The role of the judiciary in a political crisis

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Abstract

In the standard model of the modern western liberal democracy the role of the judiciary is circumscribed and fairly precisely defined. It interprets and applies the law, in a manner which is impartial and unbiased. However, when the very constitutional system which creates and empowers the courts is facing a serious threat to its existence, the position of the courts undergoes a significant change. Now, not merely must the courts impartially interpret and apply the law, but they must also decide fundamental questions of legitimacy and constitutionality. This sometimes requires the courts to "nail their colours to the mast", and stand or fall by the existing regime, or to acquiesce in the transfer of power to a new regime. But generally the role of the judiciary in a political crisis is not different to that in a peaceful environment. Its loyalty is to the law, which both empowers and sustains the courts and the government of the day. Adherence to the rule of law can mean that the maintenance of law and order – through the continuation of judicial services – may sometimes have to be subject to at least temporary suspension. But ultimately the authority of the courts is nugatory if they cannot show strict adherence to the rule of law.

Introduction

In the standard model of the modern western liberal democracy the role of the judiciary is circumscribed and fairly precisely defined. It interprets and applies the law, in a manner which is both impartial and unbiased. However, when the very constitutional system which creates and empowers the courts is facing a serious threat to its existence, the position of the courts undergoes a significant change. Now, not merely must the courts impartially interpret and apply the law, but they must also decide questions of legitimacy and constitutionality. These sometimes require the courts to "nail their colours to the mast", and stand or fall by the pre-existing regime.

But generally the role of the judiciary in a political crisis is no different to that in a peaceful environment. Its loyalty is to the law, which both empowers and sustains the courts and the government of the day. Adherence to the rule of law can mean that the maintenance of law and order – through the continuation of judicial services – may sometimes have to be subject to at least temporary suspension. Ultimately the authority of the courts is nugatory if they cannot show strict adherence to the rule of law. These principles are valid for any regime, whether or not it is a "western democracy", for, in any country, the principles of the rule of law imposes certain minimum obligations upon the courts.

The role of the courts in a peaceful environment

The role of the courts is as Montesquieu described (or rather is taken as the author of – his judicial power appears, rather, in the form of ad hoc tribunals, juries of one's peers who judge of both fact and law without need for the guiding intelligence of a professional judge). That

does not mean, however, that they are entirely dispassionate, nor necessarily immune from political and other pressures. This can be seen in debates surrounding the criticism of judges, and the process of appointing judges.

The question of the immunity of judges from political criticism – if such an immunity exists – has recently been raised in New Zealand by a number of political events. There was some criticism of judges and of elements of the judiciary during the debate on the abolition of appeals to the Privy Council – including claims that the Privy Council was "out-of touch", or that the Court of Appeal was activist or less capable than it should be when dealing with commercial appeals. In an address to the Legal Research Foundation, the then Solicitor-General, Terence Arnold, QC, called for this criticism to end, for it undermined the judiciary as a whole.[1] The Attorney-General, the Hon Margaret Wilson, made a similar comment,[2] though since she was advocating the abolition of the right of appeals to the Judicial Committee of the Privy Council (and, in so doing, had herself criticised the Privy Council) her own motivation might have reduced the weight of her call. The insecurity this litany of criticism and counter-criticism has caused, heightened by the overly political nature of the recent court reform (implemented despite considerable opposition from the legal profession, business, Maori, and most political parties), and the suspicions this has engendered, continues.[3]

Opportunities to criticise the courts and judges have occurred in New Zealand on a number of occasions recently. The recent Court of Appeal ruling which led to acrimony between the Government and Maori over the foreshore and seabed moved the Government to break with convention by openly criticising the courts. More recently, Deputy Prime Minister Dr the Hon Michael Cullen suggested that the courts were challenging the supremacy of Parliament.[4] Whether this was motivated by the Court of Appeal decision, or whether it had a more general basis, it was a significant statement. These events raise serious questions about the nature of criticism of judges and the judiciary. More importantly, these raise questions about the respective roles of Parliament and the courts in New Zealand.

The criticism of judges and of courts by politicians is not new. However, the constitutional balance require limits to be kept on such criticism. Recent events in New Zealand have highlighted the difficulties inherent when political leaders criticise judges and courts, and indeed when judges speak publicly in such a way which might be construed as being critical of Government policy. Ultimately, some element of political criticism of judges is probably desirable, for it shows that the judiciary is not subservient to the political elements of government. It is necessary however for any such criticism to be tempered by a need for balance. Too much criticism will undermine public confidence in the judiciary, and hinder its

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[1] Terence Arnold, "Update on the Supreme Court", Annual General Meeting, Legal Research Foundation Inc., Auckland, 7th August 2004. Text available at <http://www.Crownlaw.govt.nz/uploads/UpdateSC.PDF>.

[2] Hon Margaret Wilson, "The Supreme Court Bill", Press Release 14th October 2003:

> … the development of New Zealand law has been stifled. The Privy Council cannot fulfil this function for us because of the narrow range and limited number of cases it hears, and most importantly because of its lack of understanding of the context within which cases arise.

[3] See Jim Farmer, "The Judicial Process in New Zealand" (Legal Research Foundation, Auckland, 2001), 8; Noel Cox, "The abolition or retention of the Privy Council as the final Court of Appeal for New Zealand: Conflict between national identity and legal pragmatism" (2002) 20(2) New Zealand Universities Law Review 220-238; Noel Cox, "A New Supreme Court of New Zealand" (2003) 12(3) The Commonwealth Lawyer 25-28.

[4] Hon Michael Cullen, "Human Rights and the Foreshore and Seabed", Human Rights Commission Speakers Forum, Wellington, 1st June 2004. Available at <http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=19914>. See also Hon Michael Cullen, "Observations on the Role of Government" <http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=17678>.

effective operation; too little criticism may likewise weaken public confidence in the impartiality of the judiciary.

Criticism implies that judges are not above making errors, or imposing their own ideas – to at least be seen to be so doing. Thus it is also important to take care in appointing judges. The principal, and indeed pre-eminent, criterion for the appointment of members of the professional judiciary should be merit. Whether a judge is seen as socially or racially representative of his or her population should have little, if any, bearing upon their selection.

Litigants, and defendants in criminal cases, expect, and are entitled to, the highest standards of judicial performance. For this reason alone merit, not colour, sex, or political belief, should determine the selection of judges. By and large this standard has been achieved, without the need for any appointments commission.

There are other ways of selecting judges than that presently used in New Zealand, which relies (for senior appointments) on the Attorney-General, acting with the advice and support of the Chief Justice, advising the Governor-General of the names of appointees. The views of the judiciary, and of senior members of the legal profession, are sought. Attorneys-General have generally appreciated that, although they may be politicians, they are obliged to act in a non-partisan manner. The involvement of the Chief Justice normally ensures that the process works smoothly, though perhaps it is not as transparently as some might wish.

Indeed, it is possible to be too transparent. In many parts of the United States of America judges are elected, subjecting themselves to public scrutiny of a quite extraordinary kind. This may make them representative of the people, in a limited sense, but often results in a politicization of the judicial office which, I believe, would be unwelcome in this country. Even the appointment processes for more senior courts in America do not necessarily prevent this politicisation. At the highest level, the political allegiance and beliefs of candidates for the bench of the Supreme Court of the United States weigh as heavily, if not more heavily, that their judicial ability. This is unlikely to result in a truly representative judiciary, except in a narrow political sense.

Nor would the civil law systems necessarily be any more effective in ensuring a representative judiciary. In these jurisdictions the judges are, in effect, career civil servants. After an apprenticeship as a prosecuting counsel, they work their way up through the hierarchy of judicial appointments, promotion being dependent upon performance – and possibly (in some countries at least) – political favour. Whether or not it is desirable for the judiciary to be representative of society as a whole (and this must be questioned), this is rarely, if ever, achieved under any system – except at a cost.

Our current system, which emphasises the selection of judges from among the body of experienced lawyers, puts a premium on courtroom experience. This is perhaps not surprising, given that the newly-appointed judges will be required to conduct trials. It is inevitable that such a system should mean that a significant proportion of judges have been defence counsel. But that is not a bad preparation for judicial office. Nor are civil lawyers, or non-court lawyers, ignored.

Given the composition of the legal profession it is also scarcely surprising that judges were, in the past, predominantly white and male. But there are now, and have been for a number of years, more female law graduates than male. The number of lawyers from minority ethnic groups is increasing. As the numbers of women and minorities in practice, with the necessary experience, increases, so the number of judicial appointments from these groups will increase. But this should not be artificially hastened. To do so would do no one any favours. To appoint inexperienced lawyers to the judicial bench, simply out of a

misguided belief in the need for the judiciary to be more representative, would harm public confidence in the ability of the judiciary as a whole.

The bench, and the legal profession, are, or should be, committed to maintaining the highest standards of public service, and not pandering to the notion that the bench should be "more representative". The professional bench cannot, and should not, be truly representative. It should attract the general support of the community as able to provide quick, quality service of the highest standard. This is especially true in the High Court and the appellate courts (the Court of Appeal and Supreme Court of New Zealand), but also in the District Court. Well-qualified candidates from a wide range of backgrounds are eligible for appointment, but ultimately they are being appointed to a judicial office. This requires considerable legal experience, whatever their personal background. Any alteration to the method of appointing judges should have the aim of enhancing the quality of the appointees – already high – not making the judiciary a potential political football.

There is indeed room for the concept of a representative judiciary at the lowest level of the courts, where their jurisdiction is limited. Already we have part-time referees in the Disputes Tribunals, selected from a wider range of people than the professional judiciary can ever be. For many years the lay (non-lawyer) Justices of the Peace ("JPs") provided the mechanism through which even wider participation could be achieved, in criminal trials as well as civil disputes. In England and Wales today some 97% of civil cases begin and end in Magistrates Court. Regretfully, rather than utilising these part-time judicial officers in this manner, in New Zealand the role of the JP has been steadily reduced. As a consequence, we have lost much of the community involvement in the judiciary (except for juries, which raise other representation issues). The advent of the Community Magistrates a few years ago was a move to reverse this decline, but few could understand why the existing office of Justice of the Peace wasn't used.

JP's are a diverse and relative representative body, which could be entrusted with more civil and a genuine criminal jurisdiction (rather than just traffic offences), if the political will was present to do so. This could result in a much more representative judiciary, but without harming the quality of the full-time professional judiciary, which should remain selected solely on merit. There is no room for political preference in the selection of judges.

But however judges are appointed and whatever their origins, they remain primarily responsible for making unbiased and neutral decisions in matters civil and criminal. What ever criticism they may receive, and whatever their pre-appointment background might be, once appointed their primary role is to administer and interpret the law freely and fairly.

The primary function of the judiciary is to determine disputes either between subjects or between subjects and the State. Judges must apply the law and are bound to follow the decisions of the legislature as expressed in statutes. In interpreting statutes and applying decided cases they do, however, to a large extent make, as well as apply, law. The fiction that judges merely expound, or discover, the law, is too thin to bear serious scrutiny – particularly when the courts are in an activist phase (as the Court of Appeal of New Zealand arguably was under Lord Cooke of Thorndon).[5] Their decisions are potentially controversial and may be at odds with what the Government, or some politicians, might wish. But their authority derives from the formal power by which they are appointed, and also by their strict adherence to the rule of law.

One of the fundamental principles of the Constitution is the independence of the judiciary. Judicial independence is secured by law and by public opinion. The most important

[5] See, generally, Peter Spiller**,** *Court of Appeal of New Zealand 1958-1996: A History* (2002).

legislative provisions, in New Zealand, are the Constitution Act 1986, and the Judicature Act 1908. Judges are entitled to make decisions according to law regardless of fear or favour – either of litigants or of the Crown or State.

The perceived authority of the judiciary

The formal authority of judges derives from statute. But it is broader than that, encompassing notions of legitimacy and continuity. Legitimacy is a more supple and inclusive idea than sovereignty, or of continuity.[6] Legitimacy offers reasons why a given State deserves the allegiance of its members. Max Weber identifies three bases for this authority – traditions and customs; legal-rational procedures (such as voting); and individual charisma.[7] Some combination of these can be found in most political systems.

Three current alternative definitions of legitimacy are firstly, that it involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society.[8] Second, in the tradition of Weber, legitimacy has been defined as "the degree to which institutions are valued for themselves and considered right and proper".[9] Third, political legitimacy may be defined as the degree of public perception that a regime is morally proper for a society.[10]

Whichever definition is preferred, all are based on belief or opinion, unlike the older traditional definitions which revolved around the element of law or right.[11] These traditional concepts of legitimacy were built upon foundations external to and independent of the mere assertion or opinion of the claimant.[12] These normative or legal definitions included laws of inheritance, and laws of logic. Sources for these included immemorial custom, divine law, the law of nature, or a constitution.[13]

Legitimacy is sought through the advancing and acceptance of a political principle, a metaphysical or ideological formula that justifies the existing exercise or proposed possession of power by rulers as the logical and necessary consequence of the beliefs of the people over whom the power is exercised.[14] Just what this formula is depends upon the history and composition of a country.

In modern democratic societies, popular elections confer legitimacy upon governments. But legitimacy can also be independent of the mere assertion or opinion of the claimant. This has been particularly important in late twentieth century discussion of indigenous rights.[15] The legitimacy of the courts derives from the legal form through which they are instituted and operate, and their judicial personnel are appointed, and that is largely inseparable from the legal system and the constitutional order.

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[6] Rodnet S. Barker, *Political Legitimacy and the State* (1990), 4. For a general discussion of aspects of legitimacy in relation to the Crown, see F.M. Brookfield, *Some aspects of the Necessity Principle in Constitutional Law* (1972) University of Oxford unpublished DPhil thesis (on file with author); and F.M. Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (1999).

[7] Randall Collins, *Weberian Sociological Theory* (1986).

[8] Seymour Martin Lipset, *Political Man: The Social Bases of Politics* (1960), 77.

[9] Robert Bierstedt, "Legitimacy", in J. Gould & W. Kolb (eds.), *A Dictionary of the Social Sciences* (1964), 386.

[10] Richard Merelman, "Learning and Legitimacy" (1966) 60(3) American Political Science Review 548.

[11] In an extreme form, the divine right of kings; John Neville Figgis, *The theory of the Divine Right of Kings* (1914).

[12] John Schaar, "Legitimacy in the Modern State", in William Connolly (ed.), *Legitimacy and the State* (1984), 104-6, 108; Johnathan Waskan, "De Facto Legitimacy and Popular Will" (1998) 24(1) Social Theory and Practice 25.

[13] Hannah Arendt, "What Was Authority", in K. Friedrich (ed.), *Authority* (1958), 83.

[14] Fatos Tarifa, "The quest for legitimacy and the withering away of utopia" (1997) 76(2) Social Forces 437.

[15] See, for example, E. Lauterpacht, "Sovereignty" (1997) 73(1) International Affairs 137.

The constitutional principle of the rule of law is based upon the practice of liberal democracies of the western world. At its simplest, it means that what is done officially must be done in accordance with law. In Europe, where an entrenched Constitution is the touchstone for legitimacy of government, there might be a general grant of power to the executive, and a bill of rights to protect the individual. In the British tradition public authorities must point to a specific authority to act as they do. Much of the legitimacy of a political system derives from the impartiality and objectivity with which it is administered. Thus the very exercise of authority legitimates that authority.

Dicey defined rule of law to encompass the liberty of the individual, equality before the law, and freedom from arbitrary government.[16] The scope of the concept is however rather fluid. It includes such meanings as government according to law; the adjudicative ideal of common law jurisdictions; and a minimum of State intervention and administrative power. It also includes the need for fixed and predictable rules of law controlling government action; and standards of common decency and fair play in public life. It also includes the principles of freedom, equality, and democracy.

The concept of rule of law may appear to lack a denominate meaning. That is however no reason to dispense with the notion, which has a value as a governing principle for constitutional theory and analysis. Any rigid distinction between procedure and substance as artificial and unworkable. The rule of law is a set of closely interrelated principles that together make up the core of the doctrine or theory of constitutionalism.

This is explained within a framework of liberalism, which comprises any modern democratic regime that protects a range of familiar civil and political liberties and in which governmental action is constrained by law, interpreted and applied by independent judges.

A general commitment to certain foundational values that underlie and inform the purpose and character of constitutional government imposes a natural unity on the relevant jurisdictions. This is ultimately more important than presence or absence of a "written" constitution, with formally entrenched provisions. It is the spirit of the law, rather than its form, which is the embodiment of the concept of the rule of law.

The rule of law is symbolic. It is a transcendent phenomenon in that it is almost always shorthand for some interpretation of the inner meaning of a polity. It is also highly connotative. In the fifteenth century it meant that the king was always subordinate to a higher law of somewhat uncertain provenance. After the 1688 Revolution, it became clearly associated with the idea of a Lockean ideal State. The old idea of the unity of the State dominated till the classical liberal tradition overtook the older habit of mind in the eighteenth and nineteenth centuries.

The post-Lockean version of the rule of law was associated with the views of the classical liberal theorists, who combined the concepts of legitimacy, legality and legal autonomy. The courts thus exist, a peaceful environment at least, at the heart of a liberal State, imbrued with a sense of autonomy and a commitment to unbiased, neutral decision-making.

The role and perceived legitimacy of the judiciary in a crisis

In a situation where there has been a purported overthrow of a constitution but where the court system has survived virtually unscathed, the court has two options, as the cases show. First, it can say that the usurping government, by abrogating the constitution or by changing

[16] Albert V. Dicey, *Introduction to the Study of the Law of the Constitution*, with introduction & appendix by E.C.S. Wade (10th ed., 1959).

it in an illegitimate manner, has succeeded in changing permanently the previous legal order and that the new order is legally valid. There is always the danger that such a finding is seen as giving the stamp of legitimacy to a usurper. As against that perception, a court cannot be blind to reality, however unfair or unfortunate that reality may be. The other option for the court is to declare the usurpation invalid.

Judicial impartiality applies in any circumstances. Thus even where there is a political crisis the courts must uphold the law as they understand it; indeed it is especially important in such circumstances. They should not capitulate to military or political pressure, nor show favouritism to particular parties. There have been many examples in the history of the Commonwealth where the courts have been faced with recognising – or not recognising – a change of regime. In some cases they have shown the strictest adherence to the rule of law; in others a greater flexibility. This may appear justified to preserve the continuity of the legal system, but it actually deals a serious blow to the formal legitimacy of the law, through undermining the rule of law. We can see a number of instances where the role and legitimacy of the courts in crisis situations has been of major importance in resolving controversy – or in some cases of adding to it.

In 1955 Pakistan operated under a constitution which had been developed with the intention that it would be temporary. The country was facing an array of significant difficulties, foremost among them being internal political strife. The Governor-General intervened in a decisive manner and the courts were requested to consider the constitutional legality of the action.

Ghulam Muhammad[17] was Pakistan's third Governor-General. His tenure was a turbulent time for Pakistan. The young country was suffering through civil unrest and political turmoil. In 1953 Muhammad had attempted to lessen the chaos by removing the Prime Minister, Khawaja Nazimuddin.[18] Just over a year later he declared a state of emergency and dissolved the Constituent Assembly, on the grounds that he had "considered the political crisis with which the country is faced … [and] come to the conclusion that the constitutional machinery has broken down."[19] It was this dissolution which the courts were required to rule upon.

Initially, the High Court of Sind heard the case, *Federation of Pakistan vs. Tamizuddin*.[20] The court ruled in favour of Tamizuddin, arguing that the Governor-General did not have the right to dissolve the Constitutional Assembly. Presumably, their ruling was based on the belief that the Governor-General was endowed only with those powers expressly granted to him by Pakistan's constitution as it existed at the time.

The government appealed to the Federal Court. On 26th March 1955, the court ruled that "the procedure for challenging the dismissal had not been validly enacted by the Constituent Assembly."[21] Over the years, the Constituent Assembly, in its capacity as Legislature, had passed several bills. These bills had then been signed into law by President of the Constituent Assembly. If these bills had been passed through the Constituent Assembly, they would have been perfectly legal. However, as they were technically passed through the Legislature, they required the Governor-General's signature to become law. As a result, 44 Acts, including the one which Tamizuddin based his case upon, were found to be invalid.[22]

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[17] Ghulam Muhammad (ملک غلام محمد) was a Pakistani statesman. He served as Governor-General 1951-1955.

[18] Khawaja Nazimuddin (خواجہ ناظم الدین) (1894-1964) was a Pakistani statesman. He served as Governor-General of Pakistan 1948-1951 and then as Prime Minister 1951-1953.

[19] Keith Callard, *Pakistan* (1957) 141.

[20] Tamizuddin Kahn, President of the Pakistan Constituent Assembly and Speaker of the Pakistan National Assembly.

[21] Keith Callard, *Pakistan* (1957) 143.

[22] Ibid.

By relying on the significant procedural technicality, the Federal Court was able to avoid the entire question of whether the Governor-General was legally entitled to dissolve the Constituent Assembly. However, it appears it was not long before the government came to realise that it needed more legal support for its past actions, and those it intended to take to resolve the situation.[23]

The court argued that the Governor-General did not have the power to dissolve the Constituent Assembly in its legislative capacity. This was because the power of dissolution had been removed from the Government of India Act by a properly enacted Constitutional Order. However, this power had not been explicitly rescinded in relation to the Constituent Assembly proper. The court reasoned that the Governor-General had the power to dissolve the Assembly in keeping with the Crown's prerogative.[24] It chose to adhere to principles of legality, and not, for instance, back the Constituent Assembly, which might be thought to have a greater claim to political legitimacy.

Fiji has also presented examples of judicial involvement in constitutional and political crises. The constitutional development of Fiji since 1987 has seen on-going attempts to reconcile the expectations of the Indians and the rights of the indigenous Fijians. The first constitution after the 1987 coups provided for greater protection and enhancement of indigenous Fijian voting rights and land tenure and other interests, beyond the protection that had been afforded in the 1970 constitution. This was criticised for entrenching native rights, including the requirement that the Prime Minister be of native Fijian ancestry.

Until 1987 the Government was dominated by native Fijians, but in that year a new Government, headed by Dr Timoci Bavadra, and dominated by Indians, entered office. This was subsequently overthrown by Lt-Col Sitiveni Rabuka, principally because the advent of the new Government augured greater political rights for Fijians of Indian origin.

Neither the 1997 Constitution, nor general principles of constitutional law, permitted the armed forces to assume executive authority in such a way.[25] Martial law is the suspension of normal law. When this is done by the military acting at the behest of the civil authorities, justified by extreme circumstances, it is regrettable but not illegal.[26] When this is implemented by the military, without the consent of political leaders, and indeed against their wishes, it is nothing less than a military coup. In no circumstances can the military abrogate the Constitution,[27] and it was patently absurd for Commodore Bainamerana to say that he had "done so by virtue of the powers vested in me".[28]

The Court of Appeal of Fiji, a court constituted under the 1997 Constitution and untouched by the military regime, was comprised of a bench of five judges, led by the Rt Hon

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[23] Ibid, 144.

[24] Ibid, 146.

[25] New emergency powers provisions in the 1997 Constitution (chapter 14) envisage that Parliament will provide by statute for the power of the President, acting on the advice of the Cabinet, to proclaim a state of emergency (s 187).

[26] The Crown can exercise powers not specifically conferred upon it to preserve constitutional order, as in Grenada in 1983, and Fiji in 1987; *Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 35; Smart, PStJ 'Revolution, Constitution and the Commonwealth: Grenada' (1986) 35 ICLQ 950.

[27] According to the Constitution, emergency measures may not derogate from certain Bill of Rights provisions (chapter 4), unless certain conditions are met. These include such matters as the Cabinet's 'reasonable grounds' for belief in the necessity of emergency measures, confirmation of the proclamation by the House of Representatives within five sitting days, and a limitation on its initial period to three months. The protected provisions include ss 23 (personal liberty), 24 (freedom from servitude and forced labour), 30 (freedom of expression), 31 (freedom of assembly), 32 (freedom of association), 33 (labour relations), 34 (freedom of movement) and 37 (privacy).

[28] The President is the Commander-in-Chief of the military forces (s 87), as well as having the executive authority of the state vested in him (s 85). The Commander of the Republic of Fiji Military Forces, who is appointed by the President on the advice of the Minister, is to exercise military command of the forces, subject to the control of the Minister; s 112.

Sir Maurice Casey, as Presiding Judge.[29] The Court heard four days of arguments from Nicholas Blake QC, Anthony Molloy QC, Michael Scott, Savenaca Banuve and Jai Udit for the Appellants, the Republic of Fiji and the Attorney-General of Fiji, and Geoffrey Robertson QC, George Williams, Anu Patel and Neel Shivarn for the Respondent, Chandrika Prasad.

On 4th July 2000 Mr Prasad, a citizen of Fiji, who had not held any office or appointment under the 1997 Constitution, filed an originating summons in the High Court at Lautoka seeking a Court ruling that the 1997 Constitution was still in force as the supreme law of Fiji.

Gates J decided that Mr Prasad had standing to bring the proceedings. His Lordship held that the Speight coup had not succeeded and went on to consider the legality of the Commander's actions in the light of the doctrine of necessity as applied in the field of constitutional law. He concluded that while the Commander had acted in accordance with that doctrine to secure the safety of the State, he had no genuine desire to remove the 1997 Constitution, and no need to pass the decree abrogating it (a point on which the Court of Appeal was to differ from the High Court). Accordingly, the Judge held the 1997 Constitution was still in force.

On appeal, the Court of Appeal concluded that the 1997 Constitution remained in force. This is an unexceptional conclusion based on long-standing principals of constitutional law. A revolutionary seizure of power will eventually be legitimated. This, the Court found, had not occurred. Consequently, the former Constitution, and any government properly appointed under it, remained in force. Prime Minister Laisenia Qarase, appointed after the coup, was not in this category. President Ratu Josefa Iloilo was however the Vice-President, and remained legally interim President.

The starting-point for any consideration of authority on this point is the Privy Council decision in *Madzimbamuto v Lardner-Burke*[30] which held as illegal the regime of Ian Smith in Southern Rhodesia set up under the "Unilateral Declaration of Independence"

Lord Reid said at pp 723-4:

> It is an historical fact that in many countries - and indeed in many countries which are or have been under British Sovereignty - there are now regimes which are universally recognised as lawful but which derive their origins from revolutions or coups d'état. The law must take account of that fact. So there may be a question how or at what stage the new regime became lawful. A recent example occurs in *Uganda v Commissioner of Prisons, Ex parte Matovu* [1966] EA 514. On February 22, 1966, the Prime Minister of Uganda issued a statement declaring that in the interests of national stability and public security and tranquillity he had taken over all powers of the Government of Uganda. He was completely successful, and the High Court had to consider the legal effect. In an elaborate judgment Sir Udo Udoma C.J. said:
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> > . . . our deliberate and considered view is that the 1966 Constitution is a legally valid constitution and the supreme law of Uganda; and that the 1962 Constitution having been abolished as a result of a victorious revolution in law does no longer exist nor does it now form part of the Laws of Uganda, it having been deprived of its de facto and de jure validity." (at 539)

[29] The Rt Hon Sir Maurice Casey, and the Hon Sir Ian Barker, the Hon Sir Mari Kapi, the Hon Mr Justice Gordon Ward, the Hon Mr Justice Kenneth Handley, Justices of Appeal.
[30] [1969] AC 645 (PC).

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

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

Their Lordships would not accept all the reasoning in these judgments but they see no reason to disagree with the results. The Chief justice of Uganda (Sir Udo Udoma Cf) said at 533: "The Government of Uganda is well established and has no rival." The court accepted the new Constitution and regarded itself as sitting under it. The Chief Justice of Pakistan (Sir Muhammed Munir Cf) said at 185: "Thus the essential condition to determine whether a Constitution has been annulled is the efficacy of the change." It would be very different if there had been still two rivals contending for power. If the legitimate Government had been driven out but was trying to regain control it would be impossible to hold that the usurper who is in control is the lawful ruler, because that would mean that by striving to assert its lawful right the ousted legitimate Government was opposing the lawful ruler.
In their Lordships' judgment that is the present position in Southern Rhodesia. The British Government acting for the lawful Sovereign is taking steps to regain control and it is impossible to predict with certainty whether or not it will succeed. Both the judges in the General Division and the majority in the Appellate Division rightly still regard the "revolution" as illegal and consider themselves sitting as courts of the lawful Sovereign and not under the revolutionary Constitution of 1965. Their Lordships are therefore of opinion that the usurping Government now in control of Southern Rhodesia cannot be regarded as a lawful government."

Relying on later cases, particularly *Vallabhaji v Controller of Taxes*,[31] *Mitchell v Director of Public Prosecutions*, *Mokotso v H M King Moshoeshoe II*,[32] *Makenete v Lekhanya*,[33] the Court of Appeal defined the 'efficacy' test, in the context of the common law of Fiji, as follows:

> (a) The burden of proof of efficacy lies on the de facto government seeking to establish that it is firmly in control of the country with the agreement (tacit or express) of the population as a whole.[34]
> (b) Such proof must be to a high civil standard because of the importance and seriousness of the claim.
> (c) The overthrow of the Constitution must be successful in the sense that the de facto government is established administratively and there is no rival government.
> (d) In considering whether a rival government exists, the enquiry is not limited to a rival wishing to eliminate the de facto government by force of arms. It is relevant in this case that the elected government is willing to resume power, should the

[31] Unreported, Court of Appeal of the Seychelles, 11 August 1981.
[32] [1989] LRC (Const) 24 (High Court of Lesotho).
[33] [1993] 3 LRC 13 (Lesotho Court of Appeal).
[34] Seymour Martin Lipset, 'Social Conflict, Legitimacy, and Democracy' in William Connolly (ed), *Legitimacy and the State* (1984) 88-103, 92.

Constitution be affirmed.

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

(f) Such conformity and obedience to the new regime by the populace as can be proved by the de facto government must stem from popular acceptance and support as distinct from tacit submission to coercion or fear of force.[35]

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

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

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

Time, and fresh elections, can confer new legitimacy upon usurpers.[36] But it is not for the courts to do so.

In 1994, the Pacific nation of the Solomon Islands faced a potential threat to its democracy in the form of a Prime Minister attempting to govern without the support of Parliament. The Governor-General took action to prevent this breakdown in democracy, and the Prime Minister took him to court. The case highlighted that reserve powers exist independently of the constitution. The case furthermore demonstrated that the decisions of one judiciary may impact upon the judiciaries in other realms.

Having governed for a year with the smallest possible parliamentary majority, Prime Minister Frances Billy Hilly began to face problems in the months leading up to October 1994. While he had previously controlled 24 of the 47 seats in the unicameral Parliament, six members, five of whom were ministers, left his party. As Parliament had been prorogued since January, there was no opportunity for the Leader of the Opposition to move a vote of no confidence.

The Governor-General, Sir Moses Pitakaka, was aware of these developments and on 2 October, questioned Billy Hilly on the situation in the House. Billy Hilly assured Pitikaka that he was still in control and that he would provide him with a list of government supporters to prove this. He further promised to resign if the list did not comprise a majority of the House.[37]

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[35] The principle of popular sovereignty, hitherto vague, has acquired sufficient determinacy to serve, in a limited range of circumstances, as a basis for denial of legal recognition to putative governments; Roth, Brad, *Governmental illegitimacy in international law* (PhD thesis, University of California, Berkeley, 1996).

[36] See F.M. Brookfield, *Some aspects of the Necessity Principle in Constitutional Law* (DPhil thesis, University of Oxford, 1972).

[37] Nigel Greenwood, *For the Sovereignty of the People* (1999) 164.

Three days later Billy Hilly wrote to the Governor-General informing him that his Government no longer had a majority and that he wanted more time to consider various options. The Governor-General granted him a week but suspected that Billy Hilly might attempt to continue governing without the support of Parliament. Pitakaka was not willing to allow this undemocratic possibility. He contacted the Attorney-General and asked what methods of dismissal might be available in the event such action was necessary. The Attorney-General refused to assist him, arguing that the constitution did not allow the Governor-General to dismiss the Prime Minister, or to call Parliament without ministerial advice.[38]

Believing that his obligation was more to the people and democracy of the Solomon Islands than to the constitution, he prepared and proclaimed an Order on 13 October 1994. He ordered the Speaker of the National Parliament to reconvene the House at the end of the month. He also made it known that the Billy Hilly government would remain in office as a caretaker government. Finally, he informed the Commissioner of Police that it was his duty to ensure that law and order was maintained and that Members of Parliament were able to convene.

Concerned by this unorthodox occurrence, Billy Hilly brought the matter to the courts. Before the end of October the Court of Appeal[39] ruled unanimously that the Governor-General's actions were not in violation of the constitution. This is an interesting interpretation of the constitution of the Solomon Islands which states:

> In the exercise of his functions under this Constitution or any other law, the Governor-General shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet except in cases where he is required by this Constitution to act in accordance with the advice of, or after consultation with, any person or authority other than the Cabinet or in his own deliberate judgment.[40]

Convening Parliament is not stated to be an act undertaken in the Governor-General's "own deliberate judgment", yet despite this section, the justices believed that the Governor-General had the authority to act. They believed this authority to be derived from the traditional understanding of the Crown's reserve powers. Of course, the reserve powers of the Crown had never been delineated in the Solomon Islands. Indeed, in its short history as an independent nation, there had not been any situations which could be construed as have created or conferred any such powers on the Sovereign of the Solomon Islands, or on her representative.

One of the justices, Glen Williams, argued that

> If a Prime Minister without majority support in Parliament sought to continue governing without convening Parliament I am of the view that the reserve prerogative

[38] Ibid, 165.

[39] The Court of Appeal consisted of Connolly P., Williams, and Los J.A. It is interesting to note that none of the judges were citizens of the Solomon Islands and thus were unencumbered by political allegiance or pressure.

[40] Constitution of the Solomon Islands 1978, s. 31(1).

> powers would authorise the Governor-General to direct that Parliament be convened.[41]

Faced with a government willing to circumvent democracy, the Governor-General acted to ensure the supremacy of Parliament, the representatives of all citizens. Though the constitutionality of these actions has been debated, democracy survived and the nation did not, even for a short time, fall into the hands of a single individual, unaccountable to the public. The court backed their action.

Less than a decade after the events of 1994 in the Solomon Islands, a similar disagreement erupted between the Prime Minister and Governor-General of Tuvalu.

Tuvalu's Parliament consists of only 15 members. The government, under Saufatu Sopoanga had a majority, but in 2003, two by-elections returned candidates from the opposition party.[42] The house was prorogued at the time, and thus Sopoanga's leadership could not be directly challenged. The opposition party began to call for Sir Tomasi Puapua, the Governor-General, to reconvene Parliament.

The High Court of Tuvalu considered the matter and stated that despite the wording of the constitution, the Governor-General did have the right to recall the House in support of democratic principles. The Chief Justice of Tuvalu, Gordon Ward, offered this opinion:

> I would suggest that, if his [the Governor-General's] consideration of the evidence still leaves him uncertain as to what is the true support for the Prime Minister in the House, he should take the course which allows it to be determined with certainty and that must be done in Parliament.[43]

He made this ruling, recognizing that it conflicted with section 116 article 1 of the Tuvalu constitution which states that, "Subject to this section, Parliament shall meet at such places in Tuvalu, and at such times, as the head of state, acting in accordance with the advice of the Cabinet, appoints."[44] Unlike many other realms, but similar to the Solomon Islands, Tuvalu's constitution did not give the Crown much discretion in this matter. Ministerial approval for the assembly, prorogation, and dismissal of Parliament were apparently a requirement. Despite this, Ward believed that the Governor-General would have to decide in "his own, deliberate judgement" whether it was practical to comply.[45] If Puapua did not believe that it was practical, Ward suggested that he certify this in writing, and then reconvene Parliament, regardless of Cabinet's advice.[46]

Puapua considered the views of all political sides. He decided that, given the likelihood of Sopoanga getting a majority again in yet another impending by-election, he would not intervene. The Prime Minister had argued that the tiny Parliament of Tuvalu was very

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[41] *Francis Billy Hill & Others vs. The Governor-General of The Solomon Islands* [1994] SBCA 1, 6 (CA of Solomon Islands).

[42] The by-elections were necessitated by the untimely death of one MP and the decision that another had not followed proper electoral procedures and should not have been elected in the first place.

[43] *Amasone v. Attorney-General* (2003) TVHC4 (Tuvalu).

[44] Constitution of Tuvalu 1978 s.116(1).

[45] *Amasone v. Attorney-General* (2003) TVHC4 (Tuvalu).

[46] Ibid.

susceptible to change and that this was a threat to its stability. The Governor-General appears to have agreed.

In all four cases – Pakistan, Fiji, the Solomon Islands, and Tuvalu – the courts were required to decide questions of constitutionality. In these are similar cases the courts have but one recourse – to interpret and apply the law as it stands in as pragmatic a manner as possible consistent with the rule of law. The judiciary does not owe allegiance to the government of the day, though individual judges may be appointed by the political executive. Their allegiance is to the legal system. Without that system they are nothing more than legally-trained specialists, with no mandate or legitimacy beyond acquiescence or a habit of respect or obedience. They must do all they can to uphold the rule of law. If this means their dismissal by an incoming illegal regime, then so be it; but in that case it is incumbent upon the Commonwealth and other external bodies to censure the country concerned. If a judiciary voluntarily capitulates to political pressure then it too should be subject to external censure, for such actions undermine respect for the rule of law, and for the judiciary, internationally.

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