

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI ISLANDS

CIVIL APPEAL NO. ABU0078/2000S

BETWEEN:

1. THE REPUBLIC OF FIJI
2. THE ATTORNEY-GENERAL OF FIJI

Appellants

AND:

CHANDRIKA PRASAD

Respondent

JUDGMENT

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT, FIJI ISLANDS

CIVIL APPEAL NO.ABU0078 OF 2000S
(High Court Civil Action No.217/2000)

BETWEEN:

THE REPUBLIC OF FIJI

First Appellant

THE ATTORNEY-GENERAL OF FIJI

Second Appellant

AND:

CHANDRIKA PRASAD

Respondent

Coram:

The Rt. Hon. Sir Maurice Casey, Presiding Judge
The Hon. Sir Ian Barker, Justice of Appeal
The Hon. Sir Mari Kapi, Justice of Appeal
The Hon. Mr Justice Gordon Ward, Justice of Appeal
The Hon. Mr Justice Kenneth Handley, Justice of Appeal

Hearing:

Monday 19, Tuesday 20, Wednesday 21 and Thursday 22 February
2001, Suva

Counsel:

Nicholas Blake QC, Anthony Molloy QC, Michael Scott, Savenaca
Banuve and Jai Udit for the Appellants

Geoffrey Robertson QC, George Williams, Anu Patel and Neel Shivam
for the Respondent

Date of Judgment: Thursday 1 March, 2001

JUDGMENT OF THE COURT

Introduction

This appeal is against the judgment of Gates J of 15 November 2000 in which he upheld the continuing validity of Fiji's 1997 Constitution in proceedings brought in the High Court at Lautoka by the respondent Mr Chandrika Prasad. The proceedings challenged the legality of actions, including the purported abrogation of the Constitution, taken by those who

assumed control of the State during and after an attempted coup by George Speight on 19 May 2000.

As a Court of Law, our task is limited to determining legal issues. We have no jurisdiction or authority to pass judgment on non-legal questions, particularly those of a political nature.

The appeal raised questions as to what had actually happened in Fiji after 19 May 2000 and we have had to decide these questions. We have done this by finding, on the evidence, what actually happened, without considering the political merits or wisdom of what occurred. Our task has been to determine whether the 1997 Constitution remains in place as the supreme law in Fiji. It has been no part of our task to determine whether it is the best possible Constitution for Fiji. That was the task undertaken in the lead up to the 1997 Constitution, initially by the Reeves Commission, then by the Government, the political parties, the Great Council of Chiefs, and others involved in the political process. The Courts of Fiji played no part in the creation of the 1997 Constitution. Similarly our function in deciding whether the Constitution remains in force is the purely legal one of deciding, as a matter of law, whether its purported abrogation by Commodore Bainimarama (the Commander) on 29 May 2000 achieved that result, or has done so since.

Background

George Speight and his supporters mounted an armed invasion of the Parliament on 19 May 2000 which resulted in the then Prime Minister, members of his Cabinet and other

members of the People's Coalition parties being taken hostage. On the same day the President proclaimed a State of Emergency and promulgated Emergency Regulations pursuant to the Public Safety Act (Cap 19). The events that followed, particularly in Suva, evidenced a progressive breakdown of law and order. The facts themselves are not in dispute.

On 27 May the President, Ratu Sir Kamisese Mara, appointed the Hon. Ratu Tevita Momoedonu, Minister for Labour Industrial Relations and Immigration, to perform the functions of the Prime Minister, with effect from that day, while the Prime Minister was unable to perform them. On the same day, acting on the advice of the Acting Prime Minister and under section 59(2) of the Constitution, the President prorogued (that is adjourned) Parliament for six months. The Acting Prime Minister then resigned that office, reverting to his former ministerial position. Counsel agreed that the President did not dismiss the Prime Minister or his Government and did not assume executive control.

The situation continued to deteriorate. On 29 May the Commissioner of Police wrote to the President to advise "that the Fiji Police Force can no longer guarantee the security of the nation". He requested the President to invoke the Public Emergency Regulations and ask the Armed Services to perform all duties and functions of police officers.

A meeting took place that evening, on board a naval vessel, between the President and the Commander with some of his officers. In his affidavit of 6 November 2000 sworn in other proceedings, but included by consent in material filed in Court at the start of the hearing, Ratu Sir Kamisese Mara (Ratu Mara) recorded that the Commander had informed him that in his opinion the 1997 Constitution did not provide a framework for resolving the crisis

and should be abrogated. Ratu Mara continued, "I indicated that if the Constitution were to be abrogated, I would then not return to the Office of President." The Commander then assumed executive authority as "Commander and Head of the Interim Military Government of Fiji."

Ratu Mara did not then resign as President. He refused to accept office as President under a new Constitution, and was content to go out of office with the Constitution if it was abrogated. The purported abrogation of the Constitution later that day, if effective, operated as the dismissal of the President who held office under it. It followed, as Gates J held, that if the Constitution remained in force, Ratu Mara was still the President of Fiji.

Later events, which may be referred to at this point, confirm this conclusion. The affidavit of Mr Qarase the Interim Prime Minister of 10 January 2001 annexed a letter from Ratu Mara dated 15 December 2000 which states:

"Dear Prime Minister

Pension Options

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

*Your sincerely,
Ratu Kamisese Mara".*

Mr Qarase replied on 20 December:

"I write to acknowledge receipt of your letter dated 15 December 2000 informing me of your decision to take reduced pension and gratuity as retired President ...

I wish to inform you, Sir, that in accordance with section 5(2) of the President's Pension Act, Cabinet, at its special meeting earlier today, has approved the pension entitlements that you have opted for ... This would take effect from 15 December ...

Following our Cabinet meeting earlier today, our Office is issuing the attached Press Release in relation to your decision on this matter..".

The press release stated:

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

This correspondence makes it clear that Ratu Mara did not resign until 15 December when he wrote to the Interim Prime Minister.

It is now necessary to return to the events of 29 May. Later that day, the Commander promulgated a decree purporting to abrogate the Constitution (Interim Military Government Decree No. 1). Decree No. 3 was also promulgated to establish an Interim Military Government. Clause 5(2) stated that the executive authority of the Republic of Fiji was vested in the Commander as the head of the Military Government.

The Commander understood that the establishment of the Military Government by Decree No.1 involved the imposition of Martial Law on Fiji, but there was no separate proclamation to this effect. However on Sunday 11 June an advertisement by the Military

Council appeared in the Fiji press "to explain the Martial Law currently imposed on the people of Fiji". The advertisement stated :

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

Once Martial Law has been declared, the Military Authorities have set up a Military Council and are now ruling by decree. Martial Law gives the Military authorities the powers to restrict the rights of individuals and other arms of government when pursuing its aim of returning the country to normalcy at the earliest possible time.

The authorities have decided that no Military Tribunal shall be set up specifically to try civilians during this crisis. The police have been allowed to continue their normal law enforcement duties and investigations, the judiciary has not been tampered with and the bureaucracy has been allowed to continue with the occasional guidance from the Military authorities ..."

On 4 July Decree No. 10, the Interim Civilian Government (Establishment) Decree 2000, was made by the Commander. This established an Interim Civilian Government with the Commander as Head of Government. By clause 10 the executive authority of the State was vested in the Head of Government. Ministers in that Government were sworn in by the Commander the same day.

On 9 July the Interim Military Government promulgated Decree No.18, the Immunity Decree 2000, which purported to grant immunity from criminal prosecution and civil liability to George Speight and his supporters. On 9 July the Interim Civilian Government also promulgated Decree No.19, the Interim Civilian Government (Transfer of Executive Authority)

Decree. This provided for the appointment of an Interim President and an Interim Vice President. Clause 4 provided that the Government shall have 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. Clause 5 vested the Executive Authority of the State in the President who was to act only on the advice of the Cabinet. Clause 6 provided that the Cabinet should consist of a Prime Minister and other Ministers appointed by the President. The decree was signed by the Commander and took effect on 13 July. On 14 July the Great Council of Chiefs appointed Ratu Josefa Iloilo, the Vice-President under the 1997 Constitution, as Interim President and Ratu Jope Seniloli as Interim Vice President. That day the remaining hostages were released.

The Interim President and Vice President were sworn in, presumably by the Commander on 18 July. On 28 July the Interim Civilian Government Ministers were sworn in by the Interim President and took office under the Interim Civilian Government (Transfer of Executive Authority) Decree. The Interim Civilian Government has remained the de-facto Government of Fiji ever since.

On 17 August it promulgated the Judicature Decree 2000 (Decree No. 22) which was deemed to have commenced on 13 July. This provided that the persons holding appointments on 12 July as Chief Justice, Justice of Appeal, or Judge of the High Court should continue to hold such appointments, and it "re-established" the High Court of Fiji and the Court of Appeal. Clause 8(2) provided that the Chief Justice and the existing Judges of the High Court were not required to take the oath of allegiance and the judicial oath prescribed in the Schedule "if the person shall have taken such oaths within Fiji on a previous occasion".

Clause 13(2) contained the same provision for Justices of the Court of Appeal. The oath of allegiance and the judicial oath in the Schedule were not the same as those in the Schedule to the 1997 Constitution as they did not include statements that the Judge "will in all things uphold the Constitution". Clause 15(1) purported to make this Court the final Court of Appeal for "the Republic of Fiji" and clause 16(1) purported to repeal the Supreme Court Act 1998.

Gates J found, on the evidence before him, that on 29 May Ratu Mara had "stepped aside", that he had not resigned, and he was still the President of Fiji. The fourth declaration he made (referred to below) was framed on that basis. The fuller evidence before this Court has confirmed this finding as at 15 November, when Gates J gave judgment, but as previously stated, Ratu Mara resigned as President on 15 December.

The release of the hostages and the restoration of law and order were achieved as a result of the Muanikau Accord between the Commander and George Speight. The Speight group were to release the last of the hostages, evacuate the Parliament buildings and surrender their weapons, and in return they would receive immunity from criminal prosecution or civil proceedings. The Military later concluded that George Speight and some of his supporters had not surrendered all their weapons and they were arrested. At the present time they are awaiting trial on treason charges relating to the Government established under the 1997 Constitution, the Interim Military Government, and the Interim Civilian Government.

The High Court Proceedings

On 4 July Mr Prasad, a citizen of Fiji, who had not held any office or appointment

under the 1997 Constitution, filed an originating summons in the High Court at Lautoka seeking a Court ruling (declaration) that the 1997 Constitution was still in force as the supreme law of Fiji. The defendants were described as the Republic of Fiji and the Attorney-General (hereinafter the Interim Civilian Government). The summons and supporting affidavit were served on the Attorney-General's Chambers in Suva on 10 July. The proceedings came before Gates J at Lautoka on 14 July, a timetable was set and 23 August was fixed as the date for hearing. On 7 August the Interim Civilian Government filed a summons to strike out the proceedings on the ground that Mr Prasad had no legal right or standing to raise the issues in a court. On 23 August Gates J permitted Counsel representing Mr Prasad to amend the originating summons and then heard the application to strike out the proceedings and the originating summons.

Mr Prasad was represented by overseas counsel who addressed on all issues. Counsel for the Interim Civilian Government, from the Attorney-General's Chambers, addressed only on the question of legal standing. At the end of the hearing Gates J directed Counsel for the Interim Civilian Government to file written submissions within 14 days, and gave Mr Prasad leave to file written submissions in reply within a further 3 days. The Judge reserved his decision in both matters. On 15 November he delivered the judgment under appeal.

Gates J decided that Mr Prasad had standing to bring the proceedings, and while this decision was challenged in the notice of appeal, the point was abandoned in the submissions of the Interim Civilian Government. His Lordship held that the Speight coup had not succeeded (a finding not challenged on appeal) and went on to consider the legality of the Commander's actions in the light of the doctrine of necessity, as it applied in Constitutional

Law, referring to relevant decisions discussed later in this judgment. He concluded that while the Commander had acted in accordance with that doctrine to secure the safety of the State, he had no genuine desire to remove the 1997 Constitution, and no need to pass the decree abrogating it. As will be seen, we do not share his view of the Commander's purpose. Accordingly, the Judge held it was still in force and made the following declarations :

- "1. The attempted coup of May 19th was unsuccessful.
2. The declaration of the State of Emergency by the President Ratu Sir Kamisese Mara in the circumstances then facing the nation, though not strictly proclaimed within the terms of the Constitution, is hereby granted validity ab initio under the doctrine of necessity.
3. The 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.
4. The Parliament of Fiji consisting of the President, the Senate, and the House of Representatives, is still in being. Its incumbents on and prior to 19 May 2000 still hold office, that is Ratu Kamisese Mara, who had stepped aside, and who remains President as originally appointed by the Bose Levu Vakaturaga (Great Council of Chiefs); the Senators are still members of the Senate; the elected Members of Parliament are still members of the House of Representatives. The status quo is restored. Parliament should be summoned by the President at his discretion but as soon as practicable.
5. Meanwhile, owing to uncertainty over the status of the government, 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."

The Appeal Process

On 17 November the Interim Civilian Government filed a Notice of Appeal to this Court. On 1 December the hearing of the appeal was fixed for 19 February 2001 and directions were given for its prosecution.

The Interim Civilian Government, having staked everything before Gates J on the strike out application based on Mr Prasad's lack of standing, had not filed any affidavits, as directed, on the merits of Mr Prasad's claim that the Constitution of 1997 remained in force. Thus the Judge was left, at that stage, with the evidence for Mr Prasad and such notorious facts as were within the scope of judicial notice. However, subsequent interlocutory proceedings brought before the Judge affidavits of the Commander and of Mr Alipate Qetaki, the Attorney-General in the Interim Civilian Government, both sworn on 14 September. Very properly, Gates J decided to consider those affidavits.

The Judge's decision that the Constitution of 1997 remained in force, and this appeal, raise questions of great public importance for Fiji. It was necessary that the appeal be heard and determined as soon as possible. The Interim Civilian Government indicated at an early stage that it would seek leave to file further evidence. On 17 January Sir Maurice Casey, sitting as a single Judge under the Court of Appeal Act, gave it leave to adduce such

evidence, with leave to Mr Prasad to adduce further evidence in reply. A case of this importance could not properly be determined by this Court on inadequate and incomplete materials, especially when this may have been the result of procedural defaults caused by misguided tactical decisions taken by counsel for the Interim Civilian Government. Moreover, although judgment in the High Court had been reserved on 23 August, events continued to unfold directly relevant to the current legal status of the 1997 Constitution.

The parties freely availed themselves of this leave and a great mass of further evidence was filed. On 19 February, at the start of the hearing, the Interim Civilian Government obtained leave to file yet further evidence.

Nature of Events of 29 May 2000

The first question identified by Mr Blake, who appeared for the Interim Civilian Government, was whether on 29 May the Commander was acting to create a new legal order when he said he was abrogating the 1997 Constitution. His unchallenged evidence was that he advised the President at that time that in his opinion the 1997 Constitution did not provide a framework for resolving the crisis and should be abrogated.

His subsequent acts, evidenced by Interim Military Government Decrees Nos. 1 and 3 already referred to, make it perfectly clear that the Commander was attempting to abrogate the Constitution. Thereafter until 28 July, the Commander and the Interim Military Government he headed acted as if the 1997 Constitution had ceased to be the basic law of Fiji. Decrees made by the Interim Military Government provided that substantial parts of the

Constitution should remain in force, and that the holders of Constitutional offices and organs of Government, including the Courts (other than the Supreme Court), should continue to function. However, the Decrees provided that this should occur by force of the Decrees, and not by or under the 1997 Constitution.

By 28 July the Commander and the Interim Military Government had completed the transfer of executive authority to the Interim Civilian Government. The Decrees, and the transfer of power, were made under the new legal order the Commander was attempting to establish, and not under the 1997 Constitution.

The legal effect of his conduct is discussed later in this judgment, but we think it appropriate at this stage to undertake a study of the 1997 Constitution.

The Constitutional Position

A repeated theme in the Interim Civilian Government's affidavits is that there was a general perception amongst the indigenous Fijian community that the 1997 Constitution did not adequately protect their interests. The Commander suggested that "the 1997 Constitution was widely regarded as inadequately protecting indigenous rights, insufficiently protecting Fijian land and endorsing an electoral system having bizarre and unexpected results". He pointed out that the exploitation of those perceptions allowed such men as Speight to inflame their fears. By such exploitation, the "calculated destabilisation of Fiji society, loss of life, destruction of property and such other fundamentally repugnant actions of the Speight group" were made possible.

His view was that the violent acts of May 19 and the weeks that followed were committed largely by "very unsophisticated persons ... and the significance of entrenched safeguards and the meaning of same may well not have been clear to them and certainly Speight or persons of similar leaning would be astute not to cite such safeguards". The result, as the Interim Civilian Government submitted, was that "the actions of the Speight group had inflamed ethnic passions and were resulting in widespread disorder, misery, destruction of property and threats to personal security."

It was part of the Interim Civilian Government's case that, following the results of the May 1999 election, "there was rising concern amongst a substantial part of the electorate that the Government was ignoring the concerns of the indigenous Fijians and that the electoral engineering of the 1997 Constitution was responsible for an unbalanced outcome. There was particular concern about any interference with indigenous land rights that had been inadequately protected under the 1997 constitution". Counsel for Mr Prasad have contended that these concerns were not as widely held amongst the indigenous population as the Interim Civilian Government would have the Court believe.

The 1997 Constitution was the result of the report of the Fiji Constitution Review Commission under the chairmanship of Sir Paul Reeves. The Interim Civilian Government's evidence suggests that a significant proportion of the indigenous community appears to have been ignorant of the protection which that Constitution gave them. It is important, therefore, to consider the position of indigenous Fijians under the 1997 Constitution and previous Constitutions in order to see whether the fears referred to by the Commander have any foundation in fact.

When Fiji achieved independence in 1970, the Constitution given to the people of Fiji was the result of a lengthy consultation process with the leaders of the various communities at that time. Notable amongst those leaders was Ratu Mara. Pre-independence legislation protecting Fijian and Rotuman affairs and native land remained in force after independence but the 1970 Constitution entrenched their provisions so they could not be altered without a majority of three quarters of all the members of each House of Parliament instead of the normal requirement of a simple majority of those members present and voting. Any alteration of the constitutional provisions entrenching such Acts also required similar majorities. The Constitution also included the right of the Great Council of Chiefs and the Council of Rotuma to nominate senators in addition to those nominated by the Prime Minister and the Leader of the Opposition. Where any such amendment affected Fijian or Rotuman land, customs or customary rights, the majority in the Senate had to include at least three quarters of the nominees of the Great Council of Chiefs and the Council of Rotuma.

The 1990 Constitution addressed some of the suggested weaknesses or omissions in the provisions of the previous Constitution by measures specifically designed further to protect indigenous interests. Chapter II dealt exclusively with the protection of Fijian and Rotuman interests "by promoting and safeguarding (their) economic, social, educational, cultural, traditional and other interests" and required the Cabinet to act on such matters in consultation with the Great Council of Chiefs or the Council of Rotuma. It further strengthened the position of the Great Council of Chiefs by giving it the right to appoint the President and to designate the two people entitled to act in that office when necessary. It reserved the positions of Prime Minister, any acting Prime Minister and the Chairman of the Police Service Commission to Fijians; ensured that the President would have to consult with the Great Council of Chiefs and

the Council of Rotuma before nominating 25 of the 34 Senators and required that they were Fijian or Rotuman; excluded any right to challenge in the courts decisions of the Native Land Trust Board in relation to custom and Fijian ownership of land; re-established the largely defunct Fijian courts; changed the distribution of seats in Parliament to ensure an imbalance in favour of ethnic Fijians; and, by abolishing the previous national roll of electors, increased the likelihood of a majority in the House of Representatives being achieved by one ethnic group.

The 1990 Constitution provided that there should be a review not later than seven years from its enactment and in 1995 the Reeves Commission was appointed by the then President, Ratu Mara. The terms of reference required the Commission to ensure that the new arrangements would recognise, protect and guarantee the rights, paramountcy of interests and concerns of the indigenous Fijian and Rotuman people, guarantee protection and security for the land rights, fishing rights and resources of indigenous Fijians and Rotumans and recognise the Great Council of Chiefs. The Commission was also required to provide for affirmative action for the indigenous Fijian and Rotuman people as a group in order to bring about some parity between them and non Fijians particularly in the areas of commerce and business, professional and technical education and take full cognisance of traditional and customary laws in Fiji.

The terms of reference required that these protective provisions be coupled with the promotion of multi-ethnic and multi-cultural harmony, unity and co-operation. The Commission was also required to deal with the voting method for Parliamentary elections and the system of government. Originally it had been thought that the 1990 Constitution would

only need amendment but the wide terms of reference resulted in a new Constitution which, however, retained the main protective clauses of previous Constitutions.

The Reeves Commission received numerous written submissions, had consultations here and abroad and held meetings throughout Fiji to hear the views of as wide a range of people and organisations as possible. The evidence shows that the response was impressive. There are references to packed meetings, numerous submissions and the picture is of a general air of co-operation and expectation. The Commission heard 236 individual submissions and 633 from groups and organisations. It considered 163 written submissions and 38 research papers. It also conducted 25 consultations here and 79 overseas.

The Commission report and the Constitution that resulted from it received almost universal acclaim. It was passed unanimously in both Houses and was endorsed by the Great Council of Chiefs. The general consensus was referred to by the, then, Prime Minister, Sitiveni Rabuka, when moving the second reading of the Bill in the House. He stated the Constitution was "an expression of confidence and hope in our collective future".

In urging the support of all members of the House of Representatives for a "truly home grown" Constitution which reflected "the dreams and wishes of every section of society", he said:

"Let us not forget that what will give legitimacy to our Constitution is the principle that it has been developed with the free and full participation of everyone, including all of us here as elected representatives of the people and that it provides for a system of Parliamentary Government based on the consent of the people ...Rather than just focussing on removing those aspects of the 1990 Constitution that have

created and exacerbated divisions, misgivings and mistrust among our different ethnic communities, we have all agreed to develop it into a positive instrument of nation-building.” (Hansard, 23 June 1997, 4483)

That was the Constitution which Speight and his supporters sought to destroy in May last year because they suggested it did not adequately protect or take account of the rights of the Fijian people under the Coalition Government.

The Interim Civilian Government suggests two main causes for the perceived concern of the indigenous Fijian community. First, that the 1997 Constitution was responsible for the unbalanced outcome in the election and, second, that it weakened the protections under previous constitutions so that the new government under an Indo-Fijian Prime Minister could disregard and erode the rights of indigenous Fijians.

In his affidavit, the Prime Minister of the Interim Civilian Government identified “the perceived cause of the events of May 19th” as “the perception, widely held among indigenous Fijians, that the 1997 Constitution had weakened positive discrimination provisions, and other basic Fijian legal rights, and that taken with the Electoral Act it had saddled the Republic with an incomprehensible and unfair electoral system. The widespread perception of those defects in the 1997 Constitution and the role of that perception in the events of May 19th made inevitable the abrogation of the Constitution ...”

The Interim Civilian Government’s case on the first of the suggested causes is that the result arose from a failure by many of the Fijian voters to understand the complications of the alternative voting system. They adopted the view of Jonathan Fraenkel, a lecturer in Economic

History at the University of the South Pacific that, "in practice the system proved extraordinarily complex, the results remarkably ambiguous and its merits as a tool for promoting ethnic cooperation were highly questionable". Whilst we accept that such views may have been commonly held, the evidence before us clearly demonstrates that they were erroneous. In an earlier article published in the Australian Journal of Politics and History, Vol 46 (No 1) March 2000, Fraenkel analysed the voting figures and appears to have reached a different conclusion. Mr Blake did not dispute his analysis.

Prior to 1997, elections had all been conducted under the "first past the post" system. Under the new Constitution, the electoral provisions were based on the Australian preferential system of voting known as the alternative vote and, for the first time, voting was compulsory. In addition there had been a change in the arrangement and distribution of seats to provide for 46 communal seats and 25 open seats. 24 of the communal seats were for Fijian and Rotuman voters, 19 for Indians and 3 for the remaining groups. There were specific provisions for the Prime Minister to invite members of other parties to join the Cabinet after the election.

Following an extensive programme to explain the new voting system, the first elections under the new provisions were held in May 1999 and resulted in the People's Coalition led by Mahendra Chaudhry being returned with a total of 51 of the 71 seats – a majority increased by 3 when the Christian Democrats or Veitokani ni Lewenivanua Vakaristo (VLV) also joined the coalition. Within the coalition, the largest party was Mr Chaudhry's multi-ethnic Fiji Labour Party (FLP).

The figures supplied to the Court show that if only the first choice votes are taken and

treated as if the election had been held under the "first past the post" system, the result would have given a higher number of seats to the Soqosoqo ni Vakavulewa ni Taukei (SVT) (from 8 to 17) and reduced the seats of the FLP (from 37 to 34) but the People's Coalition would still have won 45 seats, giving it a comfortable majority which would have been increased by 2 more VLV seats. Even if the votes had been cast under a system of proportional representation the votes would have given a clear majority for a coalition which included the VLV. Whichever system had been used, the voting figures would have made the FLP the largest individual party by a substantial margin.

The Interim Civilian Government claimed there had been a large percentage of invalid votes in the election which had principally affected the indigenous Fijian vote. This is not borne out by the figures. The voting in the communal seats taken on a percentage basis, shows the highest number of invalid votes were cast by the Rotumans (14.69%) followed by the Indians (9.22%), Fijians (8.72%) and the General Electors (8.16%). In the open seats the invalid votes were in the same range at 8.36%. Clearly any effect from invalid votes was felt across all racial groups.

Major General Rabuka, in his speech quoted above, pointed out that the Alliance Government was defeated in 1977 not because the 1970 Constitution was inherently bad but because the Fijians were split. The number of Fijian parties in the 1999 election undoubtedly had an effect on the final result. Analysis of the results of that election shows most alternative votes were cast on ethnic lines but the majority of Fijians preferred to give that vote to the Fijian parties committed to the Peoples Coalition rather than to the SVT. There is little evidence to support the contention that the voters were confused by the system.

The second concern that the new Government was trying to erode the rights of the indigenous Fijians to their land is easily understood and equally easily exploited. 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. These are important and sensitive issues and, as the Commander pointed out, people like Speight, bent on the destruction of the legal order, relied on a lack of understanding amongst their followers of the extent and effect of the substantial safeguards entrenched in the 1997 Constitution.

Section 185 provides that any attempt to alter certain Acts relating to indigenous rights must be passed three times in each House and, whatever the vote, is deemed not to have been passed in the third reading in the Senate unless it is supported by the votes of at least 9 of the 14 Senators appointed on the recommendation of the Great Council of Chiefs. The Acts so entrenched are the Fijian Affairs Act, Fijian Development Fund Act, Native Lands Act, Native Land Trust Act, Rotuma Act, Rotuman Lands Act, Banaban Lands Act and Banaban Settlement Act. In addition to those safeguards, any amendment of the Agricultural Landlord and Tenant Act requires a two-thirds majority of all members of each House at its third reading. Any alteration of the Constitution requires special majorities and, by section 192, any alteration to the number of communal seats requires the support of a substantial majority of the members of the ethnic group affected. Section 192 (4) requires any attempt to remove or change the protective provisions of section 185, or of section 192 (4) itself, to have the additional support of two thirds of the Senators recommended by the Great Council of Chiefs.

Parliament is required to make provision for granting an equitable share of royalties to owners of land or customary fishing rights arising from extraction of minerals from the land or seabed. Although laws may not generally be made which favour one group over others, Parliament is also required to provide for the application of customary laws and for dispute resolution in accordance with traditional Fijian practices and must have regard for the customs, traditions, usages, values and aspirations of the Fijian and Rotuman peoples. In addition, the involvement of the Great Council of Chiefs in a number of constitutional functions is an added safeguard against any action that may prejudice the rights of the indigenous population.

We have referred to these provisions to demonstrate that any perceived attempt by the Government to change the law in relation to land or to indigenous rights by stealth was impossible under the 1997 Constitution and any suggestion that it needed to be replaced on that ground cannot be substantiated.

Jurisdiction of Court

Each of the members of the Court was appointed under or has had his appointment renewed under either the 1990 or 1997 Constitutions. Each of us has taken the oaths of office prescribed by one or other of those Constitutions. None of us has taken an oath of office under the Judicature Decree 2000 of the Interim Civilian Government. That Decree stated that nothing should affect our continuance in office as Judges of the Court of Appeal and it did not require us to take new oaths. The Interim Civilian Government has raised no difficulties about our travelling to Fiji to hear this case: it has provided administrative and security services.

What, then, is our position as Judges asked by the Interim Civilian Government to decide on this appeal whether the 1997 Constitution has been successfully abrogated? Has this Court the jurisdiction to decide whether a new regime, set up in defiance of the 1997 Constitution, has become legal and thus entitled to rule the country?

Although there has been a plethora of academic discussion on the topic, we have no hesitation in holding that the answer to these questions is in the affirmative. We base our view on the clear indication given by Lord Reid in Madzimbamuto v Lardner-Burke, [1969] 1 AC 645 to the effect that Courts, including those created by a written constitution, are authorised and required to decide when and if a revolutionary regime has become lawful. Lord Reid said at 723:

“ With regard to the question whether the usurping government can now be regarded as a lawful government much was said about de facto and de jure governments. Those are conceptions of international law and in their Lordships’ view they are quite inappropriate in dealing with the legal position of a usurper within the territory of which he has acquired control. But the position is quite different where a court sitting in a particular territory has to determine the status of a new régime which has usurped power and acquired control of that territory. It must decide. And it is not possible to decide that there are two lawful governments at the same time while each is seeking to prevail over the other.”

We resist the temptation to discuss the theoretical basis for exercising this supra-constitutional jurisdiction. It is sufficient to observe that such a jurisdiction has been exercised by Judges in other cases. We consider that not only is it appropriate for us to consider the seminal issues raised by this appeal, but that it is our duty as Judges of Fiji to do so.

The exercise of jurisdiction is rendered all the more sensible because the Interim Civilian Government, by appealing, has effectively invited this Court to decide whether the 1997 Constitution survives. By preserving the role and status of the Court, it has acknowledged that the Court has survived any attempted revolution which may have affected the legislative and executive branches of government.

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

The other option for the Court is to declare the usurpation invalid. Under this option, a revolutionary change to the legal order will be declared to have been ultimately unsuccessful. This result can occur even if the usurper had been acting under the doctrine of necessity - i.e. as a result of events which were so drastic as to call for the suspension of the Constitution and/or the imposition of martial law. Under this scenario, when the crisis is over, the Constitution emerges again.

Even when the doctrine of necessity does not apply, but there was a purported change in the legal order and an illegitimate overthrow of the Constitution, the new order may not ultimately be recognised as the legal government unless the usurper proves various matters

which we shall discuss later, including, notably, acceptance of the new regime by the general populace.

Doctrine of Necessity

The consequences for a country's legal system of an abrogation of a constitution and/or the usurpation of the constitution by self-proclaimed rulers, have received considerable attention in various parts of the Commonwealth where such events have occurred. Frequently, abrogation of a constitution has been the result of a coup accompanied by bloodshed and immense upheaval.

Many of the decisions cited were decided long after a change in the legal order had taken effect and at a time when the new order had become accepted by the people, perhaps reluctantly in some instances. This case is different because it is the only one where the purported rulers of a country seek through the court process an endorsement that they are in fact the legal (although not necessarily legitimate) government of the country.

Counsel for Mr Prasad submitted strongly that legal effect cannot be given to the Interim Civilian Government's actions under the principle of necessity where such actions would abrogate or change the 1997 Constitution. It is clear that the procedures under the 1997 Constitution for its amendment in Chapter 15 were never followed.

A good description of the necessity principle is found in Professor F.M. Brookfield's 'Waitangi & Indigenous Rights Revolution, Law and Legitimation (1999 Auckland University

Press) at p20:

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

The court's duty to uphold the legal order is qualified by other manifestations of the necessity principle, one of which, as recognized by the courts in some modern cases under written constitutions, has allowed temporary and strictly limited deviations from the constitution for the express purpose of safeguarding it or for preserving the rule of law."

Another formulation of the necessity doctrine is that of Haynes, P. in Mitchell v Director of Public Prosecutions [1986] LRC (Const) 35, 88 in the Court of Appeal of Grenada.

"I would lay down the requisite conditions to be that:

- (i) an imperative necessity must arise because of the existence of exceptional circumstances not provided for in the Constitution, for immediate action to be taken to protect or preserve some vital function to the State;*
- (ii) there must be no other course of action reasonably available;*
- (iii) any such action must be reasonably necessary in the interest of peace, order, and good government; but it must not do more than is necessary or legislate beyond that;*
- (iv) it must not impair the just rights of citizens under the Constitution;*
- (v) it must not be one the sole effect and intention of which is to consolidate or strengthen the revolution as such.*

It is for this court to pronounce on the validity (if so) of any unconstitutional action on the basis of necessity, after determining as questions of fact, whether or not the above conditions exist. But it is for the party requiring the Court to do so to ensure that proof of this is on the record.

Such validation will not be a once-for-all validation, so to speak, it will be a temporary one, being effective only during the existence of the necessity. If and when this ends, the right constitutional steps must be taken forthwith, that is, within a reasonable time."

Section 187 of the 1997 Constitution did provide for the President to proclaim a state of emergency 'acting on the advice of Cabinet'. Clearly, the President could not act under this section if almost all the members of the Cabinet were held hostages 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. Later on, as 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.

On the doctrine of necessity, Gates J in the Court below said:

"It is obvious therefore that the doctrine of necessity could come to aid Commodore Bainimarama in resolving the hostage crisis, imposing curfews, maintaining road blocks and ensuring law and order on the streets. Once the hostage crisis was resolved and all other law and order matters contained, if not entirely eradicated, the Constitution, previously temporarily on ice or suspended, would re-emerge as the supreme law demanding his support and that of the military to uphold it against any other usurpers. The doctrine could not be used to give sustenance to a new extra-constitutional regime. Nor could it provide a valid basis for abrogating the Constitution and replacing it with a Constitutional Review Committee and an interim civilian government. Necessity did not demand any of that."

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 had not been provided for in the written Constitution or where the emergency powers machinery in that Constitution was inadequate for the occasion. The extra-constitutional action authorised by

that doctrine is essentially of a temporary character and it ceases to apply once the crisis has passed.

Gates J held that the Commander had acted to preserve law and order to save the State from further destruction, to ensure the safe release of the hostages in Parliament and to restore normality, because the whole nation was on the brink of total chaos. He concluded therefore that the Commander had no genuine desire to remove the 1997 Constitution and there was thus no need to pass any Decrees purporting to abrogate the 1997 Constitution. This Court has had the benefit of a considerable body of evidence which was not before Gates J and it has also had the benefit of much fuller legal argument, particularly from the Interim Civilian Government.

On the basis of the further materials before this Court (including the Commander's affidavits) we have no hesitation in holding that Gates J was in error when he found that the Commander had "no genuine desire to remove the 1997 Constitution". We are satisfied in the light of the further material placed before us that the Commander, for the reasons he conveyed to the President at the time, did have a genuine desire to do just that. 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. Had the Commander chosen this path, his actions could have been validated by the doctrine of necessity. Instead, he chose a different path, that of constitutional abrogation. The doctrine of necessity does not authorise permanent changes to a written constitution, let alone its complete abrogation.

Was There A New Legal Order?

We consider that there was a purported overthrow of the Constitution and its replacement by the establishment, first, of military rule and, secondly, of the Interim Civilian Government. Whether what happened can be characterised as a 'revolution' or not is probably a matter of choice of words. We are attracted to the definition of 'revolution' in Brookfield (op. cit.) at 13:

"For the purposes of a constitutional theorist (though one with practical concerns as well), a revolution may be widely defined as the overthrow and replacement of any kind of legal order, or other constitutional change to it - whether or not brought about by violence (internally or externally directed) - which takes place contrary to any limitation or rule of change belonging to that legal order."

Not all revolutions are successful. We find that this one was not, for the reasons to be discussed later. Nor are all revolutions on the grand scale of the French Revolution or the Bolshevik Revolution in Russia. Nor are all revolutions "glorious", in the sense of ending the reign of a tyrant or replacing a repressive regime. Nor do all revolutions involve bloodshed.

In this case, there was a purported change in the legal order when the Commander decided to abrogate rather than suspend the Constitution on 29 May; he reinforced this change when, he later chose to instal the Interim Civilian Government which has purported to govern ever since. The Interim Civilian Government has clearly shown that it wishes to implement a new or significantly altered constitution by setting up a body to seek submissions on constitutional 'reform'.

Consequently, we cannot uphold the first submission on behalf of Mr Prasad to the effect that there was no need to look beyond the invalidity of the Commander's purported abrogation of the Constitution based on necessity. We must now go on to consider whether this attempted change in the legal order was successful.

Various formulations are given in the cases of what must be proved to validate a new legal order in place of the previous one. None of the authorities is binding on this Court. Some seem over-influenced by the writings of the Austrian jurist Hans Kelsen, whose theories on one view, might too readily reward a usurper. (See Das, 'Governments and Crisis Powers', Cornell International Law Journal, Winter 1994). Many of the authorities were decided before 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.

The starting-point for any consideration of authority on this point is the Privy Council decision in Madzimbamuto v Lardner-Burke (supra) which held as illegal the regime of Ian Smith in Southern Rhodesia set up under the 'Unilateral Declaration of Independence'. The majority decision of the Southern Rhodesian Appellate Court was reversed. Although its decision was given almost 3 years after Smith's usurpation of legal power and he was to remain in power for some 9 further years, the Privy Council considered that various formulations about the effect of an abrupt political change referred to in cases cited to it from Pakistan and Uganda did not apply. The British Government, acting for the lawful sovereign, was taking steps to regain control and "it is impossible to predict with certainty whether or not it will succeed" (ibid 724 per Lord Reid).

Lord Reid said at pp723-4:

" It is an historical fact that in many countries - and indeed in many countries which are or have been under British Sovereignty - there are now 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 régime became lawful.

A recent example occurs in Uganda v. Commissioner of Prisons, Ex parte Matovu [1966] E.A. 514. On February 22, 1966, the Prime Minister of Uganda issued a statement declaring that in the interests of national stability and public security and tranquillity he had taken over all powers of the Government of Uganda. He was completely successful, and the High Court had to consider the legal effect. In an elaborate judgment Sir Udo Udoma C.J. said:

"... our deliberate and considered view is that the 1966 Constitution is a legally valid constitution and the supreme law of Uganda; and that the 1962 Constitution having been abolished as a result of a victorious revolution in law does no longer exist nor does it now form part of the Laws of Uganda, it having been deprived of its de facto and de jure validity." (at 539)

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

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

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

In their Lordships' judgment that is the present position in Southern Rhodesia. The British Government acting for the lawful Sovereign is taking steps to regain

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

We now refer to some additional authorities:

i) In Vallabhaji v Controller of Taxes (11 August 1981, unreported, Court of Appeal of the Seychelles) a taxpayer claimed that he should not have been assessed for tax under decrees made by what he claimed had been an illegal regime. There had been a bloodless coup in the Seychelles in 1977 which had abrogated the Constitution. A year later, the usurping regime had issued decrees levying the tax of which the appellant complained. The Court held that the decrees were valid and enforceable: the extra-constitutional regime had acquired validity through the consent of or acceptance by the people. 'Acceptance, consent or its equivalent remains a touchstone' said the President of the Court, Sir Michael Hogan. Two quotations from this case will suffice.

(a) Mustafa, JA at p20:

"I am of the opinion that a coup Government which continues in office and existence must be viewed as a whole, and if it has become legitimate and valid, then such legitimacy relates back to its inception, that is, it becomes legitimate and valid ab initio. Similarly, if it does not acquire validity or legitimacy, it remains invalid and illegitimate, subject to savings for necessity. I do not think such a Government can be divided into legitimate and illegitimate portions, the dividing line in this instance being, according to Mr. Heald, the time when it established a constitution based on public consultation. I think that one has to accept a successful revolution as valid from its inception if it has remained in office for a sufficient period of time and has the consent and backing of the people, express or implied. On this basis, the coup Government has acquired legitimacy and validity and the decrees it enacted in 1977 and 1978 are valid and enforceable.

(b) Hogan, P at p14:

We have the advantage of not having to decide this case in mediis rebus [in the middle of the events] after an interval of some four years, during which the new revolutionary regime has enjoyed unchallenged authority and maintained stable and effective government in the Seychelles, with little or no interruption in the ordinary life of its citizens. But, even if I did not have the benefit of this hindsight I believe I would have come to the conclusion, from the smoothness and efficacy of the revolutionary transition that the new regime had, by the 28th June 1977, received such widespread and unqualified acceptance and consent that it was, already, a legal authority at that time. Even if I were wrong in this assessment, because, for example there had been insufficient time for the habit of obedience to become manifest, when a regime is firmly established and accepted as legitimate this legitimisation is extended back to cover legislation enacted by the regime from the inception of its context."

At another point, Hogan P said that fair elections probably provide the most convincing proof of acceptance of a regime but that obedience, when manifested, has also been recognised as a form of ratification. Then later:

"In 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" (Emphasis added.)

ii) Mitchell v Director of Public Prosecutions (supra), a decision of the Court of Appeal of Grenada.

In 1979, Maurice Bishop led a coup which overthrew the government established under the Constitution. He suspended the Constitution and took executive and legislative power, although the Queen remained Head of State and the Governor-General remained in office. On 19 October 1983, Bishop and some of his Ministers were killed. The head of the military assumed power. Six days later, armed forces of the United States and some Caribbean

states invaded Grenada and arrested the military leaders. On 31 October 1983, the Governor-General issued proclamations assuming executive power and declaring a state of emergency. About a year later, he brought back the 1973 Constitution. New elections followed and the legislature enacted a law which confirmed the validity of laws passed between March 1979 and November 1984 i.e. the time during which the Constitution had been suspended.

The leaders of the military coup were charged with murder but claimed that the High Court had no jurisdiction to try them since the Court had been created by the Bishop regime in a manner contrary to the 1973 Constitution. Further, that the Act validating the legislation of the Bishop regime was invalid because it effected a change to the Constitution by ordinary legislation and not by the means mandated by the Constitution.

In the High Court, the Chief Justice found that the Court was valid and had jurisdiction, though admittedly extra-constitutional. This ruling was on the basis of the doctrine of necessity. On appeal, Haynes, P and Peterkin JA held that the High Court was 'temporarily valid' on the grounds of necessity until the current government took steps to reinstate the Court contemplated by the 1973 Constitution. Liverpool JA concurred on the necessity point but held that the Bishop regime had become the 'legitimate and lawful government'.

Haynes, P formulated the 'efficacy' test in these words at p71-2:

"..... I would hold that for a revolutionary government to achieve de jure status, that is, to become internally a legal and legitimate government, the following conditions should exist:

a) the revolution was successful, in that the Government was firmly

established administratively, there being no other rival one; (b) its rule was effective, in that the people by and large were behaving in conformity with and obeying its mandates; (c) such conformity and obedience was due to popular acceptance and support and was not mere tacit submission to coercion or fear of force; and (d) it must not appear that the regime was oppressive and undemocratic.

In my view unless all four of these conditions exist no Court in a democratic country should pronounce a revolutionary regime legitimate. Every one of them (a), (b), (c) and (d) raises a question of fact.

I do not think these are unduly stringent conditions, (a) and (b) can exist without popular acceptance and support, because of submission to force or fear of it or weakness. This Court should not take an approach which might encourage power-seeking politicians or over-ambitious army officers to believe that; if by force of arms they can gain and retain governmental powers for a few years, their government will become consequentially lawful and legitimate. We must bear in mind the warning of Fieldsend, A.J.A, in Madzimbamuto v Lardner-Burke that "nothing can encourage instability more than for any revolutionary movement to know that if it succeeds in snatching power it will be entitled ipso facto to the complete support of the pre-existing judiciary in their judicial capacity. It may be a vain hope that the judgment of a court will deter a usurper, or have the effect of restoring legality, but for a court to be deterred by fear of failure is merely to acquiesce in illegality." Hence the importance of conditions (c) and (d).

A revolutionary regime should not be accorded legitimacy by this Court unless it is satisfied that, on the whole, the regime had the people behind it and with it. Legality should be achieved only if and when the people accept and approve for in them lies political sovereignty, and the Court so finds. This approval they may give ab initio or subsequently. Length of time might or might not be sufficient to infer it. It might be expressed or tacit approval. But it is that which should give legitimacy to a successful and effective revolutionary regime. The support of a real majority is sufficient. This could be shown by its majority vote at a general election or a referendum or a majority percentage at polls."

Later at 73, he said:

"I do not think this Court can properly act on a bare statement of fact or opinion of popular support, however credible and knowledgeable the source is and whatever is the basis of it. Proof of the fact by judicial notice may be admissible. But the weight to be given to it is another matter. I would hold that what is needed here is proof of particular facts or circumstances from which the court itself can infer popular support. In my view the proof here was insufficient."

- (iii) Mokotso v H M King Moshoeshoe II, [1989] LRC (Const.) 24, a 168-page judgment of Cullinan, CJ in the High Court of Lesotho.

Lesotho became independent in 1966 as a constitutional monarchy with a Westminster-style constitution. When the Prime Minister was defeated at the first general elections in 1970, he seized control, suspended the Constitution and assumed dictatorial powers. For the next 16 years, this extra-constitutional regime remained in power and was notorious for abuses of freedoms. In 1986, the military forces staged a coup as a result of which the King acting on the advice of the Military Council assumed legislative and executive authority. The Courts were to retain their jurisdiction.

The Court took 'judicial notice' of the 'notorious fact' that the 1970 coup had been successful. Such a finding seems hardly surprising given that this regime, however unlovely, had remained in place for 16 years. The Court then held that the government established by the 1986 coup was firmly established and functioning effectively. It relied on the affidavit of the Attorney-General that the Government had effective control. The Judge took 'judicial notice' of several matters i.e. a 'formidable body of legislation'; that the judiciary was functioning effectively; that the vast majority of the people were behaving in conformity with the Government's administration; and that peace and stability 'now reign'. The Judge then held that the 1986 revolution had been popular, noting the factors above and the jubilation in the streets which greeted news of the coup.

He said at p165 of the judgment, that the applicant did not "... adduce a scintilla of evidence to suggest that there was a general air of discontent".

Importantly, Cullinan CJ considered that the burden of proof of legality rests upon the new regime. We quote his comments at pp132-3 of the judgment which end with his formulation of the test for efficacy.

"... the burden of proof of legitimacy must always rest upon the new regime. No presumption of regularity can operate in the regime's favour: indeed there must be a presumption of irregularity, if I may put it that way. If then a revolutionary regime is unpopular or oppressive, it is likely that it will meet with initial resistance, perhaps even physical resistance, and the people will not conform. During any such period of resistance, of course, neither of the first two conditions formulated by Haynes P will then be satisfied. Ultimately, however, the situation must resolve itself, one way or the other. If the people ultimately acquiesce, then the new regime is entitled to recognition by the courts.

The situation is comparable even where there has been no initial rejection, but none the less the people's acquiescence in the matter is not a willing one. In the situations depicted, it would seem to be that the burden of proof of legitimacy must be all the greater. This perhaps is another way of saying that a longer period would be required for the habit of obedience to become manifest. None the less such considerations cannot affect the principle that once the court is satisfied as to the establishment of such habit then it must grant recognition to the new Government. I would accordingly express the test to be applied as follows:

A court may hold a revolutionary government to be lawful, and its legislation 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 government's administration is effective, in that the majority of the people are behaving, by and large, in conformity therewith."

The facts of Mokotso differ from the present case in many respects, particularly;

- (i) In Mokotso, there was no evidence of discontent with the new regime: rather the evidence pointed to wide public acceptance. Here, as we shall summarise later, there is evidence of general discontent with the present regime and with the purported abrogation of the 1997 constitution.
- (ii) International approval attended the overthrow of the 16 year rule of Chief Jonathan by the 1986 coup. On the evidence the same cannot be said of the reaction of the international community to the purported overthrow of the 1997 Constitution. Rather the opposite.

Mokotso is valuable but we consider that the Chief Justice's formulation of the efficacy test is too narrowly expressed. Haynes P's 'extra conditions' in Mitchell cited earlier have been criticised as unable to be 'reconciled with the facts of history' - see Ackermann, J.A. in Makenete v Lekhanya [1993] 3 LRC 13, 63. It may be that Haynes P went too far in his condition (d) (i.e. it must not appear that the regime was oppressive and undemocratic) because, as Brookfield opined (op. cit at 28), the condition goes to the legitimacy of a regime and not its legality. The distinction does not always appear to have been fully understood in some of the authorities cited to us.

- (iv) Makenete v Lekhanya [1993] 3 LRC 13 was a decision of the Lesotho Court of Appeal after the regime recognised as legal in Mokotso (supra) had itself been overthrown by the defence forces in 1990. The regime, whose birth was said in Mokotso to have been attended by great public rejoicing, had thus lasted a bare 4 years. The Court of Appeal of Lesotho upheld Cullinan CJ at first instance, finding that there had been another new legal order established by the

1990 regime which had satisfied the various tests of efficacy.

The following comments of Ackermann, JA at pp56-7 are of some guidance, particularly when the Court has to consider the length of time since a change took place in coming to a decision on a new regime's efficacy.

“As pointed out by Lord Reid in Madzimbamuto there are situations where (t) he law must take account of (the) fact that there are now regimes which are universally recognised as lawful but which derive their origins from revolutions or coups d'état'. The question is 'how or at what stage the new regime became lawful'. At the one end of the scale therefore there is the case of a regime, born out of a revolution or coup d'état, which has been entrenched for so long and has been accepted voluntarily as legitimate for so long by the people, that the court 'must take account of that fact'. Here, it seems to me, the facts have indeed become normatively prescriptive. At the other end of the scale there is the case of a regime whose usurpation of power and acquisition of control of the territory in question is so tenuous that it cannot be said that the revolution is successful or the administration's control firmly established or its rule effective where a court is bound to decide (as did Fieldsend AJA and the Privy Council in the Madzimbamuto case) that the usurper is not the lawful government. Here, too, the facts are normatively prescriptive. The problem, as Lord Reid pointed out, is that 'there may be a question how or at what stage the new regime became lawful'. This would relate to the middle ground between the two poles, where the task of adjudication becomes complex and difficult and where the totality of the circumstances must be anxiously scrutinised and where isolated facts must not be allowed to become 'prescriptive'. (emphasis added)

There have been cases where Courts have upheld the success of a usurpation on the grounds of control by the new regime and acceptance of control by the populace, despite the regime having some unattractive characteristics. Where Courts have held coups invalid, the new regime has often responded by a drastic curtailment of the power, independence and jurisdiction of the Courts. The resignation of Judges on conscience grounds in these situations opens the way for the usurpers to pack the Courts with sympathetic Judges. To its credit, the

Interim Civilian Government in this case has adopted a very responsible stance, as stated by Mr Blake at the end of the hearing. He said that in the event of the 1997 Constitution being upheld by the Courts, it would use its best endeavours to promote a return to constitutional legality.

Mr Robertson urged us to add to our formulation of the efficacy test an additional criterion to those of Haynes P, namely, whether the new regime acknowledges basic human rights as evidenced by international obligations assumed by the nation. We do not think it necessary to include a requirement that a usurping regime has to show adherence to international human rights treaties. 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. The extensive consultation undertaken by the Reeves Commission that preceded its adoption in Parliament provides strong evidence that the 1997 Constitution reflected the will of the great majority of the people of Fiji. It is permissible when assessing the test for efficacy in this context to take into account the evidence which suggests contentment with or acceptance of the 1997 Constitution by the population at large. Such acceptance militates against the proposition that there has been general acquiescence in its abrogation.

In formulating our understanding of the common law of Fiji on the efficacy question, we are conscious that we are sitting as Judges of a Fiji Court. Consequently, statements by Judges which may have been appropriate for other countries where a 'revolution' may have come about in a variety of ways need not be adopted here. As we have emphasised, this case

is unique in that it is the Interim Civilian Government itself that seeks a ruling on the legality of its regime, only some 7 months after it was established. Nor is Mr Prasad like the appellants in the Seychelles and Grenada cases who sought to manipulate the legal aftermath of a coup to avoid, in one case, payment of tax and, in the other, a trial for murder. By contrast, Mr Prasad is just an ordinary citizen seeking a return to normality.

We see the 'efficacy' test, in the context of the common law of Fiji, as follows;

- a) The burden of proof of efficacy lies on the de facto government seeking to establish that it is firmly in control of the country with the agreement (tacit or express) of the population as a whole.
- b) Such proof must be to a high civil standard because of the importance and seriousness of the claim.
- c) The overthrow of the Constitution must be successful in the sense that the de facto government is established administratively and there is no rival government.
- d) In considering whether a rival government exists, the enquiry is not limited to a rival wishing to eliminate the de facto government by force of arms. It is relevant in this case that the elected government is willing to resume power, should the Constitution be affirmed.

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

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

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

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

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

Evidence of Control and Acquiescence

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

In relation to the first requirement of control, the violence and lawlessness that ensued in the country following the events of May 19 took the country to the verge of anarchy. The Interim Military Government successfully undertook the task of restoring order. On 2 November, an attempt by elements of the army to take control was effectively put down. There is no evidence of an effective organised resistance or an attempt to displace the Interim Civilian Government by force. That does not mean that there is not a 'rival government'.

Affidavits filed by the former Prime Minister, Mahendra Chaudhry and former members of his Cabinet claim that the Peoples Coalition is ready and willing to resume office under the 1997 Constitution. Adi Kuini Speed in her affidavit said that the Coalition still has the support of least 44 out of the 71 seats in the House of Representatives and thus a comfortable majority, enough to form a Government. In addition to this, two proceedings have been instituted in the High Court by members of the Coalition challenging the abrogation of the 1997

Constitution.

The first was commenced on 8 August 2000 by Ratu Isireli Vuibau, the former Assistant Minister of Fijian Affairs, Mr Deo Narayan and Dr Gounder, both former members of Parliament who supported the People's Coalition Government. The defendants included Ratu Mara, the Commander, and Ratu Josefa Iloilo, the Interim President. Dr Gounder deposed that the plaintiffs brought the action also on behalf of other duly elected members of Parliament, Ministers, and Assistant Ministers whose names would be filed in Court. The second, of 13 October 2000, was by Anand Kumar Singh, the former Attorney-General. The defendants included Alipate Qetaki, the Interim Attorney-General, the Commander, and Ratu Josefa Iloilo. This is evidence that demonstrates that there is a rival government seeking through the Courts to assert its authority to govern.

So far as the second requirement, that of acquiescence, is concerned, counsel for the Interim Coalition Government relied on the continuing functioning of the administration of government throughout the attempted coup and its aftermath, for inferring acquiescence of the people in the Interim Civilian Government and the abrogation of the 1997 Constitution. We consider that this factor affords little proof of acquiescence.

In his affidavit of 14 September, the Commander said:

"....that the interim government headed by the Prime Minister Qarase has effective control and acceptance by the majority of Fiji's people and the administration has acquired legitimacy by such widespread acceptance by the people of Fiji."

We cannot properly act on a bare statement of belief by the Commander that there is widespread acceptance by the people, when there is a serious challenge to this claim in the evidence filed for Mr Prasad. What is required is proof of facts from which the Court can infer widespread public support for the Interim Civilian Government and acquiescence in the purported abrogation of the 1997 Constitution. The Interim Civilian Government adduced no such evidence. Its evidence came almost exclusively from persons holding official positions.

Five volumes of affidavits were filed on behalf of Mr Prasad to prove that people in Fiji by and large do not support the Interim Civilian Government. We do not intend to canvass this material in any great detail. It is summarised in Appendix A.

This evidence suggests that a significant proportion of the people of Fiji believe that the 1997 Constitution embodies and protects the ideals and aspirations of the different ethnic groups in Fiji. The material also indicates a widespread belief that there was no proper justification for its abrogation.

The Interim Civilian Government faced an almost impossible task in demonstrating real acquiescence on the part of the people when the evidence filed on behalf of Mr Prasad which is summarised in Appendix B, shows that emergency legislation remains in force, and has been used to inhibit public expression of dissent. However, it should be noted that the press appears to be free to publish views opposing the Interim Civilian Government.

A Human Rights delegation sponsored by the Commonwealth Human Rights Initiative visited Fiji between 27 August and 5 September 2000 and consulted with more than 25 civil

society organisations and community groups in Suva, Nadi and Lautoka, regional areas and Vanua Levu. They concluded at page 7 of their report:

“After consulting civil society organisations, in particular civil society groups who represented sections of the indigenous Fijian community, it became clear that there is little public support for the military backed interim administration”

The Courts have also recognised the continued existence of the 1997 Constitution. Between 23 August when Gates J heard the case and 15 November 2000 when he delivered his decision, four judgments were given by Judges of the High Court which proceeded on the basis that the 1997 Constitution remained in force (*see Prakash v Native Land Trust Board, B.R. Kwon v Suva City Council, Singh v The State and Doyle v Doyle.*)

Conclusions

In the light of the large volume of additional material put before the Court, this appeal became a rehearing, to be decided on the current situation. The burden of proving that the 1997 Constitution had been superseded lay on the Interim Civilian Government, and the standard of proof is a high one, having regard to the great public importance of the issues involved. Mr Blake accepted that he had to satisfy the Court that the citizens of Fiji truly acquiesce in the new constitutional arrangements and the Interim Civilian Government, in order to justify the conclusion that it is now the legally valid government. The affidavits filed on its behalf were directed at showing that it is in full control and that all branches of government are working normally. They make no reference directly to acquiescence, and it was left to the Court to decide what conclusions should be drawn from them on that subject.

Undoubtedly most people will have noticed little difference between this and the former constitutional regime in many aspects of their daily lives which they carry on as before, but such 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. The affidavits produced on behalf of Mr Prasad and summarised in the preceding section demonstrate that substantial sections of the community do not accept the legitimacy of the present government or acquiesce in it. It should also be remembered that the elected government has said it will await the outcome of this appeal before taking any further steps.

In the absence of any convincing evidence of real acquiescence, we must hold that the 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. The purported abrogation of the 1997 Constitution has not been justified and it remains in place. We make declarations to this effect and of the current status of Parliament and the President. But we are not prepared to adopt all the declarations made by Gates J; some are inappropriate while others have been overtaken by events.

Legality of Intervening Acts

Our conclusion that the 1997 Constitution remained in force throughout raises the question of the extent to which the decrees, executive acts and decisions of the administrations since 19 May 2000 are to be recognised as valid. This point was discussed in the Privy Council in Madzimbamuto v Lardner-Burke [1969] 1 AC 645, but the majority

found it unnecessary to decide the question. At p726 Lord Reid referred to decisions of the Supreme Court of the United States dealing with the situation after the American Civil War, in the former Confederate States and he cited Horn v Lockhart (1873) 17 Wallace 570, 580 (84 US), where the Court said:

" We admit that the acts of the several States in their individual capacities, and of their different departments of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary states touching these and kindred subjects, where they were not hostile in their purpose or mode of enforcement to the authority of the National Government, and did not impair the rights of citizens under the Constitution."

In Madzimbamuto Lord Pearce said at p732:

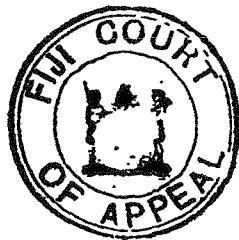
" I accept the existence of the principle that acts done by those actually in control without lawful validity may be recognised as valid or acted upon by the courts, with certain limitations namely (a) so far as they are directed to and reasonably required for ordinary orderly running of the State, and (b) so far as they do not impair the rights of citizens under the lawful Constitution, and (c) so far as they are not intended to and do not in fact directly help the usurpation ..."

We respectfully adopt this statement as an expression of the law applicable to Fiji.

Result

1. The Court makes the following declarations in lieu of those made in the High Court:

- (i) The 1997 Constitution remains the supreme law of the Republic of The Fiji Islands and has not been abrogated.
 - (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.
2. The appeal is otherwise dismissed.
3. The respondent will have costs of Fifty thousand dollars (\$50,000) against the appellants to cover the appeal and interlocutory applications. In addition the respondent will have the cost of printing and copying the affidavits filed on his behalf, and other reasonable disbursements. The appellants will also pay the reasonable accommodation and travel expenses of respondent's counsel (limited to business class air fares), the amounts of these expenses and disbursements to be fixed by the Registrar if the parties cannot agree.



M. Casey

.....
 Sir Maurice Casey
Presiding Judge

Ian Barker

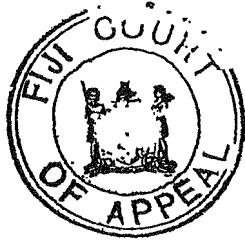
.....
 Sir Ian Barker
Justice of Appeal

Mari Kapi

.....
 Sir Mari Kapi
Justice of Appeal

Gordon Ward

.....
Justice Gordon Ward
Justice of Appeal



K.R. Handley
.....
Justice K.R. Handley
Justice of Appeal

Solicitors:

Office of the Attorney General, Suva for the Appellants
Messrs S.B. Patel & Co., Lautoka for the Respondent

APPENDIX A

ORGANISATIONS WHOSE OFFICERS GAVE AFFIDAVITS

- (1) Fiji Trades Union Congress representing 37 affiliated trade unions in Fiji. (affidavit of Felix Anthony)
- (2) Fiji Public Service Association representing all civil servants and all workers in statutory authorities other than teachers and nurses. (affidavit of Rajeshwar Singh)
- (3) Interfaith Search – a group that has been seeking since the 1987 coups to build understanding among members of different religious groups. (affidavit of Tessa Mackenzie)
- (4) Shree Sanatan Dharam Pratinidhi Sabha – a religious group which represents a great majority of Hindu Indo-Fijians with a total membership of 200,000. (affidavit of Harish Sharma)
- (5) Fiji Young Lawyers Association – a lawyers professional group that upholds human rights and the rule of law under the 1997 Constitution. (affidavit of Prem Lata Narayan)
- (6) Then India Sanmarga Ikyo Sangam, a socio - cultural religious and educational society with almost 100,000 members. (affidavit of Dorsami Naidu)
- (7) Fiji Human Rights Group, a non-governmental organisation for promoting human rights. (affidavit of Roy Krishna)

- (8) Fiji Law Society (affidavit of Giyannendra Prasad a member of its Council, and Deputy Speaker in the Parliament following the 1999 election)

- (9) Fiji Women's Crisis Centre (affidavit of Edwina Kotoisuva)

- (10) Fiji First Movement (affidavit of Millis Beddoes)

- (11) NGO Coalition of Human Rights which represents non-governmental organisations (affidavit of Akuila Yabaki)

- (12) Citizens Constitutional Forum formed in 1993 to bring together people from all sectors of society to find solutions to Fiji's political and ethnic problems (affidavits of Akuila Yabaki and Jone Dakuvula)

- (13) Fiji Women's Rights Movement, a multi-ethnic non-governmental organisation, dedicated to promoting democracy, good governance and human rights. (affidavit of Gina Houng Lee).

APPENDIX B

EVIDENCE OF EFFECT OF EMERGENCY REGULATIONS

(1) **Affidavit of Tupeni Baba (9/2/01)**

Para 15 Large meetings have been made impossible because of the current emergency regulations.

(2) **Affidavit of Felix Anthony (8/2/01)**

Para 19 There are no public protests ... because the Fiji Trade Union Congress and its members are constrained by the internal security decree which bans public gatherings and protests.

(3) **Affidavit of Edwina Kotoisuva (10/2/01)**

Para 12 The Fiji Women's Crisis Centre was granted a permit to hold a peace rally on November 26 2000. The rally was organised to provide an opportunity to discuss peace and non-violence issues in our communities and promote and encourage the same. Despite being publicised as a non-political rally, the permit was revoked by the Interim Minister for Home Affairs, Ratu Talemo, less than 48 hours before the rally was to be held.

Para 30 The Interim Administration has refused to allow any means by which civil society and the general public can meet to demonstrate their opposition to this administration.

Annexure J The Public Service Commission chose to view the Blue Day Campaign (the public were encouraged to wear blue to show their support for a return to parliamentary democracy) as deliberate opposition against the Interim Administration and issued a statement that all civil servants were not allowed to show their support for the campaign by wearing blue.

(4) Affidavit of Gina Houng Lee (11/2/01)

Also refers to the withdrawal of the permit for the peace rally on 26 November 2000.

(5) Affidavit of Akuila Yabaki (12/2/01)

Also refers to the withdrawal of the permit for the peace rally on 26 November 2000.

(6) Affidavit of Harish Sharma (10/2/01)

Para 19 "... The Emergency Decree restricts our ability to peacefully demonstrate our opposition and non-acceptance to the Interim Administration by the holding of public meetings, marches or protest in any other manner."

(7) Affidavit of Prem Narayan (8/2/01)

Para 5 The Fiji Young Lawyers Association has not been able to conduct a regular meeting because the Decree allows the District Officer or a police officer or a member of the armed forces to disperse any meeting, procession or assembly. Despite three attempts to call meetings I have not been able to secure a quorum as the members fear for their safety.

(8) Affidavit of Millis Beddoes (11/2/01)

Para 3 I was questioned for two and a half hours in custody concerning my request to citizens of Fiji to stay at home on 19th February 2001 so as to register the non-acceptance of the Interim Administration, I am now awaiting criminal charges to be laid under sections 15, 16 and 17 of the Public Order Act.

(9) Affidavit of Gina Houng Lee (11/2/01)

Para 17 "We are unable to express our dissent through public meetings, assemblies or protest marches."

(10) Affidavit of Akuila Yabaki (12/2/01)

Para 20 The Citizens Constitutional Forum also had some success in its campaigns through the local Radio Fiji and FM96 on the 1997 Constitution but this has been stopped at Radio Fiji (the Government owned station) because it was said to be political.

(See also Appendix G 15 December 2000)

Para 20 and Para 32 We are unable to publicly demonstrate through marches and rallies our public support because of the oppressive and discriminatory exercise of police powers.