Courts and Constitutional Usurpers Some Lessons from Fiji

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Much concern and disappointment has been expressed by jurists and human rights campaigners over the inaction of national judiciaries in reversing the effects of coups d'état and other acts which result in the unconstitutional overthrow of democratically constituted governments. Against this backdrop, the decisive steps taken by the superior courts of Fiji to nullify the attempted destabilisation of that country's elected government in May 2000 was a trail-blazing development. The author analyses the jurisprudence in this area and explains the implications of the Fijian judgments.

Les juristes et les défenseurs des droits de la personne ont clamé haut et fort leurs inquiétudes et leur déception face à l'inaction des corps judiciaires nationaux pour annuler les effets de coups d'état et d'autres actes qui ont pour résultat de renverser des gouvernements constitués démocratiquement. Sur cette toile de fond, les mesures énergiques prises par les tribunaux supérieurs des îles Fidji pour annuler la tentative de destabilisation du gouvernement élu de ce pays en mai 2000 se démarquent comme mesures tout à fait d'avant-garde. L'auteur analyse la jurisprudence dans ce domaine et explique les incidences des décisions des tribunaux fidjiens.
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Introduction

The impotence of national courts in the face of unconstitutional overthrows of governments has been the subject of long running debate, especially in the Commonwealth. This association of independent states - the largest in the world after the United Nations - has witnessed more than its fair share of coups d'état in recent years and has, from time to time, been the focus of international concern on matters of human rights and the rule of law. Given that the Commonwealth accounts for over a quarter of the world’s population, encompasses all major religious, ethnic and language groups and is spread over a large number of geographic regions, the high incidence of military and other unconstitutional regimes among its member states does indeed raise troubling questions.

Initiatives to tackle this problem on a pan-Commonwealth basis have, historically, been thin on the ground. The early 1990s did, however, signal a turning point, with the adoption by the Commonwealth Heads

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1. Not all instances of usurpation of state power are unlawful, or even illegitimate. There are, clearly, situations where an extra-legal change of government would be justified: e.g. where the change is aimed at toppling an oppressive regime which is so deeply and firmly entrenched in power that any means of democratic change is, for all practical purposes, impossible. An example under this category would be the government headed by President Ferdinand Marcos in the Philippines, which was toppled by a “people power” revolution in 1986.
2. According to a recent study, one-third of all Commonwealth countries have experienced at least one unconstitutional overthrow of government during the past 30 years, see John Hatchard and Tunde I. Ogowowo, Tackling the Unconstitutional Overthrow of Democracies: Emerging Trends in the Commonwealth (London: Commonwealth Secretariat, 2003) at 7.
of Government of the ‘Harare Declaration’ which, among other things, stressed “democracy, democratic processes and institutions..., the rule of law and independence of the judiciary, just and honest government [and] human rights” as fundamental principles binding on all member states. Since then, there have been some efforts to isolate and condemn governments that have come to power through unconstitutional means, but the efficacy of those efforts remains highly contentious. There has also been a good deal of ambivalence on the part of courts within Commonwealth countries towards the issue of coups d’état as the jurisprudence from countries such as Pakistan, noted below, indicate.

For all the oft-repeated judicial rhetoric about the sanctity of representative government and the rule of law, by and large, the traditional response of the courts has been to acquiesce in usurpations of power, usually with recourse to the Kelsenian doctrine of revolutionary legality. Although the reasons for such acquiescence are not far to seek — they are, plainly, rooted in the compulsions of realpolitik — the practice has engendered a high degree of scepticism about the ability of courts to act as a bulwark against the subversion of duly constituted governments.

Against this rather gloomy background, the approach adopted by the superior courts of Fiji in their response to the legal challenges to the overthrow, in May 2000, of that country’s elected government must be seen as blazing a new and refreshing trail. These courts ruled, in effect, that the military government which had assumed office following the coup lacked legal legitimacy and that the democratic Constitution which that government had purported to abrogate remained in force. The judgments have been hailed as “an important landmark in the history of the common

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4. Ibid. at para. 6.
5. For example, the suspensions of Pakistan, Fiji and Zimbabwe from membership of the Commonwealth in 1999, 2000 and 2002, respectively.
7. The two main cases are: Prasad v Republic of Fiji & Anor, [2001] N.Z.A.R. 21 (judgment of the High Court of Lautoka dated 15 Nov. 2000); Republic of Fiji & Anor v Prasad, [2001] N.Z.A.R. 385 (judgment of the Fiji Court of Appeal, delivered on 1 Mar. 2001). In addition, important issues of a similar nature were raised, and answered, in at least two other cases: Jokapeci Koroi and Ors v The Commissioner of Inland Revenue and Attorney-General and Republic of Fiji, [2003] N.Z.A.R. 18 [Jokapeci] (judgment of the High Court of Fiji dated 24 Aug. 2001, which turned on the validity of a decree issued by the usurper government contrary to the provisions of the pre-coup Constitution) and Jokapeci Koroi and Ors v Aseusa Ravuva & Ors. (unreported judgment dated 24 Aug. 2001, in which the High Court ruled that the caretaker government had no power to appoint a Commission to reconsider the Constitution of Fiji).
law,"8 heralding as they do a move away from the hitherto passive acceptance by the courts of the legality of usurper regimes which had made themselves effective. In a broader context, they may also be seen as a contribution to the ongoing global efforts to make the right to democratic governance an intrinsic component of international human rights law.9 More significantly, the Fijian developments represent a rare example of the courts actually succeeding, however imperfectly, in thwarting the designs of a usurper regime and restoring, in substantial measure, the sanctity of the pre-coup legal order. Viewed through the prism of the ongoing process of transition — from conflict to peace and democracy — the Prasad and related judgments represent a significant contribution by the judiciary to “the reversal of the delegitimization of domestic law and of legal institutions that occurred during the conflict.”10

The judgments are, therefore, clearly as welcome as they are important, not least for the relatively strong symbolic message they send out in an area of the law which has all too often been characterised by fudges, compromises and messy rationalisations.11 But do they provide a reliable and principled legal basis for dealing with future cases involving the unconstitutional overthrow of governments? Are they as revolutionary in terms of their practical potential impact as has been claimed by some of the commentators? To a large extent, they do and they are, however, before an attempt is made to justify these opinions by analysing the effects of the judgments, it would be useful to look at the conceptual issues which underpin judicial approaches in this rather murky area of law and politics.

I. Judicial dilemmas in coups d'état

That judiciaries are usually called upon to play an important, often crucial, role in the immediate aftermath of an unconstitutional usurpation of power is undeniable. Equally undeniable is the fact that both judges, as individuals, and the judiciary, as an institution, are subjected by such events to severe

11 In fairness to the judges, it needs to be conceded that “[t]he legal and moral issues involved in coups and revolutions are complex,” as one leading academic expert in this area recently reminded us: see J. M. Brookfield, Review of Tackling the Unconstitutional Overthrow of Democracies [2004] P.L. 687 at 688.
pressures which demand of them a high degree of personal and institutional strength. Given that the judicial branch of government possesses the power of neither the purse nor the sword, and given that judges, like other human beings, are usually loath to jeopardise their careers and their privileges in what may turn out to be a prolonged, and unwinnable, tussle with the usurpers and the considerable powers at their disposal, what often ensues is a Faustian bargain between the judges and the new rulers. This bargain usually involves the judges upholding the validity of the usurper regime albeit with some conditions attached, and the usurpers agreeing to allow the judges undisturbed enjoyment of their positions and privileges. But it must be noted that this bargain is not always the result of pure self-interest on the part of the judges: occasionally, it is motivated by a genuine desire on their part to stave off greater damage to the judiciary as a whole. Where the bargain was induced solely by blandishments offered by the usurpers, it has, rightly, been seen as little short of judicial corruption. As the authors of a recent study on the subject noted, "[w]hilst it is certainly true that a successfully executed coup presents the political system with a fait accompli and it would therefore be unrealistic to expect every segment of society not to "collaborate" through passivity, in the case of judges that enter into this implicit bargain their collaboration is active, not passive, and their validating actions contribute in no small measure to the legitimisation of coups."  

There are, indeed, situations where the pressures on the judiciary may be far from overwhelming, and where the judges may enjoy some room for manoeuvre vis-à-vis the usurpers and their actions. In such circumstances, leaving aside considerations of personal courage, are there any principles or policy considerations which should require the judges to act in one way rather than another? Adherents of liberalism have argued that the judges have a duty to save, rather than acquiesce in the destruction of, the constitutional order whose operation is disrupted by the actions of the usurpers. This proposition is grounded partly on notions of democratic ideals – what one writer has called "the internal morality of democracy" – and partly on grounds of constitutional foundationalism, i.e. the need to respect the sanctity of constitutions and settled constitutional orders which have been duly established. A constitution is, after all, nothing short of

12. Such as a requirement that the usurpers will seek a democratic mandate from the people within a stipulated time.
13. Such as a real possibility of the usurpers emasculating the judiciary altogether, for example by replacing the ordinary courts with military tribunals.
"an enduring but evolving statement of general values"¹⁶ which needs to be afforded the strongest protection from dissipation under pressure.

The defence of human rights also provides an important rationale for judicial activism in this context. In recent years courts at both international and domestic levels have put increasing emphasis on the paramount need for human rights considerations to be taken into account while judging the actions of governments, including emergency regimes.¹⁷ Unfortunately, the Fijian judges, for all their courage, appear to have showed an insufficient appreciation of this aspect of the matter, which is far from satisfactory, as will be explained below.

In addition, the role of law in communities in transition may also be significant. In what is often referred to as "paradigmatic" transition, i.e. transition from violent conflict to peace and democracy,¹⁸ law can play a mediating and moderating role, given its inherent characteristics of neutrality and legitimacy. As Bell, Campbell and Ni Aolain have pointed out, this is particularly true of international law which can, among other things, "buttress the autonomy of key legal norms such as the right to life, so as to affect how the state ... can conduct the conflict."¹⁹ Similarly, domestic law, when enforced by a robust and independent judiciary, can perform an equally beneficial role, as the events in Fiji have demonstrated. Indeed, it is often the case, especially in conflict situations where political control is exercised by a regime that is either hostile to, or dismissive of, measures of external scrutiny, the only remaining avenue of possible redress is domestic law and intervention by the domestic courts. The Fijian experience, it is submitted, offers a valuable object lesson in such transitional discourse.

II. Judicial responses: defensive activism

The central issue in any coup related litigation turns on the justification for what may be called "defensive judicial activism", that is to say, judicial activism which is aimed at defending – i.e. saving, preserving or reclaiming – the constitutional order and the constitutional values which are at risk of extinction by the usurpers. The justification begs such questions as: (i) to what extent can judges insist on being the custodians of the constitutional order under which they were appointed?; and (ii) how legitimate would be their claims to go behind (or to ignore) any new constitutional or

¹⁶ Donald R. Wright, "The Role of the Judiciary: From Marbury to Anderson" (1972) 60 Cal. L. Rev. 1262 at 1268.
¹⁷ See, e.g., the observations of Haynes P. in Mitchel & Others v Director of Public Prosecutions & Another, [1986] L.R.C. (Cont.) 35 [Mitchell].
¹⁸ See Bell, et al., supra note 10 at 310.
¹⁹ ibid at 311
other dispensation that the usurpers may have established or may seek to establish? The defence of democracy, it is submitted, provides a strong rationale for judicial activism in such circumstances.

This rationale has been recognised by a number of writers, and it has also received a measure of judicial approval over the years. Before those views are examined, it may be useful to make a few general observations on the nature of the judicial function. It is now widely accepted that judges are, by virtue of both their training and the nature of the office they occupy, eminently suited to act as custodians of constitutional values in societies governed by the rule of law. They are unlikely to be swayed by the prevailing political winds in the way that other actors in a democracy often are, and they are therefore more able to take a detached and dispassionate view of the relative merits of the highly charged arguments which dominate competitive politics. Little wonder that the notion of constitutionalism and judicial review has become a dominant characteristic of post-war polities, especially in societies governed by written constitutions and bills of rights.

Quite clearly, judicial review is not without its dangers. If used indiscriminately or irresponsibly, it runs the risk of substituting judicial dictatorship for democratic decision making. However, the use of judicial review in defence of democracy and the rule of law is entirely justifiable. The legal philosopher John Hart Ely has argued, for example, that judges should aggressively review laws and actions for their compliance with such pre-conditions for the operation of democracy as: (a) the rule of law; (b) formal access to democratic processes; and (c) adequate representation. In his opinion, judicial review is justified when there is a "[systemic] malfunctioning" of what he calls the "political market". Although Ely’s observations were made in the context of a "normal" society, its relevance to societies where the "political market" has been disrupted by a coup d’état or other revolutionary action can hardly be denied; if anything, defensive judicial review assumes an even greater justification and urgency in the latter situation.

21. See e.g. Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Cambridge: Harvard University Press, 2004), at 1-2. Hirschl, incidentally, is rather sceptical of the benefits of this phenomenon. A fervent advocate of constitutionalisation and judicial review, on the other hand, is Ronald Dworkin whose enthusiasm for these concepts owes much to his abhorrence of the tyranny of majority rule in democracies governed by parliamentary sovereignty, see e.g. Ronald Dworkin, A Bill of Rights for Britain (London: Chatto and Windus, 1990).
23. Ibid. at 103.
No objection can be advanced against such activism on the grounds that the judges are, by ordering a return to the pre-coup constitutional order, engaging in any form of "value determination", because the only value (if it can be so called) which they are expressing is the pre-eminence of the Constitution – a value whose importance to democracy and the rule of law is unquestionable. Nor can the court be said to be performing a policy function of the kind that constitutional courts are often criticised for attempting to perform, in the sense of taking positions on controversial questions of national policy. At best, defensive judicial review involves the judges in protecting "rights that are in some sense basic or fundamental," which is a function that is entirely consistent with the criterion of right or justice often used in appraising the role of a constitutional court.

Defensive judicial activism can be justified on another benevolent principle, viz. the need for the stakes of political battles to be kept as low as possible in the interests of the well-being of a democracy. This principle owes its origin to the political scientist Adam Przeworski, but it has been developed and applied in relation to judicial review by William Eskridge of the Yale Law School, who has argued eloquently in favour of "pluralism-facilitating" judicial review. Eskridge's central thesis is that:

judges should enforce [the rules of judicial review], regardless of the desirability of the outcomes reached outside the prescribed process. Because strict enforcement invests the political process with greater neutrality, it contributes to lower stakes.

The need to lower the stakes, Eskridge argues, is particularly important in relation to political tussles involving what Clifford Geertz has called "primordial loyalties", viz. a person's race, ethnicity, religion or sexuality, because they are not usually susceptible to resolution through calm deliberation. "Where the stakes of politics get high," says Eskridge, "especially when they involve primordial loyalties, warring groups are more likely to engage in games of chicken, where the goal of each group

25. Ibid at 291
26. Ibid at 281
27. In Professor Eskridge's view, judges can, among other things, encourage the widest possible participation in a democracy by ensuring that the neutral rules of an open political system are vigorously enforced; see William N. Eskridge, Jr., "Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics" (2005) 114 Yale L.J. 1279, online: Yale L.J. <www.yalelawjournal.org/symposium/documents/Eskridge.pdf>.
28. Ibid at 123.
becomes imposing harm or status denigration on the other.\textsuperscript{30} Since clashes involving primordial loyalties lie at the root of many of the \textit{coups d'\'etat}, including the Fijian one under discussion, the importance of defensive judicial review cannot be overstated.

Yet it must also be asked, where a judge engages in defensive judicial review of the kind being discussed, does he or she import a personal conception of morality into the decision making process? Ronald Dworkin has famously suggested that judges in constitutional cases cannot avoid making moral value choices.\textsuperscript{31} His view has been attacked by a number of writers on the grounds, \textit{inter alia}, that it would lead to a systematic bias in judicial choice of fundamental values,\textsuperscript{32} and that it would make judicial decisions no better than political ones.\textsuperscript{33} This is certainly true of decisions on socially or culturally divisive issues such as abortion or homosexual rights. But where a constitutional court decrees the reinstatement of a legal order abrogated by a \textit{coup d'\'etat}, its decision stands on a different footing. The judges do not make any moral choice about the law being reinstated, viz. the duly established constitution; they merely reaffirm its enduring nature.

Put another way, by expressing their preference for the continuation of the basic values enshrined in the pre-coup constitution rather than for their abrogation, the judges are performing the function of a "process-enforcing referee"\textsuperscript{34} – a function that is entirely appropriate in a society governed by the rule of law. Their action becomes all the more justifiable if regard is had to the fact that the pre-coup constitution carries the imprimatur – as it clearly did in the case of the 1997 Constitution of Fiji\textsuperscript{35} – of a democratic mandate. Therefore, far from either usurping the functions of another body, or acting outside their legitimate domain, the judges are simply acting as neutral enforcers of the democratic wishes of the people.

Even conservative commentators have conceded that it is quite consistent with the judicial function for judges to express a moral preference, as long as that preference accords with that of the law-maker. In the words of Robert Bork, "[i]n a constitutional democracy, the moral content of the law must be given by the morality of the framer or the legislator, never by the morality of the judge."\textsuperscript{36} When, therefore, a constitutional court rules

\textsuperscript{30} Eskridge, \textit{supra} note 27 at 121.
\textsuperscript{33} Ran Hirschl, \textit{Towards Jurislocracy}; \textit{supra} note 21 at 188.
\textsuperscript{34} Eskridge, \textit{supra} note 27.
\textsuperscript{35} This Constitution, as will be explained later, was established after a lengthy and extensive process of public consultation, and was approved unanimously by the Fijian Parliament.
– as the Fijian courts did – that the values and the provisions of the pre-coup constitution prevail over any norms that are sought to be laid down by the usurpers, that ruling is entirely sustainable.

In addition, when a court is called upon to review the validity of a purported constitutional abrogation, it usually does so as a court which owes its own existence to that very Constitution. It is entirely proper, therefore, for the court to do everything within its power to defend and protect the constitutional order under which it was created. This important principle was explained with great clarity by Justice Fieldsend of the Rhodesian Supreme Court in the landmark case of *Madzimbamuto v. Lardner-Burke*:

It is not part of a court’s legal function to repudiate the legal and constitutional system under which it was appointed, or to involve itself in the construction or justification of a new and different foundation for its existence...

A court created by a written Constitution can have no independent existence apart from that Constitution; it does not receive its powers from the common law and declare what its own powers are; it is not a creature of Frankenstein which once created can turn and destroy its maker. It is a matter of the supremacy of the Constitution...

A court cannot sit to decide under what system of government it is exercising jurisdiction. It must accept its reason for existence as stemming from the original Constitution as an unchallengeable fact.37

That said, it would be unrealistic to ignore the very real practical difficulties that judges of constitutional courts face in the aftermath of revolutionary seizures of power, as noted at the beginning of this article. The pressures of realpolitik have, therefore, led many judges to attempt to steer a “middle” course between absolute heroism and total capitulation. This they have usually done by offering the usurpers a degree of temporary legitimacy in exchange for a promise of return to constitutional “normality” through, for example, the holding of fresh elections within a limited time.38 They have justified such action on the factual basis that there has been a measure of popular acceptance of the new regime; all they are doing, they claim, is putting their imprimatur on “a flood of changing consensus” in society, to adopt the words of Mark Tushnet.39 In legal terms, they have resorted to the Kelsenian theory of revolutionary legality referred to earlier,

37. *Supra* note 6 at 429.
38. Such a tactic has, of course, always produced the expected results, as the succession of military coups in Pakistan have shown over the years.
using the twin tests of “necessity” and “effectiveness” to justify — and to some extent to moderate — the deviations from constitutional democracy. It is these tests, therefore, that must now be examined.

1. Legal realities: The doctrine of necessity

The concept of necessity has a respectable pedigree in law and legal philosophy and can be traced back to ancient times. Bracton noted that “what is otherwise unlawful necessity makes lawful,” while Rousseau was of the opinion that “the primary intention of the people is that the state should not perish.” Even Thomas Jefferson, a staunch advocate of limited government, agreed that:

The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and those who are enjoying them with us; thus absurdly sacrificing the end to the means.

This doctrine finds expression in the emergency provisions of most national constitutions, and has been invoked by governments time and again. In recent years, much work has been undertaken at the international level to moderate the use of emergency powers, and to ensure that the concept of necessity is confined within strict and narrow limits.

The need for judicial vigilance in dealing with pleas of necessity by usurpers was underlined in a 1986 judgment of the Grenada Court of Appeal, in which Haynes P. laid down a number of conditions for the acceptance of the doctrine:

(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 of 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.45

In terms of the procedure to be followed in cases involving the use of the doctrine, the learned judge added perceptively that:

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.46

This judicial warning was necessary given the alacrity with which some courts in the Commonwealth have previously validated usurpations of power by military and political adventurers, often under circumstances which smacked of pure opportunism and expediency. An oft cited example of such haste can be found in the judgment of the Supreme Court of Pakistan in State v. Dosso,47 which was condemned by one writer as "a carte blanche for treasonable conduct." There, the court was faced with a challenge to the Laws (Continuance in Force) Order promulgated by the President of Pakistan after he had abrogated the Constitution, dissolved Parliament and declared martial law on the eve of a general election which threatened the ouster from power of his favoured section of the political elite. The Order provided that all the laws that were on the statute book prior to the abrogation of the Constitution would continue in force, subject to the important qualification that the martial law administrator would have unfettered legislative powers. The Supreme Court, headed by Muhammad Munir C.J., laid down a remarkably lenient test to judge the legality of the President’s actions:

It sometimes happens ... 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. A revolution is generally

45 Mitchell, supra note 17 at 88.
46 Ibid
47 [1958] I P.L.D. 533 (S. C.) [Dosso].
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associated with public tumult, mutiny, violence and bloodshed but from a juristic point of view the method by which and the persons by whom a revolution is brought about is wholly immaterial. The change may be attended by violence or it may be perfectly peaceful. It may take the form of a coup d'etat by a political adventurer or it may be effected by persons already in public positions. Equally irrelevant in law is the motive for a revolution, inasmuch as a destruction of the constitutional structure may be prompted by a highly patriotic impulse or by the most sordid of ends. For the purposes of the doctrine here explained a change is, in law, a revolution if it annuls the Constitution and the annulment is effective. If the attempt to break the Constitution fails, those who sponsor or organise it are judged by the existing Constitution to be guilty of the crime of treason. But if the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact because thereafter its own legality is judged not by reference to the annulled Constitution but by reference to its own success...

After a change of the character I have mentioned has taken place, the national legal order must for its validity depend upon the new law-creating organ. Even the Courts lose their existing jurisdictions, and can function only to the extent and in the manner determined by the new Constitution.49

This test, which was justified on the basis of what one analyst has called "a facile resort"50 to the theory of revolutionary legality propounded by the Austrian philosopher Hans Kelsen,51 paid no regard whatsoever to the question whether the actions of the usurper were necessary at all in the sense that there was a real and imminent threat to the existence of the state or to the government established by law. Such was the tenuous nature of the usurper President's hold on power, incidentally, that within days of the Dosso judgment being handed down, he was himself toppled by a senior army officer!52

Unsurprisingly, the attraction of the Dosso test was not lost on courts in other Commonwealth jurisdictions, some of which embraced it with enthusiasm when faced with the dilemma of having to rule on the legality

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49. Dosso, supra note 47 at 538-539.
52. By contrast, the Fiji judges in Prasad v. Republic of Fiji, supra note 7 at 45-46, were more robust in their approach to assessing the claims of necessity put forward by the post-coup government, insisting that it adduce evidence of a high order to make its case, as discussed later in greater detail. This is another important distinguishing characteristic of the Prasad judgments, which can be appreciated without imposing a duty of heroism of judges.
of usurper regimes. But it was not without its critics, including some on the Bench. The Supreme Court of Pakistan itself stepped back from Dosso in 1972 when, faced with a challenge to the legality of the administration set up by another usurper, General Yahya Khan, it paid greater attention to the need to use the ‘necessity’ yardstick. “It was by no means [Kelsen’s] purpose,” said the Chief Justice, Hamoodur Rahman, in Jilani v. State of Punjab “that every person who was successful in grabbing power could claim to have become also a law-creating agency.”

No less importantly, the court in that case laid down certain qualifications for the recognition of usurper regimes:

The doctrine can be invoked in aid only after the Court has come to the conclusion that the acts of the usurpers [sic] were illegal and illegitimate. It is only then that the question arises as to how many of his acts, legislative or otherwise, should be condoned or maintained, notwithstanding their illegality, in the wider public interest. I would call this a principle of condonation and not legitimisation. Applying this test I would condone: (1) all transactions which are past and closed, for no useful purpose can be served by reopening them; (2) all acts and legislative measure[s] which are in accordance with, or could have been made under, the abrogated Constitution or the previous legal order; (3) all acts which tend to advance or promote the good of the people; (4) all acts required to be done for the ordinary orderly running of the State. I would not, however, condone any act intended to entrench the usurper more firmly in his power or to directly help him to run the country contrary to its legitimate objectives. I would not also condone anything which seriously impairs the rights of the citizens except in so far as they be designed to advance the social welfare and national solidarity.

The Chief Justice’s reference to the “previous legal order” is rather confusing because it suggests, contrary to all other assertions which are predicated on the basis that the usurper’s actions are being judged by the touchstone of the pre-coup order, that the court has recognised a new legal order.

For all the judicial rhetoric articulated in Jilani, the phenomenon of military take-overs has continued unabated in Pakistan. In May 2000, the Supreme Court had occasion to revisit the doctrine of necessity following the coup mounted by Gen. Pervez Musharraf some seven months earlier. On this occasion the Court again proclaimed a desire to hold the line

55. Ibid. at 207.
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laid down in Jilani by confining the doctrine of necessity within narrow limits, but it simultaneously offered the usurper considerable room for manoeuvre by allowing him to rule extra-constitutionally for three years. It ruled that the coup could be justified on the basis of the maxim salus populi suprema lex, because “the Constitution offered no solution to the present crisis [of rampant corruption, maladministration and economic mismanagement].” For good measure, it took judicial notice “of the fact that the people of Pakistan have generally welcomed the army take-over,” and accepted the military government’s assurance that it intended to return the country to constitutional rule within three years.

In putting its imprimatur on this “constitutional deviation”, the judges did lay down a number of conditions, including that the military government would not carry out any amendments to the existing, i.e. pre-coup, Constitution that would have the effect of obliterating its “salient features”; that it shall respect the fundamental rights of the people in accordance with the provisions of that Constitution; and that it shall only carry out acts which “tend to advance or promote the good of the people” and are “required for the ordinary orderly running of the State.” The Court also made it clear that its power of judicial review granted by the Constitution would continue unaltered “notwithstanding anything to the contrary contained in any legislative instrument enacted by [Gen. Musharraf] and/or any order issued by [him] or by any person or authority acting on his behalf.”

This judgment clearly represented a delicate balancing act on the part of the Court. In the words of one academic commentator, the judges offered the military rulers “a political bargain”: legal legitimacy in return for a promise of resumption of democracy within three years. But the bargain was not without some serious long-term consequences:

56. The court characterised the actions of General Musharraf as “extra-constitutional” rather than “unconstitutional”. “This is not,” observed the court, “a case where old legal order has been completely suppressed or destroyed, but merely a case of constitutional deviation for a transitional period so as to enable the Chief Executive [i.e. Gen. Musharraf] to achieve his declared objectives.” Judgment of the Supreme Court of Pakistan in Constitutional Petitions No. 62/99, 63/99, 53/99, 57/99, 3/2000, 66/99 and 64/99. accessible online: <www.lawfirm.org.pk/Military-Review.htm> (11 September 2004).
57. “The welfare of the people is the supreme law.”
58. Judgment of the Supreme Court of Pakistan (12 May 2000), supra note 56. The Court accepted material in the form of “newspaper clippings, writings, etc.” tendered by the new administration as evidence of the “crisis” which justified the coup.
59. Ibid. The Court listed the following as salient features: “independence of the judiciary, federalism, parliamentary form of government blended with Islamic provisions.”
60. Ibid.
61. Ibid.
There is a cost ... to acknowledging the principle of state necessity as a feature of Pakistani constitutional law. It effectively raises the Army to an institution of government; it acknowledges that the military has a role to play as part of the checks and balances of the Pakistani system. The long-term costs of this is considerable.

Once democratic government is resumed there will always be the fear that, at times of strain, the military will decide to intervene. A consequence of the existence of state necessity is that in some circumstances the Army will be legally entitled, or permitted to act. There is a risk that this may serve to encourage military rule.

With the benefit of hindsight, the Court was probably a bit optimistic about the prospects of a full return to democratic rule within three years. In April 2002, in a tactic which provoked significant domestic and international criticism, General Musharraf ordered a referendum, rather than full-fledged general elections that most people expected to legitimise his rule for a further period of five years. The referendum proposal was approved by the Supreme Court of Pakistan, and it resulted in the General being confirmed in his office by a large majority.

2. The effectiveness of a regime change
The question of effectiveness is one of the most controversial aspects of the jurisprudence on usurper regimes and is intimately connected with the principle of necessity, so it will be useful to survey that jurisprudence before turning attention to the Fijian approach to the subject. Courts are, it must be noted at the outset, not particularly well-suited to embark upon in-depth assessments either of the stability or the popularity of governments. This limitation has not, however, prevented them from undertaking such assessments, usually in the context of post-coup litigation, with the result that a considerable body of contentious case law has developed over the years.

In Nigeria, for example, the courts have shown a remarkable willingness to accept successive military governments as being well entrenched within days of seizing power, without so much as even a perfunctory enquiry as

63. Ibid at 571.
66. Qazi Hussain Ahmed, Amir Jamat Islam v General Pervez Musharraf, P.L.D. 2002 S.C. 853 at 867 In giving its sanction for the referendum, the Court gave a clean chit to the military regime saying, among other things, that "General Pervez Musharraf, ever since the assumption of power, has been performing his functions and duties in accordance with the mandate given to him by this Court in Saeed Zafar Ali Shah’s case and has been striving to transform the Army rule into a democratic set up as envisaged in the aforementioned case."
Courts and Constitutional Usurpers

to the real support they enjoy among the population as a whole. Such is the cavalier attitude adopted in this matter that, in one notorious case, the Supreme Court of Nigeria put its imprimatur on a usurper regime even as the regime was collapsing.\textsuperscript{67} Such a course of action which is hardly calculated to inspire confidence in the capacity of courts to act as bulwarks against subversion of established governments.

Control, rather than approval by a majority of the population, appears to be the yardstick by which the claims of usurper regimes to have successfully entrenched themselves are often judged by the courts. In \textit{Vallabhaji v. Controller of Taxes}.\textsuperscript{68} for instance, the Court of Appeal of the Seychelles, speaking through Hogan P., held that:

\[ \text{[W]hether the term chosen [for describing the status of the usurper regime] is success or submission, consent or acceptance, efficacy or obedience, there appears to be a consensus or at least a strong preponderance of opinion that once the new regime is firmly or irrevocably in control it becomes a lawful or legitimate government and entitled to the authority that goes with that status.}\textsuperscript{69} \]

The court did, however, sensibly suggest that "fair elections probably provide the most convincing proof of acceptance of a regime."\textsuperscript{70} This was an unexceptionable suggestion but one which is not likely to commend itself to many usurper regimes. It needs to be noted, incidentally, that the Seychelles judges were dealing with a situation in which what they called "the new revolutionary regime" had already been in existence for several months and had "enjoyed unchallenged authority and maintained stable and effective government in the Seychelles, with little or no interruption in the ordinary life of its citizens."\textsuperscript{71} Unlike the Fijian courts which had to rule on the legality of the military take-over within weeks of the event.

Lapse of time almost inevitably works to the advantage of usurper regimes. In \textit{Mokotso v. H.M. King Moshoeshoe II}.\textsuperscript{72} the High Court of Lesotho had to adjudicate on the success or otherwise of a \textit{coup d'état} which had taken place 3 years earlier. The judges took "judicial notice" of, among other things, the fact that the new regime had passed a "formidable body of legislation," that it had been functioning under a climate of peace and stability, that the vast majority of people were acting in conformity with the government's laws and policies, and that the judiciary had been

\textsuperscript{67} \textit{Federation v. Guardian Newspapers Ltd.}, supra note 53.
\textsuperscript{69} \textit{Ibid.} at 407.
\textsuperscript{70} \textit{Ibid.}
\textsuperscript{71} \textit{Ibid.}
\textsuperscript{72} \textit{[1989] L.R.C. (Const.)} 24 [Mokotso].
functioning without let or hindrance. The judges noted, too, that the coup had been popular, with news of it being greeted with jubilation in the streets. Despite this finding, the court was at pains to emphasise that "no presumption of regularity can operate in the regime's favour; indeed there must be a presumption of irregularity." The burden of proof of legality must, insisted the Court, lie on the usurper government. Even so, the following observations of Cullinan C.J. show that there are clear limits to the extent to which the courts can be relied upon to act on the principle of strict scrutiny in this area:

If a revolutionary regime is unpopular or oppressive, it is likely that it will meet with initial resistance, perhaps even with physical resistance, and the people will not conform ... 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.

Cullinan C.J. formulated the test to be applied as follows:

A court may hold a revolutionary government to be lawful ... 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.

Much the same realism was apparent in the judgment of the Privy Council in the leading case of Madzimbamuto v. Lardner-Burke which arose in the aftermath of the "unilateral declaration of independence" by the Ian Smith government in Southern Rhodesia. "It is an historical fact," said Lord Reid, "that in many countries - and indeed in many countries which are or have been under British sovereignty - there are now regimes which are universally recognised as lawful but which derive their origins from revolutions or coup d'états. The law must take account of that fact." The only qualification that their Lordships added was that, where the ousted government had not thrown in the towel in the face of the coup, the court had to exercise caution in granting recognition to the usurper:

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73 Ibid. at 132.
74 Ibid. at 132-133.
75 Ibid. at 133. Interestingly, the government which had been replaced by the revolutionary government seeking legitimacy in this case had itself come into power through a coup d'état mounted some 16 years previously. The court noted that, although that regime was notorious for abuses of freedoms, it had to take judicial notice of the fact that the regime had remained in place for 16 years. Even more interestingly, the government which was given recognition in Mokotso was itself overthrown in another coup within four years.
77 Ibid at 724.
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.\(^7\)

Most of the above noted cases have arisen in the context of challenges to laws passed by the new regime. One principle which has now been established beyond question is that, if the legality of the regime is upheld, any laws passed by it (whether in the form of decrees or Acts of Parliament) shall be deemed to be valid \textit{ab initio}, not just from the time the court determines the regime to have established itself firmly in control.\(^7\)

Further, the legal order by reference to which these laws shall be judged would be the new legal order, not the old one, as was explained by Kelsen using the following simple example:

Suppose that a group of individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic State, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as the valid order. It is now according to this new order that the actual behaviour of individuals is interpreted as legal or illegal.\(^8\)

The effect of these decisions is that the subsequent legality of an usurper regime depends not so much on the motives that propelled it into power,\(^9\) but the success of the usurpation. As Chief Justice Beadle of the Rhodesian Supreme Court noted in \textit{Madzimbamuto v. Lardner-Burke}, \"[n]othing succeeds like success; and this is particularly true of revolutions.\"\(^2\)

The inequity of this approach is obvious. As well as rewarding wrongdoing, it acts as an incentive for future adventurers. Justice Fieldsend of the Rhodesian Supreme Court noted in his dissenting judgment in \textit{Madzimbamuto} that, \"nothing can encourage instability more than for any revolutionary movement to know that if it succeeds in snatching power it will be entitled \textit{ipso facto} to the complete support of the pre-existing judiciary in their judicial capacity.\"\(^1\) As Haynes P. noted in \textit{Mitchell v.}

\begin{itemize}
    \item \textit{Ibid.}\(^7\)
    \item See e.g. \textit{Vallabhaji v. Controller of Taxes}, \textit{supra} note 68 at 407 (per Hogan P.).
    \item \textit{Kelsen, supra} note 51 at 118.
    \item There may be occasions when, for example, a revolution is aimed at overthrowing a tyranny.
    \item \textit{[1968]} \textit{2 South African Law Reports} 284 at 425 (A.D.).
    \item \textit{Ibid.} at 71-72.
\end{itemize}
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.

Before the approach of the Fijian judges to both the "necessity" and "effectiveness" doctrines is examined, it would be useful to set out the facts which gave rise to the legal challenges underlying the judgments in question. To appreciate those facts, it will be necessary to describe briefly the recent constitutional history of Fiji, which is rooted in the politics of racial division and the contested legacy of failed power-sharing arrangements.

III. Factual background of the Fijian coup d'état
The Fiji Islands, whose original inhabitants consisted of Melanesian and Polynesian peoples, came under British rule in 1874 when a convention of the High Chiefs ceded sovereignty over the islands to Queen Victoria. Following the assumption of power by Britain, a large number of Indians were brought into the country to work as indentured labourers. There was further voluntary Indian migration in the twentieth century, which led to Indians (or "Indo-Fijians" as they came to be called) forming a substantial proportion of the population. Given the cultural, religious and linguistic separateness of the indigenous population and the Indian settlers, it was not long before tensions began to develop between the two groups. These tensions were, however, contained by the colonial masters, who succeeded in maintaining at least an appearance of racial harmony and societal peace.

When the islands gained independence from Britain in 1970, they inherited a Constitution which was at best an uneasy compromise between
the conflicting demands of the two groups. Unsatisfactory though the compromise was, the leaders who assumed the reins of government at independence somehow managed to impose a semblance of national unity and governed Fiji as a fairly peaceful parliamentary democracy for the following decade and a half. But the harmony was short lived: in 1987, following the election of the country’s first Indian majority government (albeit one headed by an indigenous Fijian, Dr Timoci Bavadra), an ambitious ethnic Fijian army officer, Lt. Col. Sitiveni Rabuka, mounted two coups which resulted in the abrogation of the 1970 Constitution, the dissolution of Parliament, the ouster of the Prime Minister and his Cabinet, and the declaration of Fiji as a republic. The Government which followed, with Rabuka’s support, soon promulgated a blatantly racial Constitution (“the 1990 Constitution”) under which a majority of parliamentary seats, as well as the office of Prime Minister, were reserved for indigenous Fijians.

Interestingly, the 1990 Constitution provided for a review of itself within seven years. That review took place in 1995 under the chairmanship of Sir Paul Reeves, a former Governor-General of New Zealand. The Reeves Commission recommended a multi-racial Constitution under which power would be shared by the two main communities and the system of representation would gradually become completely non-racial. The Commission’s report was considered by a joint select committee of Parliament which, after extensive deliberation, accepted some of its recommendations (either as they stood or with modifications), rejected others, and added a few of its own. The result was a Constitution, adopted in 1997, which, while providing for “the right to equality before the law,” nonetheless recognised “the paramountcy of [indigenous] Fijian interests as a protective principle … so as to ensure that the interests of the [indigenous] Fijian community are not subordinated to the interests of other communities.” Under this Constitution, 46 of the 71 MPs in the lower house of Parliament were to be elected on a communal basis, with the

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92. Ibid., s. 38.
93. Ibid., s. 6(j).
remaining 25 seats being left open for non-racial franchise.\textsuperscript{4} Furthermore, the appointment of the national President and Vice-President was to be exclusively a matter for the indigenous Fijian Great Council of Chiefs and not subject to any process of popular approval. Indigenous Fijian interests were also protected by a constitutional guarantee that no amendment could be carried out, except in accordance with special procedures, to statutes which safeguarded their rights to land and other entitlements.\textsuperscript{5}

Despite the continuing racial basis of the new Constitution, and its preferential treatment of indigenous Fijians, it was given a cautious welcome by most political parties and by the population as a whole. The first elections under its provisions were held in May 1999, and it resulted in the emergence of a multi-racial grouping, the People’s Coalition, as the clear victor.\textsuperscript{6} This coalition was headed by the leader of the Fiji Labour Party, Mahendra Chaudhary, who was duly sworn in as Fiji’s first Indo-Fijian Prime Minister, much to the dismay of many Fijian nationalist politicians.

Within a year into the life of the new government, on 19 May 2000, a group of armed insurgents led by a failed businessman of mixed Fijian-European descent, George Speight, stormed the Parliament building and took Mr. Chaudhary and many of his ministers hostage, claiming that the 1997 Constitution and the elections under it did not sufficiently protect indigenous Fijian interests.\textsuperscript{7} In the immediate aftermath of the attack, there was large-scale pillage and arson in Suva and intimidation of villagers by mobs who began running amok in the absence of any real attempt by the police to maintain law and order. Speight issued six decrees between 19 May and 20 June, 2000, one of which purported to abolish the 1997 Constitution.\textsuperscript{8} This led to the declaration of a state of emergency by the President of Fiji, Ratu Sir Kamisese Mara,\textsuperscript{9} who also appointed as Acting Prime Minister one of the Ministers in the Chaudhary Government.

\textsuperscript{4} \textit{Ibid.}, s. 51. This reservation of seats was, contrary to the recommendation of the Reeves Commission, entrenched in the Constitution — it could only be reversed or modified with the approval of a majority of the electors in each of the respective communities.

\textsuperscript{5} \textit{Ibid.}, s 185.

\textsuperscript{6} The People’s Coalition won 54 of the 71 seats in the lower House of Parliament.

\textsuperscript{7} This claim has been contested, not least by the Commander of the Fiji Military Forces, Commodore Bainimarama, who is reported to have said that the coup had “nothing to do with Fijian rights, nothing to do with indigenous rights.” It had to do with mahogany concessions and the losers from the previous elections, people who would like to take advantage of a change in government to get new positions, and hangers on who thought they could get a piece of the pie” (Commodore Bainimarama, quoted in Brij V. Lal, “Fiji’s Constitutional Conundrum” [2003] \textit{The Round Table} 671 at 677. This explanation is not entirely far-fetched if regard is had to the fact that George Speight had himself recently been ousted from the headship of the state owned Fiji Hardwood Corporation.


\textsuperscript{9} \textit{Proclamation of Emergency} (19 May 2000).
who had not been caught up in the assault on Parliament. Parliament was immediately prorogued for six months.

The stalemate with Speight continued unabated amidst rising tensions until 29 May 2000 when the Commander of the Fiji Military Forces, Commodore Josaia Voreqe Bainimarama, assumed power and imposed martial law, after the President had been warned by the Commissioner of Police that his force could not guarantee the security of the nation. Styling himself as the head of an Interim Military Government (IMG), Commodore Bainimarama in turn issued a number of decrees which, *inter alia*, revoked the 1997 Constitution and vested in himself executive authority over the country, ostensibly because of "the absence of any other viable alternative." For good measure, the Commodore also issued a decree which guaranteed most of the rights that had been guaranteed in the 1997 Constitution and which required these to be interpreted consistently with norms of international law and "values that underlie a democratic society based on freedom and equality."

Some five weeks later, even as the negotiations with Speight continued, Bainimarama decided to hand over the reins of power to an all-indigenous Fijian Interim Civilian Government headed by Laisenia Qarase, a former merchant banker, who was given authority to make laws, by means of decrees, for the peace, order and good government of Fiji. Qarase swiftly proclaimed his desire for a new Constitution under which indigenous Fijian interests would be further protected, with the offices of both President and Prime Minister being reserved for them. In the event, that desire remained still-born after a constitutional review commission appointed by him had to be unceremoniously wound up for lack of public support.

100. Fiji Constitution Revocation Decree 2000, supra note 98.
102. Affidavit filed by Commander Bainimarama in Civil Action 217/2000 in the High Court at Lautoka.
103. *Fundamental Rights and Freedoms Decree 2000*, Interim Military Government Decree No. 7, s. 24. In a genuflection towards indigenous Fijian rights, however, this Decree subordinated the right to equality to "any law providing for or protecting the enhancement of Fijian or Rotuman interests."
105. *Interim Civilian Government (Transfer of Executive Authority) Decree 2000*, Interim Military Government Decree No. 19 (4 July 2000). Under this Decree, any law made at the instance of the Prime Minister would be promulgated as a decree by the interim President.
The deposed Prime Minister, Chaudhary, was eventually released, following a deal agreed between Speight and Bainimarama, but neither the 1997 Constitution nor the Parliament elected under it were resurrected. The Interim Civilian Government did, however. "re-establish" the Fijian High Court and the Court of Appeal in August 2000. 107 although, in an interesting departure from the traditional practice of coup leaders elsewhere in the world, it did not require the incumbent judges to take a fresh oath of allegiance. 108

IV. The Prasad trial

Chandrika Prasad was an Indo-Fijian farmer who, in the aftermath of the take-over of Parliament, had been forced off his land by a mob which, as well as vandalising his homestead, butchering his cattle and damaging his crops, issued death threats against him. After failing to obtain assistance from the police, he filed an action in the High Court at Lautoka by way of originating summons against the Republic of Fiji and the Attorney-General of the Interim Civilian Government, 109 seeking, inter alia, declarations that:

(1) the attempted coup of 19 May 2000 by George Speight was unsuccessful;
(2) the declaration of a state of emergency by the President was unconstitutional;
(3) the purported revocation of the 1997 Constitution by the Interim Military Government was unconstitutional;
(4) the 1997 Constitution still remained in force; and
(5) the Government formed following the May 1999 elections was still a legally constituted Government.

Prasad's action was heard by Mr. Justice Anthony Gates, sitting as a single judge in the Lautoka High Court, in August 2000. After dealing with a number of interlocutory applications - including an application to strike out the action on the grounds that Prasad had no locus standi and

107. Judicature Decree 2000, Interim Civilian Government Decree No. 22 (18 August 2000). This Decree also abolished the Supreme Court and made the Court of Appeal the final forum for the hearing of appeals.

108. A recent example of this phenomenon is provided by Pakistan where General Pervez Musharraf, who mounted a successful coup in 1999, required all existing judges who wished to continue in office to take a fresh oath swearing allegiance to the new regime under the Oath of Office (Judges) Order 2000. When the Chief Justice and 13 of his colleagues refused to comply, they were promptly dismissed (a few judges were cased out by not being invited to take the new oath): see Colin Nicholls, "Pakistan: The Military Government and the New Constitutional Order" [2000] The Commonwealth Lawyer 10 at 11.

that his claim was "scandalous, frivolous or vexatious." 110 – Mr. Justice Gates delivered judgment on 15 November 2000. He held that the attempted coup of 19 May was unsuccessful, but the declaration of the state of emergency by the Governor was justified under the doctrine of necessity. That doctrine did not, however, extend, in his opinion, to the act of revocation of the 1997 Constitution which consequently continued to be "the supreme and extant law of Fiji today." Justice Gates went on to declare that the Parliament, whose members had been elected in 1999, was still in being, and that the President, Ratu Sir Kamesese Mara (who had, shortly after the imposition of martial law by Commodore Bainimarama, stepped aside) still continued to hold that office. 111

Somewhat less sure-footedly, the learned judge went on to rule that the President should summon Parliament "at his discretion, but as soon as practicable," and that "owing to the uncertainty over the Government, it will remain for the President to appoint as soon as possible as Prime Minister a 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...." 112 He "invited and recommended" the military "to ensure a smooth and amicable handover of Government to that which will soon be chosen by the incoming Prime Minister" and advised "all participants in the political process ... to act unselfishly and wisely" and to explore the possibility of forming a Government of National Unity, based on the concept of a multi-party Cabinet provided for in the 1997 Constitution. 113

V. The appellate proceedings

Although the Interim Civilian Government did not heed Justice Gates' call to summon Parliament, it swiftly signalled its intention to engage in the judicial process by lodging an appeal against his judgment in the Court of Appeal and thus submitting to the jurisdiction of that court. 114 Whether or not this act was motivated by a desire to show to the world that "[e]ven after the coup, respect for the rule of law and the judiciary prevailed as a fundamental principle of Fijian political culture," 115 as claimed by one

110. Summons to Strike Out, 7 August 2000, filed by the Principal Legal Officer, Attorney-General's Chambers, Government of Fiji.
111. Prasad v. Republic of Fiji, supra note 7 at 47-48.
112. Ibid. at 48.
113. Ibid. at 47.
114. Submissions on Behalf of the Respondent, Chandrika Prasad, Civil Appeal No. ABU 0078 of 2000 (Fiji C.A.), lodged on 17 November 2000. An application by the caretaker administration to have the High Court's judgment stayed was dismissed by Justice Maurice Casey in the Fiji Court of Appeal on 17 Jan. 2001.
115. Williams, supra note 106 at 83.
commentator, is a moot point. Whatever the motives, the stage was set for another round of legal jousting, this time conducted in the presence of five judges drawn from neighbouring Australia, New Zealand, Papua New Guinea and Tonga.\textsuperscript{116}

The hearings in the Court of Appeal lasted four days,\textsuperscript{117} and they were televised by a local TV channel with the court’s permission. Both sides were represented by English QCs,\textsuperscript{118} who were allowed to lead new evidence in view of the important issues raised in the appeal.\textsuperscript{119} The central issue before the court was “whether the Commander of the Fiji Military Forces had, by his actions of 29 May 2000 and thereafter, created a new legal order under which the 1997 Constitution had been abrogated.” It also addressed a number of subsidiary, albeit no less important, questions, including the following:

(a) whether the court had jurisdiction to decide if a new regime, set up in defiance of the 1997 Constitution, had become legal;
(b) whether the events of 29 May and thereafter had the effect of dissolving Parliament;
(c) whether, and if so when, President Ratu Sir Kamesese Mara had resigned the office of President following the events of 29 May.

Although the Court disagreed with the High Court in some key respects, it affirmed the High Court’s finding on the central issue of the status of the 1997 Constitution. In doing so, it relied, as did the court below, on the doctrine of necessity, but laid down clear limits on the use of that doctrine. It examined the long line of Kelsen inspired jurisprudence emanating from other parts of the Commonwealth, but cautioned against an over-reliance on that jurisprudence, noting, among other things, that many of those cases “were decided before the modern shift towards insistence on basic human rights in a raft of international treaties....”\textsuperscript{120} That jurisprudence has, rightly, been criticised for being at best an unreliable antidote to the malaise of constitutional overthrows and at worst an irresistible invitation to future coup plotters.

As a preliminary observation, it is worth noting that the judges in \textit{Prasad}, at both trial and appellate levels, saw themselves as continuing to sit as judges of the old, i.e. pre-coup, legal order and to treat that order

\textsuperscript{116} New Zealand contributed two judges, including the presiding judge (Justice Casey) and the other three jurisdictions one each.
\textsuperscript{117} 19-22 February 2001.
\textsuperscript{118} Mr Nicholas Blake QC for the appellant and Mr Geoffrey Robertson QC for the respondent.
\textsuperscript{119} The Court treated the proceedings as a re-hearing, and went on to decide the appeal on the situation that prevailed at the time of the hearing rather than at the time of the original action in the High Court.
\textsuperscript{120} \textit{Republic of Fiji v Prasad}, supra note 7 at 405.
as still subsisting, albeit with some modifications brought about by the exigencies of the situation. They were therefore able to assess the validity of the acts of the usurper by the touchstone of that old order and to enter findings of invalidity where warranted. Their position was made slightly easier by the fact that, not only did they not have to swear allegiance to the usurper (as judges are often required to do in post-coup situations), but the usurper himself had submitted to their jurisdiction. These circumstances may have emboldened them in their belief, and underpinned the approach they adopted, that the changes effected by the usurper were purely temporary. the judges based all their determinations on the premise that the original constitutional order would eventually be restored, even if some of the deviations from that order had to be condoned on the principle of necessity.

VI. State Necessity in Prasad

Some of the jurisprudence on the doctrine of necessity, discussed earlier, was referred to in the Prasad judgments. The judges noted, pertinently, that Prasad was unique in that “it is the only [case] 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.” Part of the reason for this opinion might have been the substantial political and diplomatic pressure that was exerted by Fiji’s neighbours, notably Australia and New Zealand (as well as by the wider international community), pressure that such a small country as Fiji could ill-afford to ignore. Part of the reason may also have been that, unlike previous coups, in Fiji and elsewhere, the 2000 usurpation of power did not have the full backing of the military or the police force, both of which were, according to expert observers, “divided about supporting the illegal seizure of power.” It needs to be remembered, too, that the Prasad case was brought quite soon after the effects of the coup had become known; in most previous cases, the legal challenges came much later, which enabled the usurper regimes to claim that the post-coup order had become sufficiently acceptable to the people.

121. This was in contrast to the position in which the judges in Rhodesia found themselves following the “unilateral declaration of independence” in that country in 1965, when they had to choose between continuing to sit as judges appointed under the old (British) order or becoming judges under the new (Rhodesian) order.
122. Republic of Fiji v. Prasad, supra note 7 at 402. Justice Gates in the court below has also referred to the Prasad case as “[probably] the second most significant and important action ever brought before a Fiji court,” ibid. at 31. The first such was a challenge to the legality of certain actions which followed the earlier coup of 1987, see Bavadera v. Att-Gen. [1987] S.P.L.R. 95.
124. This point was commented upon, albeit in passing, by the Court of Appeal judges, see Republic of Fiji v. Prasad, supra note 7 at 402.
To the credit of the Fijian judges, they adopted a more discerning and democracy-friendly view of the doctrine of necessity in *Prasad* than had judges in many of the previous cases. Both the High Court and the Court of Appeal recognised that the rapid deterioration of law and order in the country which followed the Speight assault on Parliament, coupled with the fact that most of the members of the Chaudhary Cabinet had been taken hostage, meant that decisive and immediate action had to be taken to prevent large scale anarchy. Resort could not possibly have been had to the emergency provisions in the 1997 Constitution, which required the President to seek the advice of the Cabinet before declaring a state of emergency, since the Cabinet was, for all practical purposes, rendered incapable of action. Even if the President had acted unilaterally (possibly after consultation with the few Cabinet ministers who had not been taken hostage), he would have had to rely on the military to enforce law and order, given that the police had made clear their inability to deal with the looming anarchy. In the circumstances, the courts accepted, in conformity with previous practice in similar situations, that the imposition of martial law was justified on the grounds of necessity.125

Necessity was, it is worth noting, recognised as a doctrine within the pre-existing legal system. What distinguishes the *Prasad* approach from many of the cases that went before it is the unequivocal manner in which the judges delineated the boundaries of the necessity doctrine, and the robustness with which they condemned transgressions of it, all the while making it clear that they saw the deviations from the existing (i.e. pre-coup) order as purely temporary. Gates J. could not have been more definite in drawing the line:

It is obvious ... 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 does not demand any of that.*126

\[125\] *Ibid* at 403.
\[126\] *Prasad v Republic of Fiji,* supra note 7 at 42 [emphasis added]. Those sentiments were echoed by the Court of Appeal which noted that "[t]he doctrine of necessity does not authorise permanent changes to a written constitution, let alone its complete abrogation," see *Republic of Fiji v Prasad,* *ibid* at 404.
Interestingly, the Court of Appeal disagreed with the High Court in one not insignificant respect. It saw no basis for Justice Gates' finding that Commodore Bainimarama had "no ... genuine desire to remove the 1997 Constitution."[2] Although this disagreement did not make any difference to the outcome of the case, it is interesting because it shows a willingness on the part of the appellate judges – in stark contrast to the traditional reticence of courts in similar situations – to enquire into, and enter a finding on, the intentions of the key players whose actions have been impugned before it. It did so after entertaining further evidence on the conduct of the parties, including affidavits from the Commodore himself, evidence which was more extensive than had been available to the court below.

VII. Effectiveness of the regime change in Prasad

The Prasad judgments are also noteworthy for their resoluteness in taking a more questioning approach on the issue of the effectiveness of the regime change brought about by the actions of Commodore Bainimarama. Counsel for Mr. Prasad argued that it was unnecessary to consider this question because, in their opinion, once the judges had ruled that the purported abrogation of the 1997 Constitution was invalid by the touchstone of the necessity doctrine, any further enquiry as to the popular acceptance or otherwise of the new (unconstitutional) regime was not only superfluous, but was likely to confer a modicum of credibility on the regime which it clearly did not deserve. But that argument did not move the judges who proceeded on their inquiry anyway and made some interesting observations.

The warning notes struck by Justices Fieldsend and Haynes noted above[128] appear to have found a ready audience in the Fiji Court of Appeal where the judges who decided Prasad subjected the post-coup regime to a tougher standard of proof on the effectiveness issue. The standard of proof required must, said the Court, be of "a high civil standard," given the "importance and seriousness" of the regime's claim to be the new government.[129] Among other things, they required the regime to show that any conformity and obedience to it stemmed from "popular acceptance and support as distinct from tacit submission to coercion or fear of force."[130] They held, too, that it was not enough for the regime to show simply that the normal day to day running of the administration continued unhampered during the coup period and in its immediate aftermath. Such 'normality' (e.g. the smooth working of government departments such as

127. Ibid. at 43.
128. See text at notes 83 and 85.
129. Republic of Fiji v. Prasad, supra note 7 at 412.
130. Ibid. at 413.
tax and land title offices) was, said the Court, not uncommon even in the context of unconstitutional regime changes. More convincing, but by no means conclusive, indicators of the acceptance by the population at large of an usurper government were the government’s affirmations of electoral rights and personal freedoms.

The Court examined the claim of the Interim Civilian Government (ICG) to be the true and firmly established government of Fiji under two heads, viz., (1) whether it had exclusive control over the inhabitants and the territory of the country; and (2) whether the Fijian people were behaving in conformity with its dictates in such circumstances that their acquiescence could safely be inferred. On the first question, the Court noted that the ICG, as well as and its predecessor, the Interim Military Government (IMG), had successfully quelled the violence and lawlessness that had followed George Speight’s assault on Parliament, and that it had also put down an attempt by elements within the army to seize control of the government some six months later. There was, therefore, no evidence of effective organised resistance to the ICG or any attempts to topple it by force. That did not, however, prove the absence of a ‘rival government’, continued the Court, because on the sworn testimony of the deposed Prime Minister and his Cabinet colleagues, the People’s Coalition was ready and willing to resume office under the 1997 Constitution. The Court noted, too, that at least two other legal actions had been mounted during the pendency of the Prasad litigation, challenging the abrogation of that Constitution. “This,” ruled the Court, “is evidence that demonstrates that there is a rival government seeking through the Courts to assert its authority to govern.”

On the second question concerning the acquiescence of the population, the Court refused to accept the assertion of Commodore Bainimarama that the ICG had effective control over, and the acceptance of, a majority of Fiji’s inhabitants. Such evidence as was adduced by the ICG in support of this assertion came, said the Court, “almost exclusively from persons holding official positions.”

By contrast, Prasad and his legal team had produced five volumes of affidavits to prove that there was widespread public opposition to

131. Such an attempt was made on 2 November 2000.
132. One of them was brought by the Assistant Minister of Fijian Affairs in the Chaudhary government and two MPs who belonged to the People’s Coalition, both on their own behalf and on behalf of other Ministers and MPs who could not (presumably because they had been taken hostage by Speight) put their names to the action. The second was brought by the Attorney-General in the Chaudhary government.
133. Republic of Fiji v. Prasad, supra note 7 at 414.
134. Ibid.
the ICG. These came from trade unions, religious bodies, educational associations, human rights organisations, legal professionals (including the Fiji Law Society), women’s groups, peace activists, and victims of alleged discriminatory exercise by the ICG of police powers. “This evidence suggests,” said the Court, “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.”

Furthermore, the evidence pointed to a tendency on the part of the ICG to “inhibit public expression of dissent,” although, significantly, the Court noted that “the press appears to be free to publish views opposing the [ICG].”

Somewhat more controversially, the Court referred to the visit to Fiji of a delegation sponsored by the Commonwealth Human Rights Initiative (CHRI) between 27 August and 5 September, 2000, in the course of which it met some 25 non-governmental human rights organisations and community groups. The delegation’s conclusion that “there is little public support for the military backed interim administration” was, in the opinion of the Court, further evidence of the ICG’s unpopularity and lack of legitimacy. The wisdom of this aspect of the Court’s decision is debatable, not least because it elevates to a position of near infallibility the verdict of a body which, however well intentioned it may have been, was nevertheless no more than a pressure group, with its own agenda and ideological baggage to boot. Besides, the verdict of the CHRI was based on testimony which had not been subjected to the rigours of corroboration or cross-examination in the way in which testimony proffered in legal proceedings normally is.

VIII. Human rights: considerations in Prasad
Another criticism that can be made of the Court’s judgment is that it failed to consider the importance of ensuring human rights compliance as a relevant factor in applying the effectiveness test to the ICG. The need for human rights to be respected, noted earlier, was emphasised by Haynes P. in his judgment in Mitchell as a condition precedent to granting

135. Ibid.
136. Ibid. at 414-415.
recognition to a usurper regime. This point was canvassed at length by counsel for Mr. Prasad who argued:

there are principles inherent in the common law which render it inappropriate that it should take a deliberately neutral stance as between oppressive and non-oppressive regimes. Such principles would include the law’s preference for individual liberty over the absence of rights, its regard for openness for secrecy, and its preference of consistency and equality to arbitrariness, unreasonableness and irrational discrimination.\textsuperscript{139}

The Court’s characterisation of Haynes’ formulation as “probably [going] too far”\textsuperscript{140} is questionable, both on principle and having regard to the particular facts of the case before it. Its belief that ”[the 1997 Constitution] contains many of the rights and freedoms mandated by international instruments”\textsuperscript{141} was only partially correct. It needs to be remembered that the Interim Military Government had, among other things, diluted even the weak human rights protection afforded by the 1997 Constitution by promulgating Decree No. 7, which made the right to equality subject to “any law providing for or protecting the enhancement of Fijian or Rotuman interests.”\textsuperscript{142}

This change went beyond a mere derogation from the fundamental rights guaranteed under Fijian domestic law. As counsel for Mr. Prasad pointed out in their submissions to the Court,

[the explicitly racist nature of the political changes canvassed by the caretaker regime contravenes customary international law. The Appellants [i.e. the ICG] intend to safeguard the ‘paramountcy’ of Fijian and Rotuman interests, and to ensure ‘that the national leadership positions of Head of State and Head of Government’ should never again be held by someone who is not a Fijian or a Rotuman. (See the \textit{Blueprint for the Protection of Fijian and Rotuman Rights and Interests, and the Advancement of their Development}, presented by the purported Interim Prime Minister, Mr. Laisenia Qarase, on 13 July 2000.) It is submitted that the relative disenfranchisement and subordination of any racial group, let alone one which comprises over 40% of Fiji’s population, amounts to degrading treatment contrary to recognised international standards (c.f. \textit{East African Asians v. United Kingdom} (1981) 3 EHRR 76 at paras. 207-08) and places the country in clear breach of customary

\textsuperscript{140} Republic of Fiji v Prasad, supra note 7 at 411.
\textsuperscript{141} Ibid. at 412.
\textsuperscript{142} Fundamental Rights and Freedoms Decree 2000, supra note 103, s. 24(6).
international law.\textsuperscript{143}

The Court's attention was also specifically drawn to the strictures passed against the Government of Fiji by the Committee on the Elimination of Racial Discrimination in 1996, when an attempt by the Government to renege on its commitments under the International Convention on the Elimination of All Forms of Racial Discrimination by means of certain far reaching reservations under the document was rebuffed.\textsuperscript{144} The Committee held that such reservations were "incompatible with the goal and purpose of the Convention."\textsuperscript{145}

Given that the prohibition against discrimination on the basis of race has not only been reiterated in all the leading international human rights instruments\textsuperscript{146} but has also, arguably, now achieved the status of a rule of customary international law,\textsuperscript{147} the unwillingness of the Fiji Court of Appeal to give it the consideration that it deserved is disappointing.\textsuperscript{148} This is all the more so if regard is had to the fact that there was no "necessity", in the sense of a compelling need, to introduce such a sweeping discriminatory

\textsuperscript{143} The Respondent's Brief, supra note 139 at 186, para. 123. Also relevant in this context is U.N. Human Rights Committee, General Comment No. 25 on Art. 25 of the International Covenant on Civil and Political Rights 1966, 1510 Mtg., U.N. Doc. C.CPR C/21 Rev.1 Add.7, which recognises and protects the right of every citizen, \textit{inter alia}, to take part in the conduct of public affairs, the right to vote and to be elected (12 July 1996).

\textsuperscript{144} Ibid. at 187, para. 125

\textsuperscript{145} Committee on the Elimination of Racial Discrimination, \textit{Summary Record of the 1165th Meeting}, 49\textsuperscript{th} Sess., 1165\textsuperscript{th} Mtg., U.N. Doc. CERD C/SR.1165 at para. 9.


\textsuperscript{148} It is noteworthy that s. 43 of the 1997 Fiji Constitution expressly enjoins the courts not to deny or limit any rights or freedoms that may be recognised or conferred by common law or customary law, and to "promote values that underlie a democratic society based on freedom and equality," having regard to "public international law applicable to the protection of rights set out in [the Bill of Rights chapter of the Constitution]." The Fijian courts have also accepted the proposition laid down in the Australian case of \textit{Minister of State for Immigration and Ethnic Affairs v An Hin Teoh} (1995) 128 A.L.R. 353 (H.C.A.) to the effect that the principles contained in an international instrument may be used by the courts as a guide to developing the common law.
law on any objective consideration of the matter. Such is the importance accorded to the right not to be discriminated against on racial grounds that governments are required to enact laws which prohibit both actions with a discriminatory purpose ("direct discrimination") and actions with a discriminatory effect ("indirect discrimination").

Equally puzzling is the insufficiently explicit recognition by the Court of the importance of the emerging international norm favouring democratic participation and its relevance to the determination of the status of usurper regimes such as the IMG ICG. The right to vote and to be elected to public office, the right to freely determine political status and choose governments, as enshrined in Article 21 of the Universal Declaration of Human Rights, have begun evolving in recent years into a stronger "right to democratic governance." Even if such a right cannot be said to have crystallised into a norm of customary international law yet, as the Respondents in Prasad fairly conceded, the Court should at least have had regard to "a normative presumption or rule that individuals (like Chandrika Prasad) or 'peoples' who have enjoyed democratic governance may not have it removed by force." As Prasad's counsel pertinently pointed out, support for the emergence of such a rule was evident from, for example, the unanimous vote of the U.N. General Assembly for the restoration of democracy in Haiti in 1991. Counsel's plea in this regard could not have been more eloquent or more persuasive:

There are various ways by which the Court may take cognisance of this development in international law, but it is bound to do so. The test for "efficacy" expounded by Haynes P. in Mitchell is now bolstered and extended by the emergence of the norm. It is contended that no military junta or 'interim' government that overthrows a democratic government and lawful constitution should be regarded in law as 'efficacious'. Protestations by 'caretakers' that they will introduce another democratic constitution in the fullness of time cannot be taken at face value, and should not be credited by this Court.

At the very least, the Court should have acknowledged the strong persuasive value of the emerging right of democratic governance, especially given its undoubted relevance to the subject-matter of the litigation before

150. See also *the International Covenant on Civil and Political Rights*, supra note 145, Art. 24.
151. See references supra note 9; see also Gregory H. Fox and Brad R. Roth eds., *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000) for a treatment of this subject
152. *The Respondent's Brief*, supra note 139 at 188, para. 126.
it. In a world of growing interdependence, this would have been entirely "in harmony with the development of the international law of human rights" and "appropriate to the times we are living in," to adopt the words of Justice Michael Kirby of the Australian High Court.\textsuperscript{154}

These reflections beg a more fundamental question, namely, has international law progressed far enough to postulate that a regime which is effective, in the sense of commanding the acceptance of the people it governs, may nevertheless be illegitimate because, for example, it is not democratic in character, or does not respect human rights sufficiently? The \textit{Prasad} judgments do not provide an answer to this complex question. Not only is the law on the subject far from clear, but it is doubtful whether the question is even amenable to determination by a municipal court, yet perhaps. \textit{Prasad} has sown the seeds for further cultivation of the subject.

\section*{IX. The \textit{Prasad} judgments evaluated}

The judgments in \textit{Prasad} clearly represent a significant advance over the traditional approach of Commonwealth courts to the issue of the legality of post-coup regimes. By putting strict limits on the much abused doctrine of necessity, and by requiring an usurper government seeking legal recognition to demonstrate to a high standard of proof that, even if its initial grab of power could be justified, it enjoys genuine and widespread support among the people, the Court has shown that passivity in the face of constitutional legerdemains is by no means the only option available to judges. The judgments are certainly rich in symbolism: they represent, as one commentator, who was also professionally involved in the case, has noted, "the only time that a domestic court has pronounced that a coup is illegal and that the abrogation of a nation's constitution is legally ineffective."\textsuperscript{155}

Symbolism apart, the judgments have had some practical, if modest, beneficial effect too. At the very least they succeeding in putting brakes on the illiberal IMG/ICG juggernaut which had been threatening to ride roughshod over the remaining vestiges of democracy in Fiji, imperfect though that democracy was in the first place. It is even possible to argue that the judgments may yet "prove decisive in restoring democracy ... in accordance with the 1997 Constitution,"\textsuperscript{156} but that outcome is by no means guaranteed. But one important fact should not be forgotten, namely,

\begin{itemize}
  \item \textsuperscript{155} George Williams, "Republic of Fiji v. Prasad" (2001) 2 Melbourne J. Int'l L. 144 at 150.
  \item \textsuperscript{156} \textit{Ibid.} at 144.
\end{itemize}
that part of the reason why even these modest gains have been made is that the Qarase Government, unlike many other usurper regimes in the past, agreed to submit itself to the jurisdiction of the courts and, even more remarkably, undertook that “in the event of the 1997 Constitution being upheld ... it would use its best endeavours to promote a return to constitutional legality.” Not surprisingly, the Court made a pointed reference to this in its judgment:

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...  

In terms of their exposition of, and possible influence on, international law norms on the unconstitutional overthrow of established governments, the verdict is less clear cut. On the one hand, there is some truth to the claim that the judgments have introduced a normative element to the ‘effectiveness’ test (though whether, for that reason alone, they can be regarded as a ‘legal landmark’ is a moot point); on the other hand, by failing explicitly to incorporate an increasingly important condition within that normative framework, viz. the need for usurper regimes to act in conformity with internationally recognised human rights norms, the judges have left the job incomplete. It has been argued that the international precedent set by the judgments for assessing repressive military regimes and their actions “will primarily assist the major powers [i.e. Australia, New Zealand, Britain and the United States] to impose their requirements with the assistance of the local elites, not one that will defend the democratic rights of ordinary people.” But that criticism is misplaced, because, even if it is true that the outcome of the Prasad litigation accorded with the worldview of the “major powers”, the judgments clearly were directed at defending the democratic rights of the ordinary people of Fiji, however imperfectly.

One further reflection on these judgments is noteworthy: they were rendered, at both the original and appellate levels, by judges who, though

158. Ibid at 411-412.
159. Williams, supra note 154 at 150.
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sitting as members of Fijian courts, came from outside the jurisdiction.\textsuperscript{161} This has been seen by one critic as "embody[ing] aspects of colonialism, a relationship that mirrors Fiji's substantial economic dependence on Western powers and international financial institutions such as the World Bank."\textsuperscript{162} But, equally, it can be argued that it is precisely because the cases were heard by "foreign" judges, who brought with them a high degree of informed detachment and were not privy to or influenced by local politics, that they produced the results they did. As has been said about the Privy Council in relation to appeals from New Zealand—a relationship which has recently been severed—a foreign court, albeit one which has strong historical links with the territory in question, is often better able to uphold the rights of the individual against arbitrary conduct by the local government.\textsuperscript{163}

X. The aftermath of Prasad

The Prasad judgments were followed by a succession of domestic legal and political developments which were aimed, respectively, at keeping the government to the terms of the judgments and returning the country to a state of normality. Of particular legal interest were two challenges mounted by politicians belonging to the pre-coup ruling party. These challenges resulted in the courts reinforcing the tough message put out in Prasad about the need for the caretaker government to stay within its narrow mandate. In the first case,\textsuperscript{164} Justice Gates of the High Court struck down the establishment of a Constitution Review Commission which had been mandated to take a fresh look at the basic law, obviously with a view to unravelling the delicate compromise reached in 1997 on the issue of indigenous rights. In the second case,\textsuperscript{165} Justice Gates held unlawful a decree which had sought to amend a statute passed by the pre-coup government granting exemption from value added tax on essential food items.

The latter decision is particularly noteworthy for the vigour with which the High Court defended the line adopted in Prasad and reinforced its message that the caretaker government was duty bound to act in strict

\textsuperscript{161} The single judge who heard the case in the High Court was of British origin, though permanently based in Fiji. Two of the five Court of Appeal judges, including the presiding judge, came from New Zealand, with one each of the remaining three coming from Australia, Papua New Guinea and Tonga.

\textsuperscript{162} Michael Head, supra note 160 at 536.

\textsuperscript{163} Noel Cox, "End of the Privy Council as the final Court of Appeal for New Zealand?" (2002) 11:2 The Commonwealth Lawyer 32 at 33.

\textsuperscript{164} Jokapeci Koroi \& Ors. v. Aseula Ravuva \& Ors., judgments dated 15 June 2001 and 24 August 2001 (Gates J.) [Constitution Review decision].

\textsuperscript{165} Jokapeci, supra note 7.
conformity with the necessity principle laid down in those judgments. The judgment also provided an opportunity for Justice Gates to amplify his views expressed in Prasad. The caretaker administration was, he stressed, nothing but an order restoring interregnum, during which the laws and administration would continue as nearly in conformity with the old order as was possible despite the changes that had been brought about by the events of May 2000. “The [1997] Constitution,” he said, “remains in place until amended by Parliament, a body of elected members who collectively represent all of the voters and inhabitants of Fiji. During a period of dire emergency it may endure suspension, if such a suspension will ultimately see the Constitution supported, and ensure its re-emergence.”

Gates J. also articulated his strong scepticism about the applicability of Kelsenian doctrine of revolutionary legality to a situation such as arose in Fiji. He outlined his views on the proper role of judges in such a situation:

Unruly persons are unlikely to seek validation for their usurpations from judges. Nor should the courts give their sanction when application is eventually made under the doctrine of effectiveness, for there is no moral force behind it. In this regard, I respectfully differ from Kelsen. Judges should expect and anticipate that the usurpers will see them removed. So be it. Judges do not represent the law. The doctrine of effectiveness has no moral underpinning, and judges do no honourable business therefore in according lawfulness to the de facto administrations.

He decried the tendency of judges in some of the other cases to accord lawfulness to usurpers all too easily. “The usurper might rule, but that is not a basis for according lawfulness ... ‘Recognised as lawful’ as opposed to ‘lawful’ is quite a different concept with due respect to Lord Reid in Madzimbamuto v. Lardner-Burke, a decision made in what now appears a very different climate from that existing today worldwide with regard to Human Rights, good governance, and accountability....”

Even more trenchant were his observations on the doctrine of necessity. He used the opportunity provided by the present case to take a side-swipe at a brother judge, Mr. Justice Scott, who had only a few days earlier applied this doctrine rather expansively in another case where a number of declarations had been sought against the actions of the President of Fiji. Those actions included: a refusal to summon Parliament at the request

166. Ibid at 30.
167. Ibid. at 31.
168. Ibid at 32.
169. Akuila Yabaki & Ors. v The President of Fiji & Ors. (11 July 2001), Civil Action No. HBC119 of 2001S (F.H.C.), unreported judgment [Akuila Yabaki].
of the deposed Prime Minister, Mr. Chaudhary, and his colleagues; the dismissal of Mr. Chaudhary as Prime Minister; the appointment of Mr. Laisenia Qarase as the new Prime Minister, and Ministers chosen by him; and the dissolution of Parliament. Mr. Justice Scott held that all those actions were of doubtful legality, but refused to issue all but one of the declarations sought, partly on the grounds, that the “extreme conditions” prevailing in Fiji had made them necessary, and partly because “it would not be feasible to turn back the clock to May 2000...” The learned judge also cautioned against “excessive legalism” in such matters – an observation which drew the following rebuke from Justice Gates:

When the ordinary man or woman in the street expects the rule for the General Elections to be strictly complied with, as indeed is insisted on in rugby, does anyone complain of excessive legalism? How much more important is it then, that the Constitution be applied faithfully and accurately, when and where it clearly can be applied without difficulty? With respect I cannot follow the application of the doctrine of necessity in the Yabaki decision and I derive no assistance from it. There is a danger in allowing the doctrine of necessity to degenerate into a doctrine of convenience, a doctrine to avoid awkward or embarrassing situations.

Much the same concern for the need to be more discriminate in the use of the doctrine of necessity is to be found in Justice Gates’s ruling in the Constitution Review Case. Holding that the proposal to set up a Commission to initiate a far-reaching programme of constitutional reform was “outside the ambit of a caretaker administration,” he said:

Unusual programmes of expenditure or reformist projects are the prerogative of an elected government. A lawful government needs to be buttressed by holding the confidence of the House of Representatives, and by acting within the Constitution with the two other bodies of Parliament, namely, the Senate and the President. Moving in advance of the will of Parliament in reformist fields, however well intentioned, is not an act which the courts will validate under the necessity doctrine. The authorisation for the expenditure of public funds for such reform work is similarly outside the permitted scope of work of a caretaker Cabinet. Such authorisation is unlawful.

170. A declaration that the President’s failure to summon Parliament was unlawful.
172. Jokapeci, supra note 7 at 35.
174. Ibid. at 1-2.
The cumulative effect of these judgments and one or two others\(^7\) has been to ensure that the strong lead provided by the Fijian judiciary in *Prasad* was followed through as faithfully and as meaningfully as possible by the other organs of government. In achieving this outcome, the judges have, by all accounts, been fairly successful. At the very least, they have managed to put down a marker which future political adventurers in Fiji are unlikely to forget in a hurry. A further indication that the exertions of the judiciary are bearing fruit, in terms of the return of respect for the rule of law, is that those involved in the May 2000 coup are being brought to justice without let or hindrance. On 5 August 2004, the Lower Court of Fiji found a former Vice President and a former Deputy Speaker of Parliament guilty of participating in the coup and sentenced them each to four years' imprisonment.\(^6\) As was said of the role of the Greek judiciary in that country's transition to democracy, "there can be little doubt about the enormous symbolic as well as political significance of the courts' decisions for the new democracy or for their profoundly legitimating impact."\(^7\) These judgments have clearly helped in the process of "constitutional peacemaking" in Fiji.\(^8\)

On the political side, however, the successes were more modest. For all the pressures exerted by the courts, realpolitik seems to have asserted itself interstitially, as is evidenced by the decision of the President to dissolve Parliament in March 2001 and to order fresh elections. The elections themselves took place under conditions of near normality, and they were judged by most observers, local and foreign, to be, on the whole, free and fair. The party headed by the former caretaker Prime Minister, Laisinia Qarase, won the largest number of seats (32 out of 71), but the other parties, including the Labour Party, still headed by Mahendra Chaudhary, made a good showing as well, together winning the remaining 39 seats.\(^9\) Mr. Qarase was duly invited to form the government, but he was sharply reminded by the courts that he could not rule on his own: he had a constitutional duty to share power by appointments to cabinet

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75 See *e.g.*, *Lusena Qarase & Ors v Mahendra Pal Chaudhary*, Judgment dated 18 July 2004 in Civil Appeal No. CBV 0004 of 2002S, in which the Supreme Court ruled that the Prime Minister was obliged to undertake meaningful consultations with the leader of the Fiji Labour Party about power sharing in the Government.


79 The Labour Party won 27 seats.
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from all the other parties which held 10 per cent or more of seats in the House of Representatives. This duty Prime Minister Qarase publicly acknowledged shortly after the Supreme Court handed down its verdict. He subsequently offered 14 cabinet seats to the Labour Party while retaining 16 seats for his own party, but that offer was rejected after a long bout of ill-tempered negotiations, with Mr. Chaudhary eventually deciding to play the role of Leader of the Opposition in Parliament. Prasad was thus unable to put the clock back in the sense of reinstating the Labour Party to power, but it did succeed in drawing Fiji back from the brink of chaos, anarchy and a further bout of ethnic cleansing which seemed inevitable in the immediate aftermath of the May 2000 events in Suva.

One other significant shortcoming of Prasad was its failure, as noted above, to accord the issue of human rights the necessary importance in the judicial determination of the legality and/or propriety of a coup. This failure was all the more unfortunate given the serious and widespread violations of human rights that accompanied the events of May 2000.

Conclusion: Prasad and future usurpations of power

Whether the judgments in Prasad will have any significant impact on the outcome of future coups d’etat is a question which is as interesting as it is difficult to answer. The rulings should, in purely precedential terms, have a strong persuasive effect, particularly in the courts of other Commonwealth countries. The authors of one recent study have expressed the optimistic view that this "new jurisprudence" may replace, with "canonical" authority, the "dodgy" jurisprudence spawned by cases such as Dosso, though they do not underestimate the hold that the "dodgy" jurisprudence continues to have on contemporary judges. "[S]uch is the strength of the Dosso reasoning that traces of it exist even in this emerging jurisprudence," they wrote, adding: "It is important that these traces

180. Each of those parties was entitled to nominate Ministers in direct proportion to their strength in the House of Representatives.
182. It is worthy of note that the May 2000 coup did not result in the large scale flight overseas of Indo-Fijians as did the 1987 coups, and ordinary life seemed to return to a state of near normality fairly quickly.
183. Those violations were far more serious, in both scale and intensity, from the violations that occurred during the 1987 coups - see e.g., Robbie Robertson & William Sutherland, Government by the Gun: The Unfinished Business of Fiji’s 2000 Coup (Amandale, NSW: Pluto Press Australia, 2001) at xv.
184. Hatchard & Ogowowo, supra note 2 at 23.
are identified and eradicated as courts develop and refine this emerging jurisprudence.\textsuperscript{185}

It is possible that the \textit{Prasad} judgments may stiffen the sinews of some Commonwealth judges and embolden them to shake off the servile attitude that has often characterised judicial responses to coups in the past. But that will depend as much on the individual strength of character of the judges as on the inspirational effects of the jurisprudence flowing from the South Pacific.

\textit{Prasad} clearly represents a high water mark of judicial activism in the area of unlawful overthrow of governments established by law. For all their shortcomings, the judges in \textit{Prasad} probably went as far as they realistically could in taking on the might of military strongmen and political adventurers, bearing in mind that they enjoyed the power neither of the purse nor of the sword. \textit{Prasad} and related judgments clearly represent a triumph for “defensive judicial activism”: they underline the fact that, for all the difficulties which judges face in the aftermath of \textit{coups d'état}, it is still possible for the strong willed among them to salvage essential constitutional values consistently with the well understood limitations of the judicial office. The Fijian judges have, it is submitted, managed to achieve that objective on a principled basis and thus set an example which is worthy of emulation in future Commonwealth coups. If the political impact of the decisions has not been as revolutionary as some would expect, it is because, when all is said and done, there are severe institutional limitations to the role that the judiciary can play in “coup-proofing” democracies.

Even so, the contribution that the Fijian judges have made to a “re-legitimisation” of the law after its eclipse and threatened demise in the face of overwhelming extra-legal force cannot be underestimated. The developments in Fiji offer a salient input to the ongoing discourses on transitional justice and underline the mediating effect that law, as enforced by an independent judiciary, can have in paradigmatic transition.

\textsuperscript{185} Ibid.