On 9 October 2008, Fiji’s High Court ruled that the President’s actions in appointing an interim cabinet in January 2007 and in continuing to rule by decree in the wake of Fiji’s 5 December 2006 coup ‘were valid and are held to be lawful’. The three-member High Court panel, led by acting Chief Justice Anthony Gates, drew the conclusion that ‘exceptional circumstances existed’ because ‘the stability of the State was endangered’, so the President was entitled to use certain ‘prerogative powers’ not provided for in the constitution (High Court of Fiji 2008).

The decision had, as was clearly intended, the effect of legitimising the post-coup interim order.

It is worth considering the context of the Qarase versus Bainimarama ruling.

The High Court’s judgment came as a shock to many in Fiji. Despite some controversies associated with judicial reaction to the 2000 coup, people in Fiji had grown accustomed to the courts seeming to be largely independent of political influence, reasonably dependable and held in high public esteem. Indeed, an extraordinary veneration came to exist for the rule of law in Fiji—paradoxically, to a far greater degree than the respect that existed for constitutional democracy. After the failed George Speight putsch in May 2000, Fiji’s courts ruled the post-coup interim regime led by Laisenia Qarase to be illegal. First, in the Lautoka High Court, presided over by the now acting Chief Justice Gates, and then in the Chandrika Prasad case before the Court of Appeal in 2001, judges found the 1997 Constitution to be intact and ordered a speedy return to democratic rule. In contrast, other countries, such as Nigeria and Pakistan, have considerably greater familiarity with court judgments that have aimed to legitimise post-coup governments.

The Fiji experience was also unusual in another way. In the 2001 Chandrika Prasad judgment, the court said that ‘to its credit, the Interim Civilian Government in this case has adopted a very responsible stance’, making clear that ‘in the event of the 1997 Constitution being upheld by the Courts, it would use its best endeavours to promote a return to constitutional legality’ (Court of Appeal 2001). This proved to be a solid commitment. In the wake of that judgment, the President had to be re-elected by the Great Council of Chiefs and Fiji returned to the polls. In other parts of the world, regimes that have arisen in the aftermath of coups have been much more likely to defy such court decisions.
The 2001 Chandrika Prasad case was not the last of Fiji’s high-profile court judgments regarding the constitutionality of the Qarase-led government. After that case, interim Prime Minister Qarase proved able to win the subsequent election and form a majority government. This government too, however, was found to be unconstitutional, on the grounds that it had failed to follow constitutional provisions requiring all parties with more than 10 per cent of seats to participate in cabinet (Court of Appeal 2002, 2003; Supreme Court 2004). Initially, the government contested the ruling and, when it was upheld, the government sought to conform to the letter but not the spirit of the law by offering powerless token ministries to the Fiji Labour Party, which were eventually refused. After a further election in May 2006, however, which returned Qarase’s Soqosoqo Duavata ni Lewenivanua party to office, the Prime Minister formed a multi-party cabinet that included leading members of the previously excluded Fiji Labour Party, as required by the constitution. The portfolios, including labour, agriculture and health, were substantial. It was a fraught arrangement, however, largely because Fiji Labour Party leader Mahendra Chaudhry preferred to remain outside cabinet. The arrangement was ultimately destroyed by the military coup of 5 December 2006. Nevertheless, this was the first time since independence that political leaders from Fiji’s two major political parties—one representing the now 57 per cent ethnic Fijians and the other representing the 37 per cent Indo-Fijians—had attempted to cooperate in cabinet. It was a promising if stillborn experiment.

In other words, as regards the two major constitutional issues brought before the courts during 2000–06, judges in both cases found the Qarase government to be illegal. In both cases, that government—eventually—accepted the court’s verdict, and reconstructed itself accordingly. Now, however, when that government has been illegally ousted from office by the Royal Fiji Military Forces (RFMF) and looks to the courts for protection, far from finding that usurpation of power and the subsequent presidential decrees to be unlawful, the courts instead have ruled in such a way as to legitimise the post-coup interim order. The ‘stability of the State’ was said to have been endangered, justifying the President’s use of extraordinary ‘prerogative powers’ not provided for in the constitution. No consideration was given to the fact that the source of that instability was the Commander of the RFMF himself, who, as a result of the exercise of these prerogative powers, became Prime Minister. It is a deeply flawed judgment—one that is likely to have long-term negative repercussions for the respect in which the courts have been held in Fiji.

Unfortunately, there can be little expectation that Fiji’s Court of Appeal or Supreme Court will reverse the High Court’s judgment. Fiji’s judiciary has been thoroughly reshaped since the 2006 coup. First, the Chief Justice, Daniel Fatiaki, was controversially ‘suspended’ in January 2007, and Justice Gates appointed as acting Chief Justice under circumstances widely interpreted to have been illegal (see, for example, Crawford 2007). The President of the Court of Appeal, Gordon Ward, refused to accept renewal of his appointment under the new order; his house in Pacific Harbour was burnt to the ground in suspicious circumstances. The six remaining expatriate Australian judges on Fiji’s Court of Appeal resigned in September 2007, saying that it was apparent that their services were not wanted. Former Fiji Supreme Court judge Robert French, now Chief Justice in Australia, in explaining his reasons for declining the renewal of his appointment to the Supreme Court of Fiji, said that to do...
so would entail an ‘implicit bargain’ with the interim government and that, ‘when faced with a challenge to the lawfulness of the government itself, such a judge could be seen to have a conflict of interest’ (The Australian, 2 May 2008). High Court judge Justice Gerard Winter similarly decided, as he put it, that ‘I could not renew my warrant in 2008 if the military regime was still in power as to do so would run contrary to my original oath of office’ (The Australian, 15 August 2008).

There are several other Australian judges, who took their commissions from an elected government, who are still sitting on the Supreme Court, but their appointments expire before the end of 2008 or in early 2009. Clearly, the extraordinary delay—from March to October 2008—before the announcement of the verdict in Qarase versus Bainimarama has contributed to the probability that these remaining judges will be unable to hear any appeal in the Qarase versus Bainimarama case, should this reach the Supreme Court. Those who sit on the benches of Fiji’s courts will, by then, be almost exclusively judges who have accepted appointments under the interim order, or local judges who may, for obvious reasons, find great difficulty ruling in such a way as to contest the authority of the post-coup government. The right course for the deposed government is surely to appeal to the higher courts; but the likelihood of a satisfactory outcome—this side of a general election—seems slender.

Some in Fiji had hoped—understandably, if perhaps naively—that Justice Gates in particular would rule the interim government illegal and pave the way for the restoration of constitutional democracy. That, after all, would have been in accord with Gates’ statement in the November 2000 ruling in Chandrika Prasad vs the State (Lautoka High Court 2000) that ‘a judge’s first duty is to uphold the Constitution’, and his comment in the same case that ‘it is not the oath taken or the regime under which an appointment is made that colour a judge’s role on legitimacy. A judge is expected to act at all times impartially, fairly, with integrity, and to uphold all the laws of the land, independently of the regime existing at the time of his or her appointment.’ It was for that 2000 decision that Justice Gates was celebrated by Commonwealth legal scholars as a founder of the ‘new jurisprudence’ on coups, and was credited with having put forward a new doctrine potentially with ‘canonical’ authority that might replace the so-called ‘dodgy jurisprudence’ developed in coup-prone countries such as Pakistan and Nigeria (Hatchard and Ogowewo 2003:23). Alas, that courage to stand up to a post-coup government and pronounce it to be illegal was not to be repeated in the verdict on the Qarase versus Bainimarama case.

Instead, Justice Gates and his colleagues made a ruling that ‘prerogative powers’ existed that were not found in the 1997 Constitution. These, we are told, date back 1,000 years to the Norman Conquest, to the era before the subordination of kings and queens to parliaments. Supporting case history is sought from the British Raj and wartime exigencies under colonial control. It is as if no Commonwealth country, freeing itself from colonial rule, is empowered to write its own constitution in such a way as to constrain presidential powers. Such a ruling is all the more dubious and unbalanced when one bears in mind that the 1997 Constitution—whatever its flaws and whatever the manner of its construction—was essentially a compact between the leaders of Fiji’s two largest communities and sought to limit very precisely the scope of presidential powers. Despite claiming to be a ‘purposive’ interpretation of Fiji’s constitution, there was no serious inquiry into the intentions of the framers of those fundamental laws.
The heroic era of Fiji’s higher courts is clearly over. This was not a judgment, like that of the Court of Appeal in March 2001, which sought to encourage Fiji to return to constitutional democracy. On the contrary, by endowing the Office of the President with such far-reaching ‘prerogative powers’, it greatly encourages would-be usurpers of those ‘ultimate reserve powers’. The present context is important. The visibly ailing incumbent President, Ratu Josefa Iloilo, openly acknowledged on his ‘resumption’ of office in early January 2007 that he had, as he put it, been ‘unable to perform my duties’ during the critical days after the 5 December coup. It is well known that the Office of the President has, for several years, been controlled by military minders. Moves have for months been under way by the interim government to restructure Fiji’s Great Council of Chiefs, largely because this is the appointing authority for the presidency. In other words, what has been vastly strengthened by this judgment is not really the president himself, but the Office of the President. It opens the way for the usurpers, under the fiction of constitutionality, to exercise extraordinary powers should they prove able—officially and unofficially—to capture the presidency.

Furthermore, it is well known that—particularly in deeply divided societies such as Fiji—having power concentrated so heavily in a single pair of hands is a poor constitutional choice (Lijphart 1994; Linz 1994; but see Shugart and Mainwaring 1997). Since the president is also not popularly elected in Fiji, increasing his or her powers is all the more dangerous. In other words, the ‘coup to end all coups’ has now written for itself a charter for all future coups.

Where does the Qarase vs Bainimarama judgment leave Fiji? Clearly, those many people in Fiji who have been removed from their positions or suffered economically as a result of the coup cannot expect redress from the courts. The regime’s position, in this sense, would appear to be strengthened. We should remember, however, that the post-2000 pattern of legal redress in Fiji was, internationally, highly unusual. More usually, what proves more important to bringing military regimes to an end is the corrosive impact of lack of internal legitimacy and the absence of international support (Finer 1962). Both these factors helped Fiji, eventually, back to democracy and indeed towards a new, more broadly acceptable constitution after 1990.

Fiji in October 2008 had reached a hiatus. The regime’s anti-corruption initiatives, its attempted restructuring of the Great Council of Chiefs and its ‘People’s Charter’ had drawn no groundswell of support. The interim government has, however, so far encountered negligible open collective defiance, despite a seething and perhaps now broadening discontent. There is a danger, now that the High Court has ruled the regime lawful and now that elections have been put off indefinitely, that the safety valve comes off and resistance begins to grow. That in turn might encourage a military clamp-down or possibly, connected to this, schisms within the RFMF. To avoid this type of outcome, both sides surely have an interest in some form of dialogue, preferably under the auspices of the Pacific Islands Forum, possibly aided by the United Nations and the Commonwealth. In the face of a still apparently belligerent military leadership, those favouring a return to genuine constitutionality rather than the retention of sham constitutionality surely have an interest in presenting some clear alternative to the interim government’s initiatives: 1) perhaps by coming together around a ‘democratic charter’ (to counter those who want amendment to the constitution by presidential decree); 2) perhaps by making some open concessions to the widely endorsed arguments against controversial, now unnecessary and
previously divisive legislation so as to bring together pro-democracy forces; and, most of all, 3) by putting forcefully the case for power sharing as the superior alternative to the utopian goal of military transcendence of the deep divisions that have dogged Fiji since independence.

Note

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