledged and respected basic human rights as evidenced by the nation's international obligations.

The Court of Appeal of Fiji found that the effectiveness test in *Mokotso* was 'too narrowly expressed'.[32] It was prepared to accept element (c) of the *Mitchell* test, but doubted the correctness of (d).[33] Furthermore, while the Court recognised 'the modern shift towards insistence on basic human rights in a raft of international treaties and, more importantly for present purposes, the 1997 Fiji Constitution', it was not prepared to further extend the effectiveness test by also requiring that the new regime act consistently with human rights standards as evidenced by the international obligations assumed by the nation.[34]

The Court did not accept all three of the additional criteria proposed in our submissions. However, its decision is very significant in that it did incorporate a normative element into the effectiveness test in the form of the question of popular support by (or the acquiescence of) the people for the new regime. Where adopted by other courts, this criterion will make it extremely difficult for a tyrannical regime which violates basic human rights recognised at international law to gain judicial recognition.

On the evidence before it, the Court held that the effectiveness test it had formulated was not satisfied by the Interim Military Government for two reasons. First, there was a rival (or opposition) government striving for power.[35] Affidavits were filed by former Prime Minister Chaudhry and by members of his Cabinet claiming that the Peoples Coalition was 'ready and willing' to resume office under the *1997 Constitution*.[36] Two proceedings had also been instituted by members of the Peoples Coalition challenging the abrogation of the *1997 Constitution*.

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30 [1989] LRC (Const) 24, 133 ('*Mokotso*').

31 [1986] LRC (Const) 35, 72 ('*Mitchell*').

32 *Republic of Fiji v Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001), 38.

33 Ibid 40–2.

34 Ibid 30.

35 Ibid 43–4.

36 Affidavit of Mahendra Chaudhry, 22 February 2001.

Second, although the Appellants were able to demonstrate the continuing operation of the administration of government throughout the attempted coup and its aftermath, this was insufficient to prove popular acceptance and support for the Interim Civilian Government.[37] The Court found that 'passive compliance is hardly a persuasive indication of true acquiescence in a government which has been in power for only about seven months and severely restricts public protest.'[38] Furthermore, five uncontested volumes of affidavits were filed on behalf of Prasad, showing that although the Fijian people had not expressed their anger and frustration at the coup through violence, they had made their opposition clear in many forms, such as through their churches, women's groups, an alliance of union and employer organisations and non-violent days of protest.

This decision, and that of the High Court, demonstrate that the judiciary can play an important role in maintaining the rule of law, even in the immediate period after a coup. The decisions are unique in that they represent the only time that a domestic court has pronounced that a coup is illegal and that the abrogation of a nation's constitution is legally ineffective. Even more remarkable (and commendable) was the announcement by the military-supported Interim Civilian Government that it would implement the decision of the Court of Appeal.

International law played an important role in the Prasad litigation. It strengthened our argument that a normative component be included in the effectiveness test. The acceptance of this argument by the Court of Appeal makes *Republic of Fiji v Prasad* a legal landmark.

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[37] *Republic of Fiji v Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001), 44–6.

[38] Ibid 47.