THE DOCTRINES OF NECESSITY AND REVOLUTION

A CRITICAL REVIEW OF *REPUBLIC OF FIJI ISLANDS AND ATTORNEY GENERAL v PRASAD*[†]

Michael Head[*]

I. INTRODUCTION

Every now and again, a legal case comes along that reveals, at least to some extent, the essential class role of law. *Republic of Fiji Islands and Attorney General v Prasad,* decided by Fiji's Court of Appeal on 1 March 2001, is one such case. The appeal court, comprising five judges drawn from other former British colonies, performed a delicate political balancing act in considering the constitutional validity of the undemocratic military-appointed Interim Government in Fiji.

Following the military's seizure of power in the wake of businessman George Speight's attempted coup in 2000 in Fiji, the Western powers (including Australia) imposed limited economic sanctions on that State and demanded a return to constitutional rule.[1] They sought the formation of a more stable and popularly accepted government that could restore order and reopen the economy to foreign investment.[2] However, the obvious support for Speight's dispersal of parliament throughout Fiji's political establishment made it clear that any reinstatement of the elected Labour Party-led coalition of Prime Minister Mahendra Chaudhry would provoke intense opposition and trigger fresh incitement of nationalist and racist sentiment.

Employing two relatively little-known legal doctrines – successful revolution and necessity – the appeal court endeavoured to steer a

---

[†] Civil Appeal # ABU0078 of 2000, 1 March 2001 at <www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/Volume_Q-R/Republic_v_Prasad.html>.

[*] BJuris, LLB, LLM; Coordinator, Community Law Program, School of Law, University of Western Sydney.

[1] For example, see Downer, "Fiji", Press Release, No FA 57, 29 May 2000 at <www.dfat.gov.au/media/releases/foreign/2000/fa057_2000.html>.

[2] For a candid statement of the problems of defending the Australian government's security and economic interests in the South Pacific, see Downer, "Australia's strong Pacific commitment", Speech delivered at the Pacific Economic Outlook Seminar, Sydney, 2 November 2000.

middle course, declaring the Interim Government unlawful but not ordering a recall of the parliament broken up by Speight's thugs. This article will demonstrate that the court's decision effectively permitted the military's handpicked administration to cling to office, supervising supposedly democratic elections later in 2001.[3] This case note examines the decision of the appeal court in *Prasad* and the light it sheds on the highly political twin doctrines of revolution and necessity.

II. *PRASAD* AND ITS AFTERMATH

On 14 July 2000, Chandrika Prasad, an evicted Indo-Fijian small farmer, challenged in the High Court of Lautako the legality of actions taken by the armed forces chief, Commodore Frank Bainimarama. He claimed that Bainimarama had abrogated Fiji's 1997 Constitution and assumed executive power in response to Speight seizing parliament on 19 May 2000.[4] This test case was one of a series of legal challenges to the military's scrapping of the Constitution supported by Chaudhry and the Labour and trade union leaders. After three months of preparation, a weeklong hearing and five days of deliberation, the Court delivered its judgment live on national television.

The appeal judges declared unanimously that the Interim Government "cannot be recognised as the legal government".[5] The 1997 Constitution remained the supreme law of Fiji and was not lawfully abrogated by the military when it seized power on 29 May 2000, ten days after Speight took parliamentary hostage. The court ruled that the elected parliament, violently dispersed by Speight, was not dissolved but merely prorogued. This appeal ruling in *Prasad* differed from Gates J's decision at first instance in the High Court of Lautoka. He had ruled on 15 November 2000 that the regime was illegal and had upheld the validity of Fiji's 1997 Constitution.[6]

---

[3] For a candid statement of the problem of defending the Australian government's security and economic interests in the South Pacific, see Downer, "Australia's strong Pacific commitment", Speech delivered at the Pacific Economic Outlook Seminar, Sydney, 2 November 2000.

[4] Williams, "Republic of Fiji v Prasad: Introduction" (2001) 2 Melbourne Journal of International Law 144.

[5] Civil Appeal # ABU0078 of 2000, 1 March 2001 at <www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/Volume_Q-R/Republic_v_Prasad.html>.

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

Unlike Gates J, the appeal judges in *Prasad* did not propose the reconvening of parliament and the formation of a government – possibly an all-party coalition – with a parliamentary majority. Instead, they declared that Acting President Ratu Josefa Iloilovatu Uluivuda, appointed by the military with Speight's support, could lawfully remain President until 15 March 2001, three months after the formal resignation of his predecessor, Ratu Sir Kamisese Mara. Under the 1997 Constitution, Iloilo, as President, could call new elections after dissolving the elected parliament.[7]

Instead of resigning in response to the *Prasad* decision, Interim Prime Minister Laisenia 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, an unelected assembly of traditional land-owning chiefs who also backed Chaudhry government's ouster Qarase's. After consulting the chiefs' council, Iloilo used his purported reserve powers to re-appoint Qarase's cabinet of eight months comprising ethnic Fijian businessmen, landed chiefs, ex-military commanders and senior government bureaucrats, ostensibly as a caretaker government to continue ruling the State until parliamentary elections were held.[8]

In order to clothe his actions in legality, Iloilo accepted the resignation of Qarase and his cabinet. On the same day, Iloilo appointed Ratu Tevita Momoedonu as Acting Prime Minister. Momoedonu, Iloilo's nephew and a Labour Party minister in Chaudhry's ousted government, then advised Iloilo formally under the 1997 Constitution to dissolve the parliament and resigned the next day to make way for the Qarase government's return.[9]

---

[7] According to the legal opinion provided by both counsel for the plaintiff, British barrister Geoffrey Robertson and Australian law professor George Williams, the President had "reserve powers" similar to those of the Governor-General of Australia, namely, the powers used to dismiss the Whitlam Labor government in 1975.

[8] Generally, see Ministry of Information, Republic of the Fiji Islands, Interim Government, Media Release, "President dissolves House of Representatives", 16 March 2001 at <www.fiji.gov.fj/press/2001_03/2001_03_16-08.shtml>.

[9] See Uluivuda, "Address to the Nation following his Swearing-in Ceremony", Press Release, 15 March 2001 at <www.fiji.gov.fj/press/2001_03/2001_03_05-06.shtml>.

III. A VICTORY FOR DEMOCRACY?

Despite these machinations, claims were made that *Prasad* was a victory for democracy. One of the plaintiff's counsel who argued the case successfully, George Williams, observed that the verdict could be a weapon for democracy campaigners in military-run States such as Pakistan where army chief Pervez Musharraf seized power in October 1999.[10] Williams described the case as a landmark that "could make it extremely difficult for a tyrannical regime which violates human rights recognised at international law to gain judicial recognition".[11]

However, the judgment in *Prasad* does not substantiate these claims.

First, it must be noted that Fiji's Court of Appeal is a peculiar remnant of nearly a century of British colonial rule in Fiji between 1872 and 1970. The five appeal judges, headed by New Zealand's Sir Maurice Casey, were drawn from the two major regional powers (Australia and New Zealand) and two other former British colonies, Papua New Guinea and Tonga.[12]

While claiming to be ruling only on questions of law, the appeal court based itself on two highly political conclusions. The most critical was that the Qarase regime had failed to establish firm control over the population. The court concluded that "[t]he interim civilian government has not proved it has the acquiescence generally of the people of Fiji".[13] It referred to "suppression of public demonstrations of dissent", several affidavits expressing disapproval of the government and the declared readiness of the Chaudhry government to resume office.[14]

---

[10] Williams, "Republic of Fiji v Prasad" (2001) Melbourne Journal of International Law 144, 149-150; see also Williams, "The case that stopped a coup? The rule of law and constitutionalism in Fiji", Oxford University Commonwealth Law Journal (forthcoming).

[11] Ibid.

[12] The other judges were Sir Ian Barker (New Zealand), Sir Mari Kapi (Papua New Guinea), Gordon Ward (Tonga) and Kenneth Handley (Australia). All of them had been appointed prior to the Speight rebellion on 19 May 2000 and took oaths under the 1990 or 1997 Fiji Constitution: Young, "Current Issues: Fiji" (2001) 75:5 Australian Law Journal 277.

[13] See Civil Appeal # ABU0078 of 2000, 1 March 2001 at <www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/Volume_Q-R/Republic_v_Prasad.html>.

[14] Ibid.

Secondly, the appeal court declared the 1997 Constitution to be "a reliable expression of the hopes and aspirations of the whole population".[15] In particular, the judges stated that the 1997 Constitution provided 'extensive safeguards' of the rights and interests of indigenous Fijians.[16] This Constitution is often depicted as providing for the restoration of democracy in Fiji after a decade of dictatorial and ethnic Fijian chauvinist rule under military strongman, Major General Sitiveni Rabuka.

Rabuka adopted the 1997 Constitution under pressure from and with Australia and New Zealand's direct involvement.[17] This Constitution removed some of the racially-based political privileges afforded to ethnic Fijian leaders by Rabuka after his 1987 coup, thus weakening their grip over the political system and sections of the economy. However, it retained key concessions, including the right of the Great Council of Chiefs to select Fiji's President and Vice President. Indo-Fijians, who formed nearly half of Fiji's population of 840,000 people, continued to be discriminated against with parliamentary seats set aside for indigenous politicians.[18]

The appeal judges in *Prasad* met substantially the demands of the Western powers, such as Australia, New Zealand and the United States, for a return to constitutional rule without disrupting the prevailing order. In general, these States expressed satisfaction with the outcome while retaining some sanctions on Fiji until elections were held. For example, Australian Foreign Minister, Alexander Downer, welcomed the Great Council of Chiefs' acceptance of the *Prasad* ruling and described Iloilo's moves as being 'in the right direction'. Nevertheless, Downer questioned the measures' legality and stated that sanctions would remain until there was a clear return to the 'rule of law'.[19]

Throughout the Fijian crisis, the Western powers demanded a regime that could restore law and order. While paying lip service to

---

[15] Ibid.
[16] Ibid.
[17] Mataitoga, "Constitution-making in Fiji – The search for a practical solution" (1991) 21 Victoria University of Wellington Law Review 221, 230.
[18] Sections 51 and 89 of the Fiji Constitution 1997.
[19] Media Release, 1 March 2001, <www.dfat.gov.au/media/releases/foreign/2001/fa023_01.html>.

democracy, they made it plain that they did not support Chaudhry's return. Downer's comments indicated that, despite reservations, Iloilo and Qarase could be accepted if they could deliver stability.[20]

IV. THE DOCTRINES OF 'NECESSITY' AND 'REVOLUTION'

(a) Application of the Doctrines

The appeal judges in *Prasad* applied doctrines that British and American courts had 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'). Williams and other commentators pointed to the court's opinion that, while the doctrine of necessity allowed military rulers to temporarily overturn a constitution, it disallowed the scrapping of a constitution.[21] 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 suspension of democratic and legal rights.[22]

While declaring that Bainimarama had exceeded the bounds of the necessity doctrine by abrogating the 1997 Constitution, nonetheless, the judges strongly supported most of the military's repressive actions that included roadblocks, curfews and a ban on all political gatherings. They stated: "The Commander quite properly contemplated executive action by way of martial law to restore and/or maintain law and order."[23] Bainimarama had acted 'quite properly' in imposing military rule even though the 1997 Constitution provided that only Fiji's president could declare a state of emergency on the advice of Cabinet. The court held:[24]

> The doctrine of necessity would have authorised him to have taken all necessary steps, whether authorised by the text of the Constitution or not, to have restored law and order.

---

[20] Ibid.
[21] Williams, "Republic of Fiji v Prasad: Introduction" (2001) 2 Melbourne Journal of International Law 144, 149.
[22] Civil Appeal # ABU0078 of 2000, 1 March 2001 at <www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/Volume_Q-R/Republic_v_Prasad.html>.
[23] Ibid.
[24] Ibid.

The judges concluded simultaneously that no successful revolution had occurred primarily because the military and the Qarase government had failed to effectively suppress public opposition despite their emergency decrees. The court declared also that a rival government existed, that of ousted Prime Minister Chaudhry. However, had the Qarase government proved that it was 'firmly or irrevocably in control,' it would have become "a lawful or legitimate government and entitled to the authority that goes with that status".[25] Furthermore, and perhaps most significantly, the court added that the 'international community' had not accepted the military's government, thereby suggesting a new criterion for testing whether to legitimise a usurping regime, namely, the response of the major capitalist powers.[26]

(b) The Development of the Doctrines

To understand the real implications of this decision and its value as an international precedent it is necessary to review briefly the historical evolution of the doctrines of necessity and revolution.

The English civil war of the 17th century and the American War of Independence of the 18th century primarily shaped the doctrine of revolution. Both overturned the previous legal order. The civil war of the 1640s initially overthrew the 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 State, the United States, by defeating the British. In these revolutions, the British and American courts[27] recognised the legitimacy of the victorious side and generally sanctioned the acts done in the name of their revolutions, dating back to the dates on which their rebellions commenced. These revolutions were progressive eruptions fundamentally, breaking up the old feudal-monarchical forms of rule and signalling the rise to ascendancy of the emerging capitalist classes.

---

[25] Ibid.

[26] Ibid.

[27] For a brief review of some of the cases, see Cullinan CJ's judgment in Mokotso v King [1989] Law Reports of the Commonwealth (Constitutional and Administrative Reports) 24, 96. See also Haynes P's judgment in Mitchell and ors v DPP and anor [1986] Law Reports of the Commonwealth (Constitutional and Administrative Reports) 35, 52.

During the second half of the 20th century, however, the revolution doctrine 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 had drawn upon a 1951 parliamentary speech by the British Secretary of State for Foreign Affairs setting out the British government's practice when deciding whether to recognise the outcome of a *coup d'etat*. The speech, often cited in British Commonwealth courts, stipulates that a new regime must have 'effective control' over most of the State's territory where such control 'seems likely to continue' and is 'firmly established'.[28]

This approach was used to uphold the legality of various military or military-backed coups that suited or were at least acceptable to Britain and other imperialist powers, including those in Pakistan (1958),[29] Uganda (1966),[30] Lesotho (1986 and 1990),[31] the Seychelles (1977)[32] and Grenada (1979).[33] Little regard was paid to democratic rights in these cases.[34] Cullinan CJ had concluded that a military coup was legal after reviewing exhaustively the authorities in reported cases and texts in the second Lesotho case, *Makenete v Lekhanya.*[35] He stated:[36]

> [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

---

[28] Quoted by Lord Reid in the leading House of Lords case, Carl-Zeiss Stiftung v Rayner and Keeler Ltd (No 2) [1966] 2 All England Reports 536, 548.
[29] See The State v Dosso (1958) 2 Pakistan Supreme Court Reports 180.
[30] See Uganda v Coof Prisons, ex p Matovu [1966] East African Reports 514.
[31] Mokotso v King [1989] Law Reports of the Commonwealth (Constitutional and Administrative Reports) 24; Makenete v Lekhanya [1993] 3 Law Reports of the Commonwealth (Constitutional and Administrative Reports) 13.
[32] Valabhaji v Controller of Taxes (1981) Seychelles Court of Appeal (unreported), noted in [1981] Commonwealth Law Bulletin 1249.
[33] Mitchell v Director of Public Prosecutions [1986] Law Reports of the Commonwealth (Constitutional and Administrative Reports) 35.
[34] For a survey of the cases see Mahmud, "Jurisprudence of successful treason: coup d'etat and common law" (1994) 27 Cornell International Law Journal 49.
[35] [1993] 3 Law Reports of the Commonwealth (Constitutional and Administrative Reports) 13.
[36] Mokotso v King [1989] Law Reports of the Commonwealth (Constitutional and Administrative Reports) 24, 131-33.

> 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.

By contrast, where the usurpation of power cut across ruling class interests, as happened when Rhodesia's Ian Smith declared unilateral independence from Britain in 1965, the Privy Council ruled that the regime failed the test of a 'successful revolution'.[37] The court insisted that Britain remained the lawful power, ready and willing to resume control over Rhodesia, a stance backed by British economic and diplomatic sanctions designed to bring Smith to the bargaining table.[38]

In most post-World War II cases, 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.*[39] Generally speaking, his theory justified the seizure of power by force. Quoting his writings, judges had ruled that coups did not need to command 'universal adherence,' simply 'firm control'.[40] Even where judges expressed concern about the authoritarian conclusions of Kelsen's principle, they ultimately drew similar conclusions. In the Lesotho case, *Mokotso v King,*[41] Cullinan CJ noted: "To repeat the old truism, nothing succeeds like success."[42]

Likewise, the necessity doctrine, whose history may be traced to the revolutions of the 17th and 18th centuries, had predominantly become a means of legalising dictatorial measures. 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. From 1868 onwards, the United States 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 United States

---

[37] See Madzimbamuto v Lardner-Burke [1969] 1 Appeal Cases 645, 726.
[38] Ibid 729.
[39] 1949, Harvard University Press, Cambridge.
[40] For example, per Hogan J in Valabhaji v Controller of Taxes (1981) Seychelles Court of Appeal (unreported), noted in [1981] Commonwealth Law Bulletin 1249.
[41] [1989] Law Reports of the Commonwealth (Constitutional and Administrative Reports) 24.
[42] Ibid 131-133.

government.[43] The court declared that "acts necessary to peace and good order among citizens"[44] were lawful and therefore had to be obeyed, even if they infringed the United States Constitution.

In the Rhodesian case, *Madzimbamuto v Lardner-Burke,*[45] the Privy Council applied the necessity doctrine when it ruled on the legality of the Smith regime's indefinite detention of political opponents under emergency powers. With Lord Pearce dissenting, the majority of the judges held the detention invalid on the ground that Britain remained the only legal authority. Nevertheless, the law lords observed that:[46]

> under pressure of necessity the lawful Sovereign and his forces may be justified in taking action which infringes the ordinary rights of his subjects.

V. WHAT'S NEW IN THE *FIJI CASE?*

The appeal judges in *Prasad* expressed concern that Kelsen's 'principle of effectiveness' might too readily reward a usurping regime. Their judgment spoke also 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'.[47] The holding of elections would be 'powerful evidence of efficacy'.[48] However, it would be rash to interpret this emphasis as evidence of a more democratic approach. It was, we should recall, in line with the Western powers' demands for fresh elections in order to establish a more reliable regime that could command popular respect.

Far from laying down any new principle of democracy, *Prasad* disagreed with a passage in the Grenada case, *Mitchell v Director of Public Prosecutions.*[49] *Mitchell* listed as one criterion for a successful

---

[43] Texas v White (1868) 7 Wallace 700.
[44] Ibid 733.
[45] [1969] 1 Appeal Cases 645.
[46] Ibid 726-728.
[47] See Civil Appeal # ABU0078 of 2000, 1 March 2001 at <www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/Volume_Q-R/Republic_v_Prasad.html>.
[48] Ibid.
[49] [1986] Law Reports of the Commonwealth (Constitutional and Administrative Reports) 35.

revolution that "it must not appear that the regime was oppressive and undemocratic", which condition "went too far" in the opinion of the appeal judges in *Prasad*.[50] Furthermore, the appeal judges rejected an argument by the co-counsel for the plaintiff, Geoffrey Robertson, that an additional criterion be added, namely, "whether the new regime acknowledges basic human rights as evidence by international obligations assumed by the nation".[51] The judges stated:[52]

> We do not think it necessary to include a requirement that a usurping regime has to show adherence to international human rights treaties.

The only new ground broken by the appeal court in *Prasad* 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. Comparing Fiji in 2001 with Lesotho in 1986, the appeal court stated that the African coup had 'international approval' whereas 'rather the opposite' applied to Fiji.[53] By this logic, it is arguable that courts should quite openly endorse regimes that seize power with diplomatic and economic support in Western capitals.

Moreover, as indicated earlier, the appeal judges upheld a sweeping definition of necessity. They cited a New Zealand legal text and stated that although courts were under a duty to uphold a legal order:[54]

> [the courts] 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.

Finally, the appeal court placed great store in the 1997 Constitution because it was adopted after a lengthy period of consultation involving former New Zealand Governor-General Sir Paul Reeves. The court

---

[50] See Civil Appeal # ABU0078 of 2000, 1 March 2001 at <www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/Volume_Q-R/Republic_v_Prasad.html>.
[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] Brookfield F, Waitangi and Indigenous Rights Revolution: Law and Legitimation (1999, Auckland University Press, Auckland) 20.

held that this consultative process provided strong evidence that the Constitution "reflected the will of the great majority of the people of Fiji".[55]

In reality, Rabuka, who seized power in a military coup in 1987 and later became Prime Minister, had agreed to Reeves' appointment to head a constitutional review panel under pressure from Australia and New Zealand. The two regional powers had demanded a constitution less overtly racist than Rabuka's 1990 document. This document barred Indo-Fijians from the prime ministership, reserved a majority of parliamentary seats for ethnic Fijians, discriminated in favour of ethnic Fijian business entrepreneurs and gave the Great Council of Chiefs power to nominate 25 of the 34 upper house Senators.[56] Rabuka fashioned a compromise of sorts with Reeves' assistance. 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. As the appeal judges noted, this constitution entrenched the rights of ethnic Fijians.

It was the 1997 Constitution, drawn up in the mid-1990s in an attempt to satisfy both international investors and the Fijian elite, that the appeal judges in *Prasad* upheld. Their 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, not one that will defend democratic rights.

---

[55] Civil Appeal # ABU0078 of 2000, 1 March 2001 at <www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/Volume_Q-R/Republic_v_Prasad.html>.

[56] See sections 21(2)(b), 55(1) and 83(2) of the (Fiji Islands) Constitution Act 1990.