

A Coup by Another Name?
The Politics of Legality

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On 19 May 1987, five days after Lieutenant Colonel Sitiveni Rabuka's coup against the Labour-National Federation Party Coalition government, Governor-General Ratu Sir Penaia Ganilau assumed direct power himself and announced his intention to administer Fiji through a council of advisers he would appoint.¹ On the same day, he dissolved Parliament and dismissed the prime minister, Dr Timoci Bavadra, and his ministerial colleagues. At the end of August 1987, he was still claiming to be the sole executive authority in Fiji. The claims of the governor-general to be in sole charge and authority were given credence abroad, especially at Buckingham Palace and Downing Street, and by sections of the local community—until almost the time of his resignation in October 1987. These claims served a number of purposes, which were not lost on Rabuka and promoted his aims.² The cloak of the rule of the governor-general protected the regime from the full force of foreign as well as domestic opposition; cut off the Coalition leaders from access to the Queen and certain foreign governments; enabled foreign governments sympathetic to the coup (like the British) to justify their continued support of it; put the entire administration at the service of new objectives; protected Rabuka and his collaborators from the due process of law; restored to power the instruments of indigenous Fijian hegemony; and enabled the governor-general and Rabuka to maintain their traditional relationship of *turaga* and *bati* (chief and warrior).

There is little doubt that the apparent legality of the regime damaged the position of the deposed government (although it might not have regarded it as entirely unfortunate that the governor-general stayed in place). In particular it was their view that the dissolution of Parliament

and the dismissal of the government went beyond the powers of the governor-general. Denied effective access to the Queen to challenge the actions of the governor-general, and finding itself left out of new institutions of administration, the deposed government challenged the legality of the dissolution and the dismissal in court. On 29 May 1987 it filed a case requesting the Supreme Court to declare, among other things, that the dissolution of Parliament and the dismissal of the prime minister and the cabinet were beyond the power of the governor-general. The governor-general tried to have the case struck out as disclosing no reasonable cause of action. On 14 August 1987 Mr Justice Rooney decided that the action was not frivolous, but was "probably the most significant and important action ever brought before any court in Fiji," and ruled that it should proceed to a full hearing (*Bavadra v A-G* 1987). However, the case was never adjudicated upon, for, after the conclusion of the Deuba Accord in September 1987 providing for the formation of a caretaker government composed of the Coalition and Alliance parties, the Coalition withdrew it as a gesture of conciliation.

It is not idle to speculate what the decision of the court would have been had it heard the case. Many countries in the Pacific have formal and ceremonial heads of state, and their relationship with the executive or the legislature can become problematic unless there is a clear understanding of the limits of their respective powers. When the constitutionality of the acts of someone like the governor-general in this instance is challenged, at least three lines of defense are possible. The first is that the acts are squarely within the powers of the governor-general as provided in the constitution. The second is that the acts are justified by necessity in the exceptional and difficult circumstances, not contemplated by the constitution, that have arisen (the doctrine of necessity). The third is that the acts have fundamentally altered the basis of the constitutional and legal system, in fact repudiated the old order, and established a new, effective system validating the acts (the doctrine of the successful coup). It is clear in the Fiji case that the governor-general would not have relied on the third defense (whereas if Rabuka had been a defendant, he might well have relied on it, although even he did not abrogate the 1970 constitution until October 1987). The governor-general continued to profess his loyalty to the Queen and the constitution and to claim that his powers arose from the constitution. But it is also possible that his legal advisers may have raised the defense of necessity, and there are indications that at times his lawyers thought that was a stronger basis for his authority.

This paper will therefore concentrate on the two defenses of constitutional validity and necessity; but first it is necessary to set out the sequence of events in Fiji during the critical period in 1987.

THE FIJI COUPS: A CHRONOLOGY

For the general elections of April 1987 the National Federation Party and the Labour Party formed a coalition with a common manifesto and a common slate of candidates. It won 28 seats, against 24 for the Alliance Party, and thus ended the uninterrupted rule of the Alliance Party since Fiji's independence in 1970. Dr Timoci Bavadra, the president of the Labour Party and the leader of the Coalition, was appointed prime minister by the governor-general under section 73(2) of the constitution on 14 April, and the prime minister designated a number of ministers under section 75(1); the sensitive portfolios of land, education, and home and Fijian affairs were given to Fijians.

A month later Lieutenant Colonel Sitiveni Rabuka staged his coup. He announced the suspension of the constitution, plans for an interim council of ministers, and his intention to return Fiji to democratic government under a revised constitution. At first Rabuka said that he had acted to bar Indians permanently from ever winning control of the government again (*IB*, June 1987, 8). Later the same day he said that the coup was to prevent any further disturbance and bloodshed and called it a "pre-emptive" measure to avoid Fijian violence against Bavadra's Indian-dominated government. In his authorized biography, *Rabuka: No Other Way* (Dean and Ritova 1988), he made it clear that his primary motive was to ensure the political paramountcy of the indigenous Fijians.

Rabuka sought the recognition of the governor-general for his regime (it is not clear under what legal provision or principle, since his suspension of the constitution would have deprived the governor-general of his own office, and in any case he had no constitutional power to appoint a usurper to office), but appears to have failed. Instead, the governor-general issued a statement (whose rebroadcast was prevented by the armed forces) in which he condemned the takeover, declared a state of public emergency, and said that he was taking immediate steps to restore the lawful situation. He emphasized that the constitution was the supreme law of Fiji; it had not been overridden, and all duly appointed public officers remained in office. As commander in chief, he called on the armed forces,

the police, and the public service to return to their lawful allegiances in accordance with the oath of office and their duty of obedience without delay. He commanded the people of Fiji to respect and obey the constitution. After the statement, the governor-general contacted Buckingham Palace and received a message of encouragement from the Queen.

Rabuka apparently ignored the orders of the governor-general and announced his council of ministers the following day, when it also had its first meeting. This council was dominated by former Alliance ministers (including their previous prime minister, Ratu Sir Kamisese Mara), and all but two members were Fijians; Rabuka himself was president and minister of home affairs. Both the governor-general and Rabuka claimed to be in full control, but the armed forces stopped radio stations from broadcasting the former's statements and introduced press censorship. The chief justice was told that the constitution would be abrogated, the regime would govern by decree, and after an interval a constitutional conference would be convened. The judges' appointments would also lapse, but they would be reappointed on 18 May under a new oath of allegiance. Later the same day Rabuka, accompanied by a legal adviser, went to see the governor-general to persuade him to accept his authority, while the governor-general reportedly urged him to call off his coup. Meanwhile Rabuka and his council strengthened their grip over the administration. On 17 May (Sunday) the governor-general swore in Rabuka as head of the government in a secret ceremony, and agreed to swear in the rest of the council later in the week.

On the previous day Supreme Court judges and the chief magistrate had met with the chief justice, when they agreed to continue as normal and to refuse any directives from the military regime. The constitution remained in effect, they argued, and they assured the governor-general of "our complete and undivided loyalty and our readiness to continue to exercise our duties in accordance with the law of Fiji and our oaths of office" (in a letter dated 17 May 1987 and reproduced in Tinker et al 1987). On Sunday the governor-general heeded the advice against recognizing Rabuka's regime or abrogating the constitution, and on the twentieth he issued a statement to the effect that he had decided it would be impossible for him to recognize the military regime. He went on to state that the regime had recognized his right to exercise executive authority and had urged him to stay on as governor-general. A rebuttal from the ministry of information, however, revealed that Rabuka had already been sworn in as head of the

government and his council was scheduled to be sworn in on the following day. The next morning the governor-general refused to swear in Rabuka and his council.

A special meeting of the Great Council of Chiefs (convened without proper authorization) opened in Suva to discuss the current situation and future constitutional changes. Later in the day the governor-general issued an important statement in which he sought to establish the legal basis of his authority and administration. It said that he had explained to Rabuka that it was constitutionally impossible for him to swear in the council of ministers because of the illegality of the military government. Acting in accordance with the principles of the constitution, he would dissolve Parliament and prepare the stage for fresh general elections. He would continue to exercise executive authority under the constitution and appoint a council to advise him. The council of advisers would inquire into the efficacy and general acceptance of the 1970 constitution and suggest modifications to meet the expectations and assuage the fears of the people of Fiji. The governor-general said that he had taken this step because he was convinced that he was unable to restore the present Parliament and that it was his responsibility to take into account the "practical realities of the situation and the social structure of Fiji." At the same time he proposed to exercise the prerogative of mercy in favor of Rabuka and others "implicated in the illegal seizure of power" because "no useful purpose would be served by vindictiveness which might hinder the complete restoration of legitimacy" (Radio Fiji, 7 June 1987).³

A proclamation by the governor-general was published the same day in the *Fiji Royal Gazette* in which he dissolved Parliament and declared the offices of the prime minister, the attorney general, all ministers, and the leader of the opposition vacant (Proclamation No. 3 [19 May 1987], in *FRG* vol 114, no. 38). Dr Bavadra and his ministers were released the same evening after their legal adviser had filed an application for *habeas corpus*; although he declared that those involved in the coup were guilty of treason, he promised to cooperate with the governor-general. The next morning he called on the governor-general to express support for his scheme. It appears, however, that the Great Council of Chiefs, sympathetic to the coup, was not pleased with the governor-general's plan and advocated a republic as a way out of Fiji's constitutional difficulties. The governor-general attended the meeting of the council to explain his proposals and agreed to defer appointment to his council of advisers until after the delib-

erations of the chiefs. On 22 May the governor-general announced the formation of a 19-member council of advisers; under Rabuka, 8 of them would review the constitution, and the remainder would be responsible for routine administration. Alliance and Fijian members dominated; there were to be only 2 Coalition members (see Lal 1988). Ratu Mara became adviser for foreign affairs, while Rabuka retained responsibility for home affairs and the armed forces. Bavadra and his deputy, Harish Sharma, (the leader of the National Federation Party) declined the invitation to join the council, complaining about the lack of consultation and the small representation given to the Coalition.

The Coalition members challenged the legality of the dissolution of Parliament "in that it was not done on the advice of the Prime Minister as required by the Constitution. The Governor-General's emergency powers do not allow him to dissolve Parliament. The purported agreement between the Governor-General and those who seized power unlawfully is without any legal or moral foundation" (*IB*, June 1987, 13). They urged the governor-general to "immediately restore the democratically elected government." On 29 May Bavadra filed a summons in the Supreme Court seeking a declaration that the dissolution of Parliament was illegal and that he remained prime minister. Two days previously the New Zealand judges of the Fiji Court of Appeal wrote to the governor-general saying that unless changes to the constitution were made by Parliament in accordance with prescribed procedures, they would resign from the court; he replied that whatever changes were made would be within the law (*Radio Fiji*, 19 May 1987).

Frustrated by their inability to make an impression on the governor-general, the Coalition sent a delegation, led by Bavadra, to London to see the Queen as Fiji's head of state. The Queen, apparently after consultations with the governor-general, refused to see Bavadra, but he did meet twice with her private secretary, Sir William Heseltine. Little is known about what transpired at these meetings. Back in Fiji, the governor-general claimed on 7 June that there would be no change to the constitution in an illegal manner, but that the review would look at strengthening the political rights of indigenous Fijians. He assured the public that provisions dealing with fundamental rights, citizenship, public service, and the judiciary would be altered.

On 9 June the governor-general enacted the Public Emergency (Maintenance of Supplies and Service) Regulations, which gave him and certain

officials wide-ranging powers to secure essential services and reversed the presumption of innocence in relation to offenses under the act. On 11 June he made another announcement that he intended to preserve the framework of legality and outlined his scheme for the restoration of constitutional rule. He proposed to appoint a Constitutional Review Committee; its proposals would be submitted to a Council of National Reconciliation that he would convene to reach a consensus on the changes to the constitution. Once that consensus was achieved, uncontested elections to Parliament would be held, and Parliament would enact the changes. Parliament would then be dissolved, and fresh elections, based on the amended constitution, would follow. It was understood that the governor-general wanted the writs for the first, uncontested elections to be issued within sixty days of the time when he dissolved Parliament (shortly after the middle of July) to conform to section 69(3) of the constitution. On 23 June he provided further details of the composition (with a bias toward Fijian and chiefly interests) and terms of reference (emphasizing rights of indigenous Fijians) of the Constitutional Review Committee. Bavadra returned to Fiji on 24 June and met the governor-general on the twenty-sixth, when he told him that the committee should reflect the equitable representation of all races as provided in the 1970 constitution, and that the constitution should treat all races fairly.

On 3 July the governor-general announced the composition and terms of the Constitutional Review Committee. It was to be chaired by Sir John Falvey, former Alliance attorney general, and composed of four nominees each of the governor-general (supposed to be politically neutral), the Great Council of Chiefs (including Rabuka), the leader of the Coalition, and the leader of the Alliance. It was to propose amendments that "will guarantee indigenous Fijian interests with full regard to the interests of other people in Fiji." After receiving and reviewing eight hundred submissions from groups and individuals, it submitted its report on 17 August (FCRC 1987). However, it was unable to reach a consensus and produced both a majority and a minority report. The majority, consisting of the nominees of the Alliance Party and the Great Council of Chiefs and the two Fijians nominated by the governor-general, advocated several changes to increase Fijian representation in the legislature and to reserve various offices of state for Fijians. The minority report recommended the retention of the 1970 constitution in its entirety.

Far from reaching agreement, the Constitutional Review Committee

had further polarized opinion, and it became obvious that the following stages of the governor-general's scheme had become unworkable. Economic difficulties were worsening, and ethnic and political tensions remained high. The governor-general convened a meeting of the Alliance and the Coalition under his own chairmanship to see if a basis for consensus within the National Reconciliation Council could be established in advance. A series of meetings were held at Deuba from 4 to 22 September, when a different agreement on the formation of a caretaker government (the Deuba Accord) was reached and signed. The caretaker government would consist of an equal number of members from the Alliance and the Coalition under the chairmanship of the governor-general, and its primary task would be to guide the country to a solution of its constitutional problems as well as to help with the recovery of the economy and the restoration of law and order. A subcommittee of the new council, chaired by an eminent judge from another Commonwealth country, would have the responsibility to make proposals for the constitution. Two days later the group was to meet to agree on the division of portfolios and to approve the governor-general's proclamation giving effect to the agreement.

Before that could be done, Rabuka led another military coup. Leaders of the Coalition were detained. However, the governor-general arranged a meeting between Rabuka and the leaders of the two parties for the following Monday. At that meeting Rabuka outlined his terms for a new administration, which were similar to the proposals of the Great Council of Chiefs. While the Alliance was agreeable to Rabuka's offer, the Coalition was not. Rabuka then appeared to conclude that the only way he could achieve his objectives was through a republic.

He asked the governor-general to assume the presidency of the planned republic; Ganilau refused and claimed still to be the lawful authority. On 1 October Rabuka declared himself the head and commander of an Interim Military Government, revoked the constitution, and assumed to himself the power to legislate by decree. On 7 October he declared Fiji a republic and on 9 October he appointed a 21-member Executive Council, drawn largely from the Alliance and including Mara as foreign minister. On 15 October the chief justice and other judges refused to serve the new regime and were dismissed. Later the same day the governor-general tendered his resignation to the Queen, while she was in Vancouver for the meeting of Commonwealth leaders. Fiji's membership in the Commonwealth was terminated by the meeting. The governor-general remained in the State

House and was eventually persuaded to become president (although he had earlier said that he would not become president without a constitution that was fair to the multiracial population as a whole) in an agreement that saw the appointment of Mara as prime minister with his cabinet (replacing the short-lived Executive Council), which included Rabuka and three other officers. The former chief justice, Sir Timoci Tuivaga, also agreed to return to his post. The ambiguities that had surrounded the constitutional system of Fiji since the first coup in May were eventually resolved; but the mixture of military and civilian administration remained, and the three key posts of the state were in the hands of the same persons as before the military adventures began.

THE LEGALITY OF THE GOVERNOR-GENERAL'S ACTIONS

The question of the legality of the actions of the governor-general is not easy to determine. Although he vacillated a great deal, it is clear that his actions have to be examined with reference to the terms of the 1970 constitution and to the doctrine of necessity. The question of his powers deriving from a coup does not arise, for then his position as governor-general would come to an end, and any powers he might have would depend on the status accorded him by Rabuka under a new constitutional dispensation, as happened after the second coup. The governor-general always claimed that he was acting under the 1970 constitution, at first within its provisions and conventions, and later under the doctrine of necessity with that constitution still providing the broad framework. It is therefore necessary to examine his actions under both the express provisions of the constitution and any doctrine of necessity implicit in it or more general constitutional principles.

Validity under the Constitution

The first formal action of the governor-general was to proclaim an emergency and assume the powers of administration under it. It has already been suggested that he fought off Rabuka's attempt to abrogate the constitution and to rule by his own decrees. In that sense Ratu Ganilau's assumption of emergency powers might be seen, and at the time was widely seen, as maintaining the rule of the constitution. The governor-general himself justified the proclamation of emergency under section 18(6)(b) of the constitution. But the powers of the governor-general under

this section are to be exercised in accordance with the advice of the cabinet (section 78). He also claimed, as we have seen, that the executive authority of Fiji was vested in the Queen and exercised by him on her behalf on the advice of the cabinet. In the temporary absence of her ministers, he assumed that authority to himself. The constitution does not give him the power to act independently under either section 18(6)(b) or section 72 in any circumstances. Nor is it possible to rely on any conventions for the authority, when the legal provisions are clear. It would be equally inappropriate to invoke prerogative powers, since the basis of public power is the written constitution. Although it was not so claimed by the governor-general at the time, if there is authority for the assumption of direct authority and the declaration of emergency, it may lie in the doctrine of necessity, which is examined later.

Having declared an emergency and assumed governmental powers to himself, the governor-general proceeded to make various regulations. Under what authority could he make regulations? In the preamble to the most important of these, the Public Emergency Regulations of 18 May 1987, he recited that section 72 vested executive authority in the Queen, which authority may be exercised directly by him or through officers subordinate to him. Since he does not cite any other authority for the promulgation of the regulations, it must be surmised that he thought that section 72 gave him the authority.⁴ The constitution does not give the executive any authority to make regulations during an emergency (as in for example Western Samoa, Nauru, the Federated States of Micronesia, and Kiribati). It is presumably open to Parliament to delegate such law-making powers to the executive, but this appears not to have been done in Fiji. The governor-general's powers to make emergency regulations did not therefore arise from the constitution or an act of Parliament.

Assuming that he did have the powers, were they valid under the constitution? The regulations gave the police and the armed forces the absolute right to ban or disperse meetings and processions, close roads, impose curfews, detain (pending enquiries) persons suspected of actions prejudicial to public safety, control the movement of persons, and designate places or areas as "protected," thereby prohibiting the entry into or presence in them of members of the public. The regulations enabled the governor-general to control the movement of persons, the possession of firearms, and the manufacture or display of flags and uniforms. The police and the armed forces were given extensive powers to arrest any person

suspected of having committed or being about to commit a breach of the regulations. The courts were authorized to hold trials arising out of alleged breaches in camera "if it is expedient in the interests of justice or of public safety or security so to do."

Although these regulations restrict many of the fundamental rights protected under the constitution, the constitution provides for derogations in the interest of public safety, and it could be argued that the regulations would be justified under those provisions. However, only such derogations are permitted as are necessary to deal with the exceptional circumstances that may have arisen, and which are "reasonably justifiable in a democratic society." Applying these criteria, it is doubtful if the regulations were valid. The threat to public safety came from the more militant members of the Taukei Movement or certain members of the armed forces. The latter were largely excluded from the regulations (and in fact were vested with the responsibility for their enforcement), while the former would appear not to be the targets of the regulations in the contemplation of the governor-general. The regulations were used primarily against the members and supporters of the deposed government.

There are similar doubts about some of the other major decisions and acts of the governor-general. Two of these, the dissolution of the Parliament and the dismissal of the prime minister and his ministers, were challenged by Dr Bavadra in the Supreme Court, but the action was withdrawn before the full hearing after the Deuba agreement. In neither case was the prime minister consulted by the governor-general, who was certainly not acting on cabinet advice.

The powers of the governor-general to dissolve Parliament may be briefly summarized. The general rule is that he can dissolve Parliament only on the advice of the prime minister (section 70). However, he may dissolve Parliament in his own deliberate judgment in two situations: (a) if the House of Representatives has passed a vote of no confidence in the prime minister, and within three days he either does or does not resign or advise the dissolution of the House; (b) when the office of the prime minister is vacant, and the governor-general does not consider that there is any prospect of his being able to appoint a person to that office who can command the support of the majority of the members of the House of Representatives. Neither of these exceptional circumstances applied in this case, and one must therefore conclude that insofar as the constitution was concerned, the act of the governor-general in dissolving Parliament was ille-

gal. The power of the governor-general to dismiss the government is set out in section 74. During the lifetime of a Parliament, the governor-general can dismiss the prime minister only if the House of Representatives has passed a vote of no confidence in him. He cannot dismiss any other minister except on the advice of the prime minister. Here again there is no doubt that his dismissal of the government was illegal, so far as the constitution is concerned.

The constitution may not be dispositive of the question of the legality of the governor-general's actions. At first he appears to have taken the position that his powers came from the constitution, that the imprisonment of his ministers enabled him to exercise powers in his own discretion, and the emergency powers were thus justified. (His early proclamations were based on that view, for example, Proclamation No. 3 of 19 May, and even in his broadcast to the nation of 7 June he said that "I have taken on the role of executive authority for managing the affairs of the nation in line with the powers vested in the office of the Governor-General by the Constitution.") But as he was drawn into further acts more and more remote from the constitution, he seems to have taken the line that the authority for his actions was the doctrine of necessity. For example, in his proclamation of 22 May 1987 giving amnesty to Rabuka and his collaborators, he based his powers on both his constitutional status as governor-general and "by virtue of extra-legal powers necessitated and compelled upon me by the worst political crisis ever experienced in the history of Fiji." His legal advisers would undoubtedly have relied on the doctrine of necessity if the case against him by Bavadra had proceeded to argument. It would be difficult to argue that he was relying on his residual powers under the constitution, for the constitution sought to provide for a complete scheme for the exercise and control of public power, and the conventions governing the powers of the head of state were reduced to specific legal provisions in the constitution, leaving no room for unspecified, but constitutional, powers. (For further elaboration of this point, see Ghai and Cottrell n.d.)

The Doctrine of Necessity

The acts of the military under Rabuka that threw the country into turmoil were outside the contemplation of the constitution. The doctrine of necessity is perhaps a more secure basis for the acts of the governor-general. Before looking at the relevance of this doctrine in the situation specific to

Fiji, one should understand how it has been developed by courts elsewhere.

The essence of the doctrine is that if an action that is illegal was taken to safeguard the security of the state or the welfare of its citizens when no lawful course was possible, the necessity of the case excuses the illegality. Although the doctrine is said to be ancient (Williams 1953; Judge Haynes in the Grenadan case of *Mitchell v DPP* [1986]), its application to modern constitutional law is frequently traced to the well-known Pakistan case, *Reference by H E the Governor-General No. 1 of 1955*. The governor-general had dissolved the Constituent Assembly, which was established to adopt a constitution for Pakistan but which also had ordinary legislative power. The assent of the governor-general had been dispensed with in relation to all bills passed by the assembly in the mistaken belief that such assent was unnecessary. When the speaker of the assembly challenged the legality of the dissolution, the Supreme Court held that the courts had no jurisdiction to hear the case since the legislation giving jurisdiction to the courts was void due to the absence of the assent of the governor-general (*Federation of Pakistan v Tamizuddin*). While this took the new regime off the hook, the victory cup was a poisoned chalice since it rendered void all the legislation passed by the assembly over an eight-year period.

The governor-general sought to fill the void by issuing a proclamation under the basic constitutional act still in force giving his assent retrospectively to all the legislation. In *Usif Patel v Crown* (1955) the court held that he had no such power, since the proclamation itself amounted to legislation. The governor-general immediately summoned a Constitutional Convention to make a provision for a constitution and meanwhile issued a proclamation assuming to himself (until the convention provided otherwise) such powers as were necessary to validate and enforce laws that were needed to avoid a constitutional and administrative breakdown. In reliance on these powers, he retrospectively validated a number of earlier acts, but referred the question of the legality of his actions (including the dissolution of the assembly and attempts to validate its legislation) to the Supreme Court. The court gave its opinion on the basis of "facts" as alleged in the reference, which included a recital that the constitutional machinery had broken down; a state of emergency had been declared throughout the country; and the Constituent Assembly, having lost the confidence of the people, could no longer function. The court held, by a

majority of three to two, that although under the constitution the governor-general did not have the power to do what he had done, his actions were valid under the doctrine of necessity. Referring to a number of ancient English authorities, the court held that in exceptional circumstances, illegal acts are justified if they are necessary to preserve public order or the security of the state. It relied on the maxims *salus populi suprema lex est* (the safety of the people is the supreme law) and *salus reipublicae est suprema lex* (the safety of the state is the supreme law). Some of the authorities had held even private persons justified in their illegal acts on these grounds; the Pakistani court took the view that "in the case of the Head of State justification to act [in necessity] must *a fortiori* be clearer and more imperative" (Chief Justice Muhammad Munir).

The court held that in view of the irresponsible behavior of the Constituent Assembly, the governor-general was justified in dissolving it, and having dissolved it, was justified in enacting legislation himself pending validation by the new Constitutional Convention. It said that the governor-general "must be held to have acted in order to avert impending disaster and to prevent the State and society from dissolution." However, it went on to say that since the validity of those laws during the interim period was founded on necessity, there should be no delay in calling the Constituent Assembly. The dissenting judges maintained that the law of necessity was confined to cases where in times of war or other national disaster the executive might interfere with private rights, but that it had never been extended to changes in constitutional law, and most authorities referred to had related to periods of supreme and undisputed royal power. One of them (Mr Justice Cornelius) said that "the records of these affairs are hardly the kind of scripture which one would expect to be quoted in a proceeding which is essentially one in the enforcement and maintenance of representative institutions. For they can bring but cold comfort to any protagonist of the autocratic principle against the now universal rule that the will of the people is sovereign."

In spite of Mr Justice Cornelius' powerful dissent, the views of the majority of the court have been followed in other jurisdictions. But the other courts that have followed the doctrine have been more careful in elaborating the limits on the powers that may be exercised under it. The Supreme Court of Cyprus in a detailed discussion in *Attorney-General v Mustafa Ibrahim* (1964) set down these limits. The legislature of Cyprus sitting without its Turkish members purported to pass a law to amend the

personnel and the jurisdiction of the Supreme Court, due to the boycott of the courts by the Turkish judges. The legislation did not conform to constitutional requirements for its enactment, and indeed sought to alter some provisions of the law that had been declared unalterable. The government's justification was that the rigidity of the constitution and the noncooperation of the Turks had rendered the old law unworkable, and a large number of cases were pending. The considerable tension between the Greek and Turkish communities was liable to be aggravated by the breakdown in the judicial system.

Under these circumstances the court was willing to accept the validity of the legislation (as one judge said "Otherwise the absurd corollary would have been entailed, viz., that a State and the people should be allowed to perish for the sake of its constitution"). The court's decision was clearly influenced by the consideration, outlined by one judge, that "the legislature has not abolished any organ of the state, or any of its courts, but it simply legislated for another court to take their place during the period they will not be functioning . . ." Another judge said that the doctrine would only be applicable where four conditions were satisfied: there must be an imperative and inevitable necessity or exceptional circumstances; no lesser remedy would suffice; the measure taken must be proportionate to the necessity; and it must be of a temporary character limited to the duration of the exceptional circumstances (Mr Justice Josephides at 265).

Judges who, in the series of cases arising from the Unilateral Declaration of Independence in Rhodesia, were not prepared to hold the Smith regime lawful but were prepared to uphold its laws and acts on the basis of necessity, sought to impose some limitations on the exercise of power. Mr Justice Lewis at first instance held that only such legislative and administrative powers could be exercised as would be lawful under the 1961 constitution for the preservation of peace and good government and the maintenance of law and order (*Madzimbamuto v Lardner-Burke* 1968). When the case went on appeal to the Privy Council only Lord Pearce was willing to recognize any of the acts of the Smith regime—on the basis of necessity—but even he imposed three qualifications on the exercise of power. Necessity would validate only such laws as were directed to and reasonably required for the orderly running of the state; did not impair the rights of the citizens under the previous lawful Constitution; and were not intended to strengthen the usurper ([1969] Appeal

Cases). The doctrine was also considered in subsequent Pakistani cases. *Jilani v Punjab* (1972) arose when President Ayub Khan, faced with mounting opposition to his regime, purported to hand over power to the head of the army, Yahya Khan. The latter declared martial law, arguing that the armed forces could not "remain idle spectators of the state of near anarchy," and assumed the office of the president. The court refused to recognize the validity of his regime but was prepared to enforce a few of his laws, although not all, since they did not satisfy the tests outlined above. In *Bhutto v Chief of Staff* (1977), the court upheld Zia ul-Haq's assumption of power, taking the view that his action was not intended to completely suppress or destroy the constitutional order, but represented a temporary deviation in order to restore law and order and to provide for free and fair elections to return the country to democratic rule. In a Nigerian case (*Lakanmi v Attorney-General* 1971) the court held that a military takeover of power in 1966 was a temporary expedient to restore law and order, and that democracy and consequently its acts were to be tested against the doctrine of necessity and not a coup. It went on to hold that the legislation in question, for the forfeiture of the property of the plaintiff, was invalid as it went "beyond the necessity of the occasion."

The Grenada Court of Appeal, in a case that involved the validity of the decrees of the government of Bishop following the overthrow of the government of Gairy by his political party, the New Jewel Movement, and those of the governor-general after the US invasion of Grenada and the ousting of the military regime that had murdered Bishop, reviewed extensively the authorities on necessity, and its decision may be regarded as a considered and authoritative statement of the doctrine. In upholding the decrees, the court laid down a number of conditions for the validity of acts under the doctrine of necessity: 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; there must be no other course of action reasonably available; 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; the action must not impair the just rights of citizens under the constitution; and it must not have the sole effect and intention of consolidating or strengthening a revolution as such (*Mitchell v DPP* 1986, 88-89).

To return to the Fiji situation, although it is my view that this doctrine

arises independently of the constitution, its operation is connected with it. The doctrine of necessity requires that the old constitutional order be respected as far as possible, with only the minimum deviations from it necessary for the exigencies of the situation being permitted. In that sense the constitution does provide the basic framework for law and administration. My understanding is that the governor-general received conflicting legal advice on how far the doctrine of necessity enabled him to deviate from the constitution and existing laws (one view being that he had pretty well a *carte blanche*), but there is some evidence that the governor-general did feel himself bound by the parameters of the constitution. For example, in his proposals of 11 June 1987 for the return to constitutional democracy he had provided for the adoption of new constitutional provisions by an act of Parliament under the 1970 constitution and was anxious that general elections should be held within sixty days of his dissolution of Parliament (the period provided in the constitution). He described his proposals as "the most direct path that I can realistically take within the laws of Fiji." Moreover, when the negotiations between the Coalition and the Alliance parties took place under his chairmanship some controversial decisions (eg, about the composition of the Council of State and his own role as its chairman) were sought to be resolved by the requirements of the doctrine that the constitution should as far as possible provide the framework.

The Acts of the Governor-General and the Doctrine of Necessity

How do the actions of the governor-general measure up to the test of legality if the doctrine of necessity is applied? The answer is not easy. For one, it is not possible to apply precedents in any mechanical way. Each situation of crisis is different from any other, and the doctrine has to be applied to the specific circumstances of the situation under study. Second, it is not possible to apply the rules of the doctrine in any objective or abstract manner. One has to understand the constraints under which the person in charge had to act. One may disagree with his judgment, aided by hindsight, political predilections, or a different assessment of the exigencies. Decisions sometimes need to be taken quickly in a volatile situation. Outside observers do not always know the full facts as available to the person in charge. On the other hand, it would be equally erroneous to apply an entirely subjective test, for that would amount to no test at all, precluding any examination of the appropriateness of the acts of, in this case, the governor-general. The court would be justified in determining

what a reasonable person in the position of the governor-general, aware of all the facts that he was aware of, subject to all his constraints, and with some appreciation of the consequences of his acts, would decide. If the acts of the governor-general were so out of line with what a reasonable person would do, the court might well conclude that he was not acting in good faith and should not have the benefit of the defense of the doctrine of necessity.

There is a further difficulty in this case. The courts have generally assessed the acts, allegedly based on the doctrine of necessity, of those who have assumed effective authority and are in a sense responsible for their actions. Although on several occasions the governor-general claimed that he was in command and that he ran a civilian administration, it seemed to many observers that effective powers lay with Rabuka and his associates. A dramatic illustration of this is the total disregard by Rabuka of the Deuba agreement that the governor-general had so painstakingly put together. The governor-general had not initiated the action that led to the May coup (for the purpose of this analysis I disregard rumors that he was involved with Rabuka; see Lal 1988, 131; and Robie 1987). He had tried, as he claimed, to stop the coup and ensure respect for the constitution in circumstances when he did not have full command of forces. It would therefore not be appropriate to judge him by the same standards as for example the late President Zia ul-Haq of Pakistan.

The governor-general's initial justification for deviating from the constitutional provisions was that his ministers were not available to advise him, so he had to act at his own discretion. He then envisaged that his assumption of authority would be temporary, presumably until his ministers were released. He stated his intention to restore constitutional rule and regard the constitution as still in force. All public officers should remain on duty; as commander in chief, he ordered the army and the police to "return to their lawful allegiance in accordance with their oath of allegiance and their duty of obedience without delay." After some initial hesitation, he refused to recognize the military regime or swear in Rabuka's council (although he swore in Rabuka). Up to that point (with the exception of swearing in Rabuka) his conduct may be regarded as correct.

However, there is considerable doubt of the legality—applying the doctrine of necessity—of his next major initiative. On 19 May, the same day as the prime minister and his colleagues were released from military detention after their lawyer had filed applications for *habeas corpus*, he dis-

solved Parliament and dismissed the government, acting at his own discretion. He announced plans to run the administration with the help of a council of advisers that he would appoint; and gave amnesty to Rabuka and his collaborators. How is one to square that action with his earlier statement that he had assumed executive authority temporarily in the absence of his ministers? His explanation was that "in the situation presently obtaining in Fiji the Prime Minister and his Ministers are unable to discharge the powers duties and functions conferred upon them by the Constitution" (Proclamation No. 3, 19 May 1987). He claimed his action was necessary because he could not restore the present Parliament and "must take into account the practical realities of the situation and the social structure of Fiji."

Thenceforth he appeared largely to ignore Bavadra and his colleagues, and any attention he paid them seems to have been on the advice of the Queen in the early days, until the negotiations leading to the Deuba meetings. He relied on the advice of the Great Council of Chiefs, by no means an impartial body (and whose meeting in May 1987 was unconstitutionally convened), and depended heavily on Mara and Rabuka. Most of the decrees he passed gave increased powers to the armed forces and the administration, now dominated by these two men. Both the Constitutional Review Committee and the councillors he appointed to advise him were heavily biased in favor of the Taukei Movement and the Alliance Party. One may argue on his behalf that he had no option other than to go along with Rabuka, the *taukei*, and the Alliance; that on the whole he exercised a restraining influence on Rabuka; and that his efforts in August and September 1987 manifested a true desire for reconciliation of opposing views and a return to constitutional democracy.

How valid are the acts of the governor-general measured against the four important tests of acts allegedly undertaken under necessity that emerge from the cases discussed earlier? The first requirement is that an imperative necessity must arise out of exceptional circumstances not contemplated in the constitution and requiring immediate action to preserve some vital functions of the state. There is little doubt that the military coup satisfied this condition. The second test is that there must be no other course of action reasonably available. Here the case would depend on the validity of the claim that the governor-general had no option but to go along with the views of Rabuka and the Great Council of Chiefs.

Against that view, it could be argued that the governor-general could

have tried harder to persuade Rabuka to return the military to the barracks. Rabuka had consistently declared his commitment to the chiefly system and professed loyalty to his high chief. The governor-general happened to be his high chief, and firmness on the part of the governor-general, coupled with the support of the Coalition ministers and members and friendly neighboring states, might have turned the tide. There is little evidence that he considered alternatives. By his premature dissolution of the Parliament and the dismissal of the government he made other solutions highly unlikely. There can be no justification for the dissolution of the recently elected Parliament or for the dismissal of the government. He might in his discretion have chosen not to summon Parliament for the time being, but its dissolution could in no sense be regarded as necessary in the circumstances. His dismissal of the government sidetracked the Coalition leaders and weakened their legal and political position. By these two acts, he went a long way toward consolidation of the coup, its leaders, and their objectives.

Furthermore, he authorized a recruiting program that brought the army to 5500 men, as well as the purchase of additional arms and two fast oil-rig tenders for use as patrol boats, for which there appeared to be little necessity (indeed very much the contrary). Similarly, there would appear to be little justification for the amnesty for Rabuka and his collaborators (quite apart from the fact that he misconceived his powers under the law, since the exercise of the "prerogative" of mercy is possible only after a conviction), his explanation being that no purpose would be served by vindictiveness, which might hinder the complete restoration of legitimacy. This early blow against the rule of law by the governor-general may well have encouraged Rabuka, the *taukei*, and their collaborators to further acts of lawlessness, and, as we have seen, amnesties for such acts appear to have become standard. The governor-general then went on to promote Rabuka and some of his close associates in their military ranks. The necessity for this action is questionable, to say the least.

The third test is that the acts must as far as possible be consistent with the constitution and the rights of citizens under it. I have already noted the massive deviations from the constitution: the dissolution of the Parliament, the dismissal of the government, the running of the administration by the governor-general and his council of ministers, the emergency regulations, the censorship of the media, the grant of amnesty, the disregard of the lawfully appointed prime minister and his ministerial colleagues.

These deviations are valid only if absolutely necessary, but the case for so regarding them is not strong. Ganilau was careful in the very early stages to respect the broad parameters of the constitution, but he soon appears to have taken the position that the necessity doctrine enabled him to do what he felt desirable. There is reason to believe that he took the flexible stance under pressure from some members of his council. His legal advisers were in fact in disagreement about his legal powers. The solicitor general (John Flower) took the view that the powers were restricted to those strictly necessary in the circumstances to maintain law and order, while a visiting counsel (supported by the government's new legal adviser, Alipate Qetaki), advised him that he could personally exercise all the powers available to the prime minister and his cabinet under the constitution (*PNG Post Courier*, 15 Aug 1987). (That advice, as is clear from this analysis, I think was wrong.)

The fourth test is that the acts must not be such that in their intent and effect they consolidate or strengthen the coup; on the contrary, they must be directed to a speedy return to constitutional rule. It would be unprofitable to enter into a discussion of the intentions of the governor-general—he stated several times his intention to steer Fiji back to constitutional rule, while at an early stage he appears to have committed himself to the aim of the coup, the establishment of Fijian supremacy, which in principle is incompatible with the 1970 constitution. However, it is possible to be more confident about the effect of the acts of the governor-general. Here one is constrained to conclude that they helped to consolidate Rabuka's authority: not only was he pardoned for his treasonable activities and promoted to commander of the armed forces, but the military was provided with increased numbers and armaments and extensive powers of arrest and detention. The very ambiguity of the legalities of the situation produced by the intervention and claims to authority of the governor-general helped Rabuka, as I have already argued. There is little doubt that he got what he wanted, and, in the ultimate analysis, he was the person in effective authority and the main beneficiary of the actions of the governor-general.

No attempt was made to restore the 1970 constitution. When the governor-general talked of a return to parliamentary government, he had in mind a new constitutional dispensation more in line with the thinking of Rabuka and his *taukei* associates. The initial terms of reference he proposed for the Constitutional Review Committee were to suggest amend-

ments to the 1970 constitution that "will guarantee indigenous political rights" (generally understood to mean their political supremacy). He told the Great Council of Chiefs that "as a native Fijian and as one who is blessed with chiefly status, the interests of the indigenous Fijians, are those which I hold and shall always hold dear and close to my heart," and assured them that no administrative arrangements he made would ignore or be capable of undermining the interests of native Fijians (Scarr 1988, 87-88). Under this fourth test it would appear that the acts of the governor-general were not legal.

Notwithstanding my analysis, massive deviations from the constitution and the assumption of extensive powers by the governor-general might have been justified if this had been the only way to prevent the infliction of greater harm to the country. About the time he dissolved Parliament, Ganilau thought that public disorder might ensue if he resigned (Scarr 1988, 84), but public disorder did occur while he remained theoretically in charge. There was a steady attrition of human rights, harassment of the members of the coalition, discriminatory enforcement of the law, and decline in the economy. His conduct was far from that of an impartial ruler holding the balance fairly between the opposing groups and searching for a genuine compromise. Sadly, it must be concluded that his acts were indefensible under general constitutional principles. His presidency under Rabuka's republic may be said to have merely formalized the position he held from the time of the first coup. That he should agree to serve under what is essentially a military and racist regime (which he was allegedly trying to eliminate) must cast doubts about his commitment to a fair and constitutional democracy.

CONCLUSION

The illegality of the conduct of the governor-general does not mean that all acts of the regime would be denied legal effect by the courts. In the Rhodesian cases arising out of the Unilateral Declaration of Independence, the courts accepted that in certain circumstances they enforce certain laws not because of the authority of the lawmaker, but in spite of it in order to maintain the social order. Only a limited number of laws would qualify under this criterion, for example, budgetary appropriations to run schools and hospitals and to provide other essential services. It is not necessary to examine the specific decrees and proclamations of the Fiji regime

that the courts would have been justified in enforcing, for the concern of this paper is the exploration of broad constitutional principles.

Nor do I pretend that a resolution of the legal issues of the powers of the head of state is dispositive of political issues and power. Having filed a suit to challenge the legality of the dissolution of Parliament and the dismissal of the government by the governor-general, the Coalition leadership was in no hurry to pursue it. Indeed, there is reason to believe that they were apprehensive of the consequences of a victory for their legal argument (Scarr 1988, 105-106). Their anxieties arose from a number of sources. First, many Fijians had been upset at the affront to their high chief (not, be it noted, to him as governor-general) by the institution of the case. A decision by the court that he had acted unconstitutionally would further inflame feelings and erode Fijian support for the Coalition. Second, the governor-general would probably resign, which in the Coalition's view could produce greater chaos and strengthen the hand of the more extreme among the *taukei*. Despite its reservations about his intentions and acts, the Coalition still regarded the governor-general as the only party likely to achieve a satisfactory settlement and did not therefore want to weaken his position. Third, the Coalition leader must have realized that there would be no real prospect of enforcing a favorable court judgment, which might well precipitate a declaration of a republic.

On the other hand, the impendence of the case could be useful. The regime claimed to be legal and from that claim gained valuable advantages, including a preferred position with the Queen for the governor-general. But the case implied that the claim was by no means justified beyond doubt (and the ruling of the court in August 1987, dismissing the request on behalf of the governor-general to strike out the action as frivolous and of no merit, that the case was of great importance, strengthened doubts about the legality of the governor-general's conduct). The Palace was thought to be concerned about the case; so it might bring pressure to bear on the governor-general, who himself might take care to operate within the broad framework of the constitution. The governor-general (as well as the Alliance Party) was known to be anxious about the outcome, and thus perhaps susceptible to a political compromise on promise of the withdrawal of the case.

Furthermore, the Coalition had been unsuccessful in pursuing other avenues of protest and a hearing, and it had been largely ignored by the governor-general. The judiciary, on the other hand, had taken a sympa-

thetic position, and the courts were the only public forum where the Coalition could air its grievances. But the case was an asset that could be more readily cashed by its withdrawal than its prosecution through the courts. This irony typifies the paradoxes and ambiguities of legality in situations of civil turmoil and unlawful seizures of power. While it is quite right to establish the parameters of the exceptional powers of the head of state, as an end toward clarity and the promotion of constitutional rule, it is clear that legal considerations are merely one, and generally a secondary, aspect of decision making when power struggles follow grave threats to or violations of the constitution.

Notes

1 The chronology of the coup is derived from published accounts, government sources, and personal observation—which explains why I have not provided detailed documentation. That is available in Lal (1988) and Scarr (1988). [And other books listed in this issue: see Resources; Book Reviews.—Ed.]

2 Rabuka is reported to have said in May 1987 that “I am still in control but I need the Governor-General for the international community, our relationship with the outside world and with the Queen” (*Guardian*, 22 May 1987).

3 In fact a Proclamation was issued granting amnesty to Rabuka (Proclamation no. 4, 23 May 1987, in *Fiji Royal Gazette* vol 114, no. 40).

4 It appears that Fiji has a Public Safety Act under which the governor-general can make regulations to maintain order in times of civil commotion. But this is an old colonial piece of legislation, which therefore had to be read with changes necessary to make it compatible with the 1970 constitution with its protection of fundamental rights (Fiji Independence Order 1970, para 5[1]); in any case the governor-general may have considered that it did not provide sufficient authority for all the regulations he deemed necessary.

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