The Prasad Affidavits: Proof of Facts in Revolutionary Legitimacy Cases

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1. Introduction

On 1 March 2001, for the first time in history, a government was overthrown by court order. In an unprecedented victory for the victims of repressive coups d'etat, the Court of Appeals of Fiji ruled that the military government that took power there on 29 May 2000 did not validly abrogate the country's 1997 Constitution, and that its subsequent appointment of a handpicked civilian government was illegal.[1] Although previous decisions existed in which revolutionary governments were held unlawful, each of these decisions was made after the government in question had fallen[2] or was ignored as the decision of a foreign court.[3] As a Pakistani commentator was able to state as late as 1994, '[t]he courts have yet to dismount a leader on horseback'.[4] With the decision in *Republic of Fiji v Prasad*,

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1 See *Republic of Fiji v Prasad* [2001] FJCA 1 (Fiji Court of Appeal, 1 March 2001) (hereinafter *Prasad*).

2 See *Jilani v Gov't of the Punjab* [1972] PLD (Supreme Court) 139 (Pak) (hereinafter *Jilani*) (holding that the military government of Agha Muhammad Yahya Khan, which had fallen in 1971, was unlawful); *Liasi v Attorney-General* [1975] CLR 558 (Cyprus) (hereinafter *Liasi*) (holding that the coup d'etat government that held power in Cyprus during July 1974 was unlawful). Indeed, one commentator has stated that the legality of a revolutionary government is only relevant after it has fallen, because domestic courts are bound to uphold it while it is in power: Rose Marie M King, 'The Legal Status of the Aquino Government: Foundations for Legitimacy' (1986) 61 *Phil LR* 137 at 146–147. The *Prasad* decision is the first known empirical refutation of this position.

3 See *R v Ndhlovu* [1968] 4 SALR 515 (Rhodesia Appeal Division) at 517–523 (rejecting the Privy Council's holding in *Madzimbamuto v Lardner-Burke* [1968] 3 All ER 561 (PC) (hereinafter *Madzimbamuto II*) that Ian Smith's breakaway government in Rhodesia was subject to the colonial constitution of 1961).

4 See Tayyab Mahmud, 'The Jurisprudence of Successful Treason, Coup d'Etat and Common Law' (1994) 27 *Cornell Int'l LJ* 49 at 126 & n513, quoting Kamal Azfar, 'Constitutional Dilemmas in Pakistan' in Shahid Jared Burki & Craig Baxter (eds) *Pakistan Under the Military: Eleven Years of Zia-ul-Haq* (1991) at 64.

a government on horseback was dismounted for the first time. Less than two weeks later, the Bose Levu Vakaturanga (Great Council of Chiefs) confirmed that it would accept the Court of Appeal's decision, and that new elections would be held in August under the terms of the 1997 Constitution.[5] Although the interim president was subsequently reappointed by the BLV, this was done in a constitutional manner, and the caretaker government selected by the new president acknowledged the limitations of the Constitution.[6] Subsequently, on 25 August to 1 September 2001, a general election was held resulting in the inauguration of a new government.[7] The *Prasad* decision thus marks a unique moment in history as the first successful restoration of constitutional rule by judicial process.

The *Prasad* case, however, may also prove influential far beyond Fiji's borders as a development in the Commonwealth jurisprudence of 'constitutional facts'.[8] Although the legal standard for determining the validity of revolutionary regimes had been discussed in numerous prior cases, surprisingly little attention was paid to the method and quantum of proof by which this standard could be met. In the great majority of such cases, the facts underlying the courts' holdings were established solely through judicial notice or through 'Brandeis briefs' in which relevant facts were presented through the arguments of counsel.[9] Even in the few cases where extrinsic proof was taken, it was presented by only one side and was treated almost as an afterthought by the court.

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5 See Agence France-Presse, 'New Fiji Government Appointed to Organise Elections' (15 March 2001).

6 Ibid.

7 See 'Fiji: A Post-Coup Parliament, At Last' *New York Times* (2 October 2001) at A12. A complete discussion of the facts surrounding the May 2000 coup in Fiji, the facts of the *Prasad* case and the events occurring after the decision is beyond the scope of this article. Readers who are interested in a thorough and perceptive discussion of these issues are referred to George Williams, 'The Case that Stopped a Coup? The Rule of Law and Constitutionalism in Fiji' (2001) 1 *Oxford U Commonwealth LJ* 73, and George Williams, 'Republic of Fiji v Prasad: Introduction' (2001) 2 *Melbourne J Int'l L* 144. In addition, this author is currently preparing another article discussing additional aspects of the *Prasad* decision and the common law of revolution.

8 Constitutional facts are the fundamental facts upon which a determination of the constitutionality of a governmental action turn. See Steven Allen Childress, 'Constitutional Fact and Process: A First Amendment Model of Censorial Discretion' (1996) 70 *Tul L Rev* 1229 at 1234; see also *Crowell v Benson* 285 US 22 (1932), 63; Susan Kenny, 'Constitutional Fact Ascertainment (With Reference to the Practice of the Supreme Court of the United States and the High Court of Australia)' (1990) 1 *PLR* 134 at 135 (defining constitutional facts as 'the facts which either the Court has, or might reasonably have, regarded as relevant to the determination of constitutional issue'); *Families Achieving Independence and Respect v Nebraska Department of Social Services* 111 F 3d 1408 (8th Cir 1997) (en banc) at 1411 (stating that the doctrine extends to 'critical facts' underlying constitutional determination). The constitutional fact doctrine 'had its antecedents in the doctrine of jurisdictional fact, which the English superior courts, particularly King's Bench, developed to confine administrative agencies and inferior courts within their delegated authority:' Henry P Monaghan, 'Constitutional Fact Review' (1985) 85 *Colum LR* 229 at 249. Although the doctrine of constitutional facts was pioneered in the United States, it has since been adopted by other common law countries with written constitutions. Cases of revolutionary legality have been described as implicating 'extra-constitutional facts'; see *Bhutto v Chief of Army Staff* [1977] PLD (Supreme Court) 657 (hereinafter *Bhutto*) at 671 (Pak) (Haq CJ), but have generally been treated similarly to cases involving issues of constitutional dimension.

The absence of proof as to such important constitutional issues has not gone unremarked. Some 30 years ago, in connection with a similar case in Uganda, a commentator noted that:

> To determine this sort of question a court should, in order to inform itself as fully as possible of the political realities of a situation, rely on extra-legal evidence to establish the constitutional fact in question. Unfortunately, the concept of constitutional fact seems to be confined solely to the United States and has not been adequately developed in Commonwealth countries, even those which possess written constitutions. Commonwealth judges have contented themselves with taking "judicial notice" of social and political facts, a practice which hardly adds support to those who wish to call the law scientific.[10]

This statement retains considerable validity today. Although the concept of constitutional facts has undergone considerable development in Commonwealth countries during subsequent decades, especially in Australia and Canada, an Australian court as late as 1999 described the issue of proof in constitutional cases as one which has 'never been clearly articulated and established'.[11] As a result, many cases involving the legality of a change of government by revolution — perhaps the most far-reaching issue upon which a court can ever be called upon to rule — have been decided solely on facts taken on judicial notice or presented via the arguments of counsel.[12] In fact, even the burdens of proof, and of appellate review, have encountered very little analysis in cases of this sort.

Judicial notice and the submissions of counsel played a role in the *Prasad* case as well, especially in the determination of background facts. However, when it came to the critical facts underlying its decision, the *Prasad* court went far beyond any prior court in demanding and accepting proof from both parties, and in relying on that proof rather than its own opinion in making conclusions of law. Moreover, in conducting extensive discussion of the burden of proof and in admitting new evidence on appeal, the *Prasad* court paved the way for other cases involving both revolutionary legality and other weighty constitutional issues. The *Prasad* case thus represents an advance for 'those who wish to call the [common] law scientific'.[13]

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9 See below n59–77 and accompanying text. For a discussion of the nature and history of Brandeis briefs, see *Canada Post Corp v Smith* [1994] 118 DLR (4th) 454 (Ontario Division Court) (hereinafter *Canada Post Corp*). See also Ellie Margolis, 'Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs' (2000) 34 *USF LR* 197; Patrick Brazil, 'The Ascertainment of Facts in Australian Constitutional Cases' (1970–71) 4 *Fed LR* 65 at 86 & n80 (describing the use of Brandeis briefs in Canada and Australia).

10 R B Martin, 'Note and Comment: In the Matter of an Application by Michael Matovu' (1968) 1 *Eastern African LR* 61 at 65.

11 See *R v Henry* (NSW Supreme Court, (1999) 106 A Crim R 149 163). See also *Canada Post Corp*, above n9 at 463 (describing proof of constitutional facts as 'an area where Canadian legal principle is in a very early state'). For additional discussion of proof of constitutional facts in Canada and Australia, see below n78–94 and accompanying text.

12 See Kenny, above n8 at 162 (stating that Australian courts have 'under an extended and indefinite concept of judicial notice, permitted litigants (usually the Commonwealth) to supply evidentiary deficiencies by bar table assertions, or tender of untested material.)

13 Above n10 at 65.

This article will accordingly analyse the *Prasad* case from an evidentiary standpoint. First, this article will discuss the legal standards adopted by the *Prasad* court and other courts for determining the validity of a revolutionary regime, and analyse the reasons why judicial notice is an inadequate substitute for factual evidence. This article will also discuss the method in which the *Prasad* court resolved issues concerning the burden of persuasion, the standard of appellate review and the admission of new evidence on appeal.

This article, however, will also note that the quality of the Court of Appeal's fact-finding might have been better if it had resolved the case through trial rather than motion. A case where the issue to be decided is as critical as the foundation of a new constitutional order demands the highest and most accurate degree of proof, which can best be accomplished through cross-examination. In addition, because this is an area where the standard of proof is at best unsettled, a full trial will afford the court an opportunity to inquire as to the issues that it, rather than counsel, views as important. Finally, a public trial at which the revolutionary government is required to defend its foundation and policies can itself contribute to or detract from the fundamental underpinning of its legitimacy — acceptance by the people. Accordingly, it is the conclusion of the author that courts determining issues of revolutionary legality or other similarly weighty constitutional matters should make at least some provision for public testimony under cross-examination.

2. *The Framework of Proof*

It is axiomatic that the appropriate method of proof depends upon the applicable legal standard, and the nature of the facts that must be established in order to meet that standard.[14] Therefore, in order to determine the method of proof necessary in revolutionary legality cases, or even whether any extrinsic factual evidence is necessary at all, it is essential to analyse the legal standards by which the validity of revolutionary regimes are determined.

Modern jurisprudence concerning the legality of coups and revolutions is surprisingly uniform as to the starting point of its reasoning. Although some judges have drawn inspiration from medieval English cases dealing with the obedience owed to usurper kings[15] or to Islamic *hadiths* on the same subject,[16] the real foundation of the modern decisions is the work of Austrian legal philosopher Hans Kelsen. Whether ultimately accepting or rejecting Kelsen, courts have uniformly regarded his theories as the basic expression of legal thought on the validity of revolutions.

14 See *Canada Post Corp*, above n9 at 463–465. See also Kenny, above n8 at 135 (describing the factors that determine the appropriate method and standard of proof); *McDonnell Douglas v Green* 411 US 792 (1973) at 800–803 (constructing specialised scheme of proof for employment discrimination cases due to the fact that the evidence in such cases is most often indirect).

15 See *Madzimbamuto v Lardner-Burke* [1968] 2 SALR 284 (Rhodesia Appeal Division) (hereinafter *Madzimbamuto I*) at 383–412 (MacDonald JA).

16 See *Bhutto*, above n8 at 726–727 (Cheema J).

Kelsen's theories fall into the category of 'legal positivism', a school of thought which originated in Britain during the 19th Century and sought to divorce the law from considerations of morality and ethics.[17] The 'essential presupposition of... positivistic theory is the recognition of the fundamental difference between the "ought" and the "is"', with the law being an expression of the latter.[18]

In the *General Theory of Law and State*, authored in 1945, Kelsen applied positivist legal theory to revolutions, arguing that a successful revolution creates its own legitimacy by reason of its success.[19] Kelsen postulated the existence of a 'basic norm' or *Grundnorm* which formed the foundation of the legal order of a nation.[20] If such a *Grundnorm* — whether it be a written constitution or an unwritten principle of government — is overthrown by a successful revolution, then a new *Grundnorm* is established which forms the foundation of all subsequent law.[21] Thus, 'a national legal order begins to be valid as soon as it has become — on the whole — efficacious; and it ceases to be valid as soon as it loses this efficacy.'[22] This is the principle of effectiveness. In other words, whenever a revolutionary government is successful enough to destroy the existing *Grundnorm* and put its own legal order into effect, then it becomes the de jure government of the nation. This applies no matter what the motivation of the revolutionary government was in seizing power, or whether its rule can be considered just or unjust according to conventional standards of morality.[23] As one court succinctly explained the essence of Kelsen's theory, 'it may be truly said [of revolutions] that nothing succeeds like success.'[24]

The courts that have adopted Kelsen's theory accordingly demand nothing more than the success of a revolution before conceding its lawfulness. Although different courts have described the test in varying language, every court that has adopted Kelsen's principle of effectiveness has required proof of two elements. First, the revolution must be successful — that is, it must be in unchallenged control of the country with no pre-existing legitimate government contending for power.[25] Second, it must be effective, in that it commands the obedience of the bulk of the population.[26]

Throughout the 1950s and 1960s, common-law courts ruling upon the legality of revolutions overwhelmingly took the Kelsenite view, with one — the Supreme

17 See Hans Kelsen, 'On the Pure Theory of Law' (1966) 1 *Israel LR* 1 at 3.

18 Id at 1.

19 See Hans Kelsen, *General Theory of Law and State* (1945) at 117–119, 220.

20 See id at 118.

21 Id at 118–119.

22 Id at 220. See also Kelsen, above n17 at 2 (stating that 'a legal order... in order to *remain* valid, must become effective and that it *loses* its validity if it loses its effectiveness').

23 Kelsen, above n17 at 3–4.

24 Above n15 at 391 (MacDonald JA).

25 See *Dosso v State* [1958] 2 PSCR 180 (Pak) at 184–185 (hereinafter *Dosso*); see also *Madzimbamuto II*, above n3 at 565 (Lord Reid); *Uganda v Commissioner of Prisons, Ex Parte Matovu* [1966] EA 514 (Uganda High Ct) (hereinafter *Matovu*) at 533 ; but see *Madzimbamuto I*, above n15 at 322–323 (Beadle CJ) (suggesting that the existence of a viable counter-revolution that is a serious contender for power might render a revolutionary government unsuccessful).

Court of Sierra Leone — stating that the doctrine of effectiveness 'appears to gather momentum'.[27] Many courts, especially in southern Africa, have continued to adhere to this view.[28] Beginning in the 1970s, however, other courts have expressed discomfort at Kelsen's separation of law and justice, especially in the context of determining whether the fundamental legal order of a nation had been destroyed.

These courts have generally followed two approaches. The first, which is drawn from Western democratic thought, requires that any revolutionary regime must be accepted by the people before it can be considered legitimate. This standard was first articulated by the Supreme Court of Cyprus in *Liasi v Attorney General*,[29] in which it held that the 'substantial test' of the legitimacy of a revolutionary regime is 'popular acceptance, even if a tacit one, of the change [in government] and the legal values thereby invoked'.[30] Thus, under the standard of *Liasi*, it is 'indispensable' that 'further to the submission there would have been active acceptance, or a persistently long and conscious silence under the appropriate conditions'.[31]

In the 1981 decision of *Valabhaji v Controller of Taxes*,[32] the Seychelles Court of Appeal similarly acknowledged that '[a]cceptance, consent or its equivalent remains a touchstone' of the legitimacy of a coup d'etat.[33] The same point was made in even stronger fashion by the Grenada Court of Appeal in *Mitchell v Director of Public Prosecutions*,[34] a decision which followed the American invasion of Grenada. Writing for the court, Haynes P stated that:

> ... the Court called upon to decide the question [of the legality of a coup] should take into consideration both the reason why the old constitutional government was overthrown and the nature and character of the new legal order. Was the motivation mere power grabbing or was it a rebellion or example against oppression or corruption or ineptitude? And is the new legal order a just one?[35]

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26 See *Dosso*, id at 184. See also *Madzimbamuto I*, above n15 at 316–317 (Beadle CJ), 399–401 (MacDonald JA); *Matovu*, id at 534–537; *Matanzima v President of the Republic of Transkei* [1989] 4 SALR 989 (Transkei Gen Div) (hereinafter *Matanzima*) at 997; *Mulaudzi v Chairman, Implementation Committee* [1994] 4 BCLR 97 (Venda) at 110; *Mokotso v King Moshoeshoe II* [1989] LRC (Const) 24 (Lesotho High Ct) (hereinafter *Mokotso*) at 163; *Lakanmi v Attorney-General, Western State* [1971] U Ife L R 201 (Nigeria) (hereinafter *Lakanmi*) at 212, 214–217.

27 *Thomas v Johnson* [1968–69] ALR SL 380 (Sierra Leone Sup Ct) at 393. See also *Macaulay v Coker* [1968–69] ALR SL 399 (Sierra Leone Sup Ct) at 417 (validating a detention order issued by National Interim Council on the basis that it 'had effective control of the country').

28 See for example, *Makenete v Lekhanya* [1993] 3 LRC 13 (Lesotho Ct App) at 55–58. Berthan Macaulay QC has informed the author that the courts of The Gambia arrived at a similar conclusion after the Gambian military coup of 1994.

29 *Liasi*, above n2.

30 Id at 573.

31 Id at 574.

32 Civil Appeal No 11 of 1980 (Seychelles Court of Appeal, 11 August 1981), summarised in (1981) 7 *Commonwealth LB* at 1249–1251 (hereinafter *Valabhaji*).

33 Id at 12 (Hogan P).

34 [1986] LRC (Const) 35 (Grenada Court of Appeal) (hereinafter *Mitchell*).

35 Id at 67 (Haynes P).

Accordingly, he demanded that a revolutionary government fulfil a four-part test before its legitimacy could be established.[36] In addition to the Kelsenite formula of success and effectiveness, Haynes demanded additionally that 'such conformity and obedience was due to popular acceptance and support and was not mere tacit submission to coercion or fear of force; and... it must not appear that the [new] regime was oppressive or undemocratic.'[37]

A second line of cases, while not relying on principles of popular sovereignty, has rejected Kelsen by citing a *Grundnorm* which, to the court's mind, is incapable of being overthrown by something as ephemeral as a revolution or coup d'etat. Such cases might be said, in fact, to derive their inspiration from the regicide trial of Daniel Axtell in 1660.[38] Axtell, the Commander of the Guard at the trial of Charles I, was indicted for regicide after the fall of the Commonwealth and the restoration of Charles II.[39] At trial, he sought to defend himself under the long-standing principle of English law that obedience to the 'King for the time being' was not treason.[40] The court, however, held that 'this defence did not avail one who served a *de facto* government that was not monarchial'.[41] In Kelsenite terms, the decision of the Restoration court could be considered a recognition of an indestructible English *Grundnorm* of monarchy, which the Commonwealth did not overcome and to which no disobedience could be excused.

A similar conclusion was reached by the Supreme Court of Ghana in *Sallah v Attorney-General*[42] in concluding that the military coup of 1966 did not work a destruction of the pre-existing constitutional order. Noting that the sources of law in Ghana included common law, customary law and pre-existing British enactments, the court found that the *Grundnorm* of Ghana did not depend upon the existence of the 1960 constitution and was thus not destroyed by the revolutionary government that abrogated that constitution.[43]

The most complete expression of the 'indestructible *Grundnorm*' theory, however, occurred in Pakistan. Although initially adhering to the Kelsenite viewpoint,[44] the Supreme Court of Pakistan performed an about face in the 1972 decision of *Jilani v Gov't of West Punjab*.[45] In an opinion joined by the other members of the Court, Chief Justice Hamoodur Rahman noted that Pakistan was an Islamic republic and that Islamic law was thus an 'immutable and unalterable norm' to which any Pakistani Government must conform.[46] Since Islamic law

36 Id at 71–72.

37 Id at 72.

38 See Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1961) at 298 (describing Axtell's defence).

39 Ibid.

40 Ibid.

41 Ibid; see also *Madzimbamuto I*, above n15 at 391–392 (MacDonald JA) (criticising the Axtell trial as 'conducted without regard to elementary principles of justice' and 'a black chapter in the history of the English criminal law').

42 [1970] CC (Ghana) 55 (hereinafter *Sallah*), reprinted at Gyandoh & Griffiths, *Sourcebook of Constitutional Law in Ghana* (1972) at 493–511.

43 See id at 498–499 (Archer JA).

44 See *Dosso*, above n25 at 184–185.

45 *Jilani*, above n2.

46 Id at 182 (Rahman CJ).

'rules through the utterance of justice', any conception of law or revolutionary legitimacy that did not take into account the necessity of just government was untenable in Pakistan.[47] This principle was expressed in even stronger terms by Rahman's successor, S. Anwarul Haq, in the 1977 decision of *Bhutto*:[48]

> It must not be forgotten that the continued validity of the grundnorm has an ethical background, in so far as an element of morality is built in it as part of the criterion of its validity. These considerations assume special importance in an ideological State like Pakistan, which was brought into being as a result of the demand of the Muslims of the Indo-Pakistan sub-continent for the establishment of a homeland in which they could order their lives in accordance with the teachings of the Holy Qur'an and Sunnah... In other words, the birth of Pakistan is grounded in both ideology and legality. Accordingly, a theory about law which seeks to exclude these considerations, cannot be made the binding rule of decision in the Courts of this country.[49]

Some courts have achieved a synthesis between the two approaches, combining Western democratic thought with the recognition of an indestructible indigenous *Grundnorm*. In *Bhutto*, for instance, Chief Justice Haq found support in Islamic law for an alternative theory of revolutionary legality propounded by RWS Dias.[50] This theory includes seven principles, namely (1) effectiveness; (2) legitimate disobedience to improperly exercised authority; (3) state necessity; (4) the need to remedy violations of rights; (5) the principle that a court will not allow itself to be used as an instrument of injustice; (6) the interest of the community in preserving order; and (7) the principle that government should be by the consent of the governed.[51] Similarly, in the *Jilani* decision, Justice Yaqub Ali cited Imam Shafi'i's pronouncement that 'the voice of the people is the voice of God' in support of his conclusion that 'the people as delegatee of the sovereignty of the Almighty alone can make laws which are in conformity with the Holy Quran and the Sunnah.'[52]

The decision of the Fiji Court of Appeal in the *Prasad* case likewise represents a fusion of the indestructible *Grundnorm* with Western democratic thought. The court rejected Kelsen's theories in unequivocal terms, noting that they 'might too readily reward a usurper'.[53] While the court described its standard in terms of effectiveness, its holding actually mirrored that of the Grenada court in *Mitchell* in that 'conformity and obedience to the new regime by the populace... must stem from popular acceptance and support as distinct from tacit submission to coercion or fear of force.'[54] In addition, the court explicitly adopted democracy as a criterion of legality, noting that 'a regime where the people have no elected representatives in government and no right to vote is less likely to establish

47 Ibid; see also id at 235 (Ali J).

48 See *Bhutto*, above n8.

49 Id at 692 (Haq CJ); see also id at 733 (Akram J), 740 (Khan J).

50 See id at 688–689 (Haq CJ).

51 Id at 689.

52 See *Jilani*, above n2 at 235 (Ali J).

53 See above n1 at para 30.

54 Id at para 42.

acquiescence.'[55] Thus, the Prasad court's decision was clearly informed by currents of Western democratic philosophy.

In addition, however, the court found another source of support for its insistence on democratic norms. Specifically, it noted that '... [m]any of the [prior] authorities [on revolutionary legitimacy] were decided before the modern shift towards insistence on basic human rights in a raft of international treaties.'[56] In other words, although it declined to explicitly adopt respect for human rights treaties as a *sine qua non* of legitimacy,[57] the Prasad court recognised human rights had become part of an international *Grundnorm* which could not be defeated by anything as transitory as a coup d'etat in a single nation. Moreover, Fiji's 1997 constitution specifically provided that it be interpreted in light of '... developments in the understanding of the content of particular human rights...' which could arguably be taken as an adoption of this international *Grundnorm* as the law of Fiji.[58]

3. *The Necessity of Proof*

It can readily be seen that the type and amount of proof required to establish the legality of a revolutionary regime depends upon whether it follows or rejects the theories of Kelsen. Under Kelsenite jurisprudence, the legality of a revolution or coup turns on facts that either cannot be seriously disputed or can be treated as questions of pure law. There is little need to present evidence, for instance, concerning whether a revolutionary government has a viable rival, or whether widespread civil or armed disobedience exists. While there may be a dispute, as there was in Rhodesia, as to the likelihood of a pre-existing legitimate government regaining power, this question can generally be treated as one of law or at very

55 Ibid; but see id at 81 (remarking that '... it may be that Haynes P went too far in [requiring that] it must not appear that the regime was oppressive and undemocratic, because... the condition goes to the legitimacy of a regime and not its legality'). A similar observation was made by Chief Justice Concepción of the Philippine Supreme Court in considering whether the people had accepted a constitution promulgated under martial law: 'In the words of the Chief Executive, "martial law connotes power of the gun, meant coercion by the military, and compulsion and intimidation." The failure to use the gun against those who comply with the orders of the party wielding the weapon does not detract from the intimidation that Martial Law necessarily connotes... the intimidation is there, and inaction or obedience of the people, under these conditions, is not necessarily an act of conformity or acquiescence.' *Javellana v Executive Secretary* [1973] 50 SCRA 30 (Phil) (Concepción CJ, dissenting).

56 Above n1 at 69.

57 See id at 70.

58 See *Constitution Amendment Act* s3(b)(i) (Fiji 1997). See also Caren Wickliffe, 'The Relationship Between the *Constitution Amendment Act* 1997 and the International Instruments on the Rights of Women and Children' (1998) 2 *J South Pacific L*, Article 4 (suggesting that s3(b)(ii) of the 1997 constitution incorporated the international human rights instruments to which Fiji was signatory into domestic law). An even stronger adoption of public international law as domestic law in Fiji is provided by s43(2) of the 1997 constitution, which states that courts interpreting the Bill of Rights 'must, if relevant, have regard to public international law applicable to the protection of the rights set out in this chapter'. At least three South Pacific courts have directly applied human rights conventions as the common law of Fiji pursuant to this section. See Laitia Tamata, 'Application of Human Rights Conventions in the Pacific Island Courts' (2000) 4 *J South Pacific L*, Working Paper 4 (discussing cases).

least one that can be resolved via judicial notice.[59] Perhaps for this reason, revolutionary governments frequently assert that there is no need for the court to examine factual evidence in order to pass on their legality.[60]

Arriving at a decision under a non-Kelsenite standard is a completely different story. In contrast to mere evaluation of effectiveness, such a court will be called upon to determine whether a government has truly been accepted by the people, its motivation in taking over the reins of power, and/or whether it is in conformance with democratic (or Islamic) norms. Each of these issues will be very much in controversy. All revolutions consider themselves glorious, and regard themselves as having taken power in the name of and by the will of the people. In many cases, however, this is not so, and the responsibility will lie upon the court to determine the truth of the matter.[61] These are issues of fact, and must be proven by factual evidence.[62]

Despite this, however, courts have frequently relied upon the institution of judicial notice in determining these complicated elements.[63] In English law, judicial notice is a finding by a court 'that [a] fact exists... although the existence of the fact has not been established by evidence'.[64] In general, judicial notice is only appropriate where 'the fact in question is too notorious to be the subject of civil dispute'.[65] It has been noted that:

59 See *Madzimbamuto I*, above n15 at 322–323 (Beadle CJ).

60 See *Bhutto*, above n8 at 672 (Rahman CJ) (noting that '[the government counsel] submits that the Court may take judicial notice of the picture emerging from the mosaic of these events... and not to embark upon a detailed factual inquiry which would be outside the scope of these proceedings'). See also *Skeleton Arguments of Appellants* in *Republic of Fiji v Prasad* at 13 (arguing that evaluation of the validity of a revolutionary government is 'usually a matter of common sense and judicial notice').

61 At least one revolutionary government has argued that the Kelsenite standard of effectiveness should be adopted precisely because any other standard would require factual evidence. See *Skeleton Arguments*, above n60 at 66(ii). Specifically, the Government of Fiji argued that the Court of Appeal should not attempt to determine whether the government had gained popular acceptance because 'there could be no means of judging "popularity" on an evidential basis, particularly in a racially divided society.' Ibid. The obvious answer to this is that, in a multi-racial society, no government should be recognised as de jure unless it is accepted by all races.

62 See above n34 at 72 (Haynes P). See also id at 74–75 (stating that factual evidence is necessary to determine elements of acceptance and democratic character). It should be noted that even many Kelsenite courts have sought to buttress their holdings by arguing that a revolution or coup was popularly accepted in addition to being affected. See, for example, *Madzimbamuto I*, above n15 at 414 (MacDonald JA); *Matanzima*, above n26 at 998–999 (citing evidence of popular acceptance of 1988 military takeover of Transkei); *Mokotso*, above n26 at 166 (stating that the 1986 coup in Lesotho was popularly accepted).

63 See *Mokotso*, above n26 at 166; *Mitchell*, above n34 at 74–75; *Bhutto*, above n8 at 693 (Haq CJ); *Liasi*, above n2 at 571, 573–574; *Madzimbamuto I*, above n15 at 321, 324 (Beadle CJ), 414 (MacDonald JA). Indeed, at least one court has not engaged in any factual discussion at all in support of its holding that a revolution was effective. See *Dosso*, above n25 at 184–185; see also Mahmud, above n4 at 55 (stating that 'the [*Dosso*] Court, deciding the case only twenty days after the coup, did not refer to any evidence which formed the basis of its determination that the coup was efficacious').

64 See *Carter v Eastbourne Borough Council* [2000] 164 JP 273; [2000] 2 PLR 60 (QB).

65 Ibid.

> Familiar examples are provided by the rulings that it is unnecessary to call evidence to show that a fortnight is too short a period for human gestation, that the advancement of learning is among the purposes for which the University of Oxford exists, that cats are kept for domestic purposes, that the streets of London are full of traffic and that a boy riding a bicycle in them runs a risk of injury, that young boys have playful habits, that criminals have unhappy lives, and that the reception of television is a common feature of English domestic life enjoyed mainly for domestic purposes.[66]

Judicial notice may also be taken of facts which are '... so clearly established, or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary'.[67]

Judicial notice has been described in similar terms by the courts of other countries. In Canada, judicial notice may generally be taken where facts are 'notorious and undisputed' or where their accuracy can be demonstrated by 'resort to readily accessible sources of indisputable reliability'.[68] The Malaysian courts have taken judicial notice of facts which are 'familiar to any judicial tribunal by their universal notoriety' and with which 'men of ordinary intelligence are acquainted'.[69] Courts in the United States have similarly described the scope of judicial notice as encompassing 'generally known' facts which '[do] not require any foundation establishing the accuracy of a specific source of information'.[70]

This doctrine, which permits a court to substitute its own knowledge for evidence submitted by the parties, has self-evident limits. Courts have repeatedly cautioned that judges should exercise restraint '... in treating a factual conclusion as obvious, even though the man in the street would unhesitatingly hold it to be so'.[71] Other courts have noted that judicial notice should only be taken of 'matters beyond controversy'[72] and should not be exercised with respect to facts that are subject to empirical challenge.[73]

The acceptance of a coup d'etat by the people of a country can hardly be described as a 'matter beyond controversy' even in the most clear-cut of cases. Nor

66 Ibid.

67 *Mullen v Hackney London Borough Council* [1997] 2 All ER 906 (Ct App).

68 *Bramble v Medis Health & Pharm Svces Inc* [1999] 175 DLR (4th) 385 (NB Ct App) at 401, citing *Law v Canada (Minister of Employment and Immigration)* [1999] 170 DLR (4th) 1 (Can S Ct).

69 *Lee Chow Meng v Public Prosecutor* [1976] 1 MLJ 287 (High Ct Kuala Lumpur). See also *Yong Pak Yong v Public Prosecutor* [1959] 1 MLJ 176 (High Ct, Ipoh) (judicial notice may be taken of 'what everybody knows'); *Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30 (High Ct Kuala Lumpur) (same).

70 *Garner v Louisiana* 368 US 157 (1961), 194 (Frankfurter J, concurring). See also *United States v Reynes* 50 US 127 (1850), 147 (stating that judicial notice may be taken of 'historical and notorious facts'); *United States v Moia* 251 F 2d 255 (2d Cir 1958), 258 (judicial notice may be taken of facts 'so notorious that [they] would not be disputed').

71 Above n64 at 65.

72 *Freightlines & Construction Holding, Ltd v State of New South Wales* [1968] AC 625 (PC) at 680.

73 See *Bramble*, above n68 at 402; see also *Pembangunan Maha Murni*, above n69 at 32 (stating that parties should be given an opportunity to refute the sources upon which a judge relies in taking judicial notice).

would an issue as critical as the existence of a new constitutional order appear to be one where a court would be justified in arriving at a decision based on its own factual impressions, rather than evidence in the record. However, this was the preferred practice of Commonwealth courts as recently as 30 years ago[74] and in many ways continues to be so today.

In Canada, where the doctrine of 'constitutional facts' has been subject to the greatest development, the Supreme Court has recognised that litigation of Charter issues cannot take place in a 'factual vacuum', reasoning that 'to attempt to do so would trivialise the Charter and inevitably result in ill-considered opinions'.[75]The Canadian courts, however, have not taken as stringent a view of the source of constitutional facts. Instead, facts tending to establish a 'social, economic or cultural context' are 'of a more general nature and are subject to less stringent admissibility requirements'.[76] Put another way, '[m]aterial relevant to the issues before the court, and not inherently unreliable or offending against public policy should be admissible' in constitutional cases.[77]

In many respects, this relaxation of technical rules of evidence is eminently sensible. Cases which involve matters of public policy frequently involve facts which cannot be proven within the traditional confines of the hearsay rule; thus, it is just and proper to allow them to be proven by means of books, newspaper accounts, statistical compilations, scientific studies or similar documents. However, the same reasons do not counsel in favour of adopting a broader rule of judicial notice. While constitutional cases might require the admission of unorthodox evidence, the need for evidence should not be dispensed with entirely.

Nevertheless, expansion of judicial notice has occurred in precisely the category of case most subject to the influence of judicial preconceptions — the constitutional case, with broad public policy implications. At least one Canadian court has commented that 'in the area of legal policy, [judicial notice] is said to be much broader than suggested by traditional evidence texts'.[78] Another court has noted that '[t]he adoption of the Canadian Charter of Rights and Freedoms has brought with it a need, and an opportunity, for more extensive use of judicial notice...' and added that:

> Because of the nature and importance of constitutional facts, it is suggested that judicial notice might be taken of facts which, even if not utterly indisputable, might be regarded as presumptively correct unless the other party, through an assured fair process, takes the opportunity to demonstrate that those facts are incorrect, partial or misused.[79]

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74 See Martin, above n10 at 65.

75 See *Danson v Ontario (Attorney General)* [1990] 73 DLR (4th) 686 (Canad Sup Ct) at 697. See also *John Carten Personal Law Corp v Attorney General for British Columbia* [1997] 153 DLR (4th) 460 (BC Ct App) at 470 (speculation and self-serving arguments of counsel will not suffice to establish constitutional facts).

76 See *Danson*, id at 695.

77 *Canada Post Corp*, above n9 at 464.

78 Ibid.

79 *R v Bonin* [1989] 47 CCC (3d) 230 (BC Ct App) at 247.

It has been said, in fact, that judicial notice is the 'usual resort' for ascertainment of legislative and constitutional facts[80] and that 'truth seeking procedures are not usually required for the ascertainment of [constitutional] facts'.[81]

Australian courts have also recognised that constitutional determinations must be grounded in fact, particularly in cases involving the freedom-of-commerce provision in Section 92 of the Australian Federal Constitution.[82] Like Canadian courts, however, Australian courts have not given similar attention to the methods by which such facts may be proven.[83] Instead, as elsewhere in the Commonwealth, courts in Australia have primarily relied upon judicial notice.[84]

In fact, until recently, Australian courts in constitutional cases have expressly limited themselves to facts which may be judicially noticed.[85] This is likely due to two factors. The first is the traditional attitude of the Australian judiciary that the legislature is more competent than the courts to determine social and political facts.[86] The second is that, prior to 1988, Australian judges inquired only into the facial constitutionality of government actions as opposed to whether they were unconstitutional as applied.[87] However, even after the landmark decision of *Cole v Whitfield*,[88] which permitted the constitutionality of government actions to be adjudicated on their particular facts,[89] the Australian judicial system has not developed procedures for ensuring that such facts are adequately proven.[90]

80 See McCormick, *McCormick on Evidence* (1954) at 705.

81 See *Canada Post Corp*, above n9 at 466.

82 See generally Andrew S Bell, 'Section 92: Factual Discrimination and the High Court' (1991) 20 *Fed LR* 240. See also *Armstrong v State of Victoria (No 2)* (1957) 99 CLR 28 at 89–90 (stating that, in a Section 92 determination, a court '... without evidence of the material matters [could not] characterise a charge as reasonable or unreasonable'); *Tamar Timber Trading Co Pty Ltd v Pilkington* (1968) 117 CLR 353 at 358 (stating that Section 92 cases 'must be decided according to their own particular facts' and that such facts '[c]onsequently ... ought at the outset to be carefully proved and fully explored by both parties'). The Australian High Court's recognition of its fact-finding role in constitutional cases extends at least to its landmark decision in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, in which it declared that the courts rather than the legislature or the executive were to be the final arbiter of both fact and law in constitutional determinations. See also Kenny, above n8 at 155 (describing the Communist Party Case as '[t]oday's centrepiece of the modern Australian theory of constitutional fact').

83 See Kenny, above n8 at 149 (stating that the High Court of Australia 'has not developed a coherent body of practicable principles to control "constitutional fact" ascertainment'). See also Bell, above n82 at 247 (stating that Australian courts have not developed a satisfactory method of ascertaining facts in constitutional cases); Brazil, above n9 at 68 (stating that the High Court has exhibited little awareness of constitutional fact-finding procedures).

84 See Kenny, above n8 at 149, 162. See also PH Lane, 'Facts in Constitutional Law' (1963) 37 *ALJ* 108 at 109–110; JD Holmes, 'Evidence in Constitutional Cases' (1949) 23 *ALJ* 235 at 237.

85 See Kenny, above n8 at 152. See also Holmes, id at 237 (stating that, unlike the American courts, Australian courts rarely base constitutional determinations on facts presented by the parties).

86 See Kenny, above n8 at 150–151, 164.

87 See Bell, above n82 at 241, 245–246; see also Brazil, above n9 at 81 (describing the pre-1988 Australian policy of reviewing facial constitutionality only).

88 (1968) 165 CLR 360.

89 Id at 399; see also Bell, above n82 at 245–246 (stating that the *Cole* standard of review increases the likelihood that contested facts will arise in Australian constitutional cases).

This is illustrated by the 1999 decision of *R v Henry and Others*,[91] in which the Supreme Court of New South Wales observed that:

> The court may, of course, invite and receive assistance from the parties to ascertain the statutory facts, but it is free also to inform itself from other sources. Perhaps those sources should be public or authoritative, and perhaps the parties should be at liberty to supplement or controvert any factual material upon which the court may propose to rely, but these matters of procedure can wait consideration until another day. The court must ascertain the statutory facts 'as best it can' and it is difficult and undesirable to impose an *a priori* restraint on the performance of that duty.[92]

It is significant that the *Henry* court quoted this passage verbatim from a decision of the Australian High Court of a decade and a half before.[93] Evidently, despite the growing realisation of the importance of facts to the process of constitutional adjudication, judicial notice remained the order of the day.

Expanded use of judicial notice in constitutional cases has fortunately not met with universal acceptance. As one Canadian court has noted, '[f]acts most needed in thinking about difficult problems of law or policy have a way of being outside the domain of the clearly indisputable.'[94] Another criticism was voiced in 1988 by a dissenting judge in the Manitoba Court of Appeal, who stated that '... [i]n the end, the determination of constitutional facts comes down to judicial notice by judges who are not often trained or qualified to distinguish between propaganda and truth'.[95] He argued additionally that '[w]here a constitution itself is based on historical facts, there must be some judicial method to take cognisance of them.'[96] Australian commentators have also pointed out the shortcomings of excessive use of judicial notice, with one particularly harsh critic arguing that '... when [constitutional] facts are propounded to the court by one party, [and] subjected to criticism by the other party... the decision rests on a surer foundation than when it is built upon the "flat-earthism" of so-called notorious facts which are contestable.'[97]

These criticisms are especially apparent in cases of revolutionary legality, where a determination of issues such as popular acceptance and the motivation behind the coup rest heavily upon judges' interpretation of historical fact. If such interpretation is made via resort to judicial notice, there is more than a theoretical danger that the judges' findings of fact may be based on their preconceptions rather than the true facts.[98] With revolutions, what 'everybody knows' is frequently not

90 See Bell, above n82 at 247.

91 Above n11.

92 Id at 164 (Spigelman CJ).

93 See *Gerhardy v Brown* (1985) 159 CLR 70 at 142 (Brennan J).

94 Id at 464; quoting BG Morgan, 'Proof of Facts in Charter Litigation' in Robert J Sharpe (ed), *Charter Litigation* (1987) at 172.

95 *Dumont v Canada (Attorney General)* [1988] 52 DLR (4th) 25 at 34 (Man Ct App) (O'Sullivan J, dissenting).

96 Ibid.

so. In the confusion of a revolution and its aftermath, it is also difficult to ascertain the entire truth; even where a revolution is greeted with 'jubilation by the people in the streets',[99] this may be counterbalanced by the dismay of opposition supporters huddled in their homes.

Moreover, as has been previously noted, revolutions frequently benefit one class or subgroup of society to the detriment of others — Pinochet's coup in Chile being a case very much in point — and a judge's view of what is a 'notorious fact' may thus depend upon whether he is a member of that class or subgroup. It is no secret that the majority of judges in most societies are drawn from the middle and upper middle classes,[100] and might thus tend to assume that a revolution benefiting those classes has popular support whether or not that support extends outside the privileged strata. Likewise, where a revolution benefits a particular racial group — as occurred in Fiji — a judge's membership or lack thereof in that group might influence his view as to the coup's popularity.

Possibly the most striking example of this can be found in the opinions of Chief Justice Beadle and Justice MacDonald in *Madzimbamuto v Lardner-Burke*,[101] a case involving the legality of Ian Smith's unilateral declaration of independence in what was then Rhodesia. Chief Justice Beadle, for instance, stated that he was '... satisfied that few well-informed persons living in Rhodesia at the moment would disagree with the statement that the territory has been effectively governed during the past two years'.[102] Justice MacDonald additionally took judicial notice of the 'fact' that 'the Rhodesian people had been united to a considerable extent' due to sanctions imposed by the United Kingdom and the United Nations against Rhodesia.[103]

It is safe to say — in fact, it may be so obvious as to be a matter suitable for judicial notice — that these 'facts' would by no means have been notorious to the substantial majority of the Rhodesian population who were black. This consideration, however, apparently escaped the notice of the all-white bench. For

97 See Lane, above n84 at 110. See also id at 118 (arguing that courts should not acquire facts in the absence of consultation with the parties). Professor Lane noted that: 'Such an acquisition of contestable facts is a doubtful practice, for those facts generally will not appear as the basis for decision until judgment is actually being delivered; at that stage it is too late for a prejudiced party to adduce evidence to establish that the sources relied upon by the court for its judicially noticed "facts" are not "accepted writings," "serious studies" or "standard works"': Ibid. See also Holmes, above n84 at 242 (response of PD Phillips KC) (arguing that the method of fact ascertainment in constitutional cases is 'a question of whether [the facts] are going to be investigated and probed in court or whether they will exercise their influence without critical observation in the conference room or the judge's chambers'); Kenny, above n8 at 162–163 (stating that reliance on judicial notice as opposed to proof has detracted from the quality of fact-finding in Australian constitutional cases).

98 See Lane, above n84 at 110, 117–118.

99 See *Mokotso*, above n26 at 167.

100 See, for example, *United States v Levinson* 56 F 3d 780 (7th Cir 1995), 785 (cautioning judges against granting excessive leniency to middle-class criminals due to class sympathy).

101 Above n15.

102 Id at 321 (Beadle CJ).

103 Id at 414 (MacDonald JA).

much the same reason, a foreign judge sitting on the Bophuthatswana General Division was able to say — apparently with a straight face — that citizens of Bophuthatswana enjoyed self-determination and that '[t]he different races live in this country in a spirit of amity and co-operation.'[104]

Such willful ignorance in the guise of judicial notice is by no means limited to the apartheid milieu. Similar objections have been made to the taking of facts on judicial notice by the Ugandan High Court in *Uganda v Commissioner of Prisons, Ex Parte Matovu.*[105] Specifically, it was noted that 'the learned Chief Justice... had, in fact, taken a specific oath of loyalty to the [post-coup] 1966 Constitution immediately after it was adopted' — a fact which the commentator sardonically noted 'tends to give... the proceedings something of an air of unreality'.[106] In light of this, it was perhaps not surprising that 'the Court emphasise[d] that the new Constitution has been accepted by the people of Uganda, thus presumably giving it greater legitimacy [but] [i]t is not clear how this "fact" was proved to the Court.'[107]

In Pakistan, where military coups have been a frequent event, criticism has likewise been levelled at the *Bhutto* Court for its extensive use of judicial notice concerning the facts leading up to the 1977 takeover by General Mohammed Zia ul-Haq. As one commentator noted in the context of yet another coup in October 1999, the High Court 'overlooked... the strong public reaction against Zia ul-Haq's takeover'.[108] In other words, the judges based their determination at least in part on what they personally believed rather than what 'everybody knows'.

For this reason, Haynes P of the Grenada Court of Appeal in *Mitchell* strongly criticised the use of judicial notice in revolutionary legality cases. In criticising the trial judge's findings as to popular support for the revolution of 1979, Haynes noted that 'opinion could not be evidence of such a fact'.[109] He further stated that 'I do not think this Court can properly act on a bare statement of fact or opinion of popular support, however credible and knowledgeable the source is and whatever is the basis of it... I would hold that what is needed here is proof of particular facts or circumstances from which the court itself can infer popular support'.[110]

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104 See *S v Banda* [1989] 4 SALR 519 (Bophuthatswana Gen Div) at 545. The grand prize for invidious use of judicial notice in a racial context, however, may well go to the Supreme Court of Delaware. In an 1881 case in which a black defendant challenged his indictment due to the fact that no black man had ever served on a Delaware jury, the Chief Justice of this court stated: 'That none but white men were selected is in nowise remarkable in view of the fact — too notorious to be ignored — that the great body of black men residing in this State are utterly unqualified by want of intelligence, experience or moral integrity to sit on juries.' *Neal v Delaware* 103 US 370 (1880), 393–394 (quoting the Delaware court). While such extreme expressions of prejudice in the guise of judicial notice may be rare, they provide a further caution against the overuse of judicially noticed facts in revolutionary situations where passions — and therefore prejudices — run high.

105 Above n25.

106 Martin, above n10 at 63.

107 Id at 65.

108 Muddassir Rizvi, 'Pakistan's Supreme Court Backs Military Rule' *Asia Times* (16 May 2000).

109 Above n34 at 73.

110 Ibid.

Moreover, aside from the well-taken criticism of Haynes P, another of the reasons for use of judicial notice — deference to the greater fact-finding competence of the legislature[111] — is completely absent in revolutionary cases. Unlike a statute, a coup or revolution is not based on careful legislative fact-finding; the closest analogues to legislative findings of fact that exists in revolutionary situations are the self-serving proclamations of the new government in support of its takeover. While at least one court has apparently accepted such statements at face value,[112] they demand not judicial deference but the utmost scepticism. For a court to accept such 'facts' through judicial notice is an abdication of responsibility.

Finally, yet another caution against excessive use of judicial notice exists in at least some revolutionary legality cases. This is where, as in many southern African nations or as in Fiji, the judges who must decide the legality of the revolutionary regime are not citizens of the country where the revolution occurred. The bench in the *Prasad* case consisted of two judges from New Zealand, one from Australia, one from Tonga and one from Papua New Guinea, who noted in the decision that they were required to travel to Fiji to hear the case.[113]

The use of overseas judges can have both a positive and negative effect on the accuracy of fact-finding in revolutionary legality cases. On the one hand, overseas judges can consider the facts dispassionately, without any of the prejudices or fears that might affect a local judge. On the other hand, such judges do not have a citizen's depth of understanding of the society or a citizen's access to its currents of information. Thus, while the *informed* opinion of a foreign judge can be of great value in determining the legality of a revolution, an overseas judge's *uninformed* opinion carries a high risk of error. Thus, Haynes P's admonition is particularly applicable to foreign judges, who are most in need of the advice of the parties to reach accurate findings of fact.

The Fiji Court of Appeal took this admonition to heart, paying much closer attention to issues of proof than in any previous revolutionary legality case. In the few prior cases where any evidence was taken at all, it concerned undisputed facts[114] or was proffered by only one side.[115] This was initially the case in *Prasad* as well; while the plaintiff submitted evidence before the High Court of Fiji, the government relied solely upon its contention that he had no standing to sue.[116]

111 See above n86 and accompanying text.

112 *Bhutto*, above n8 at 672–679 (Rahman CJ).

113 Above n1 at para 48.

114 *Liasi*, above n2 at 571.

115 *Matovu*, above n25 at 537 (noting that affidavits submitted by Ugandan civil servants were unopposed by the plaintiff). While the Matanzima court referred to the 'affidavits' of both parties, it is apparent from context that the plaintiff's 'affidavit' was actually a submission of counsel and that the only supporting affidavits were introduced by the government. See *Matanzima*, above n26 at 998–999. In addition, in the recent Pakistani case of *Zafar Ali Shah v Musharraf* [2000] 33 SCMR 1137 at 1150, the Supreme Court of Pakistan noted that the military government had submitted 'newspaper clippings, writings and the like' in support of its position, but there is no indication that any evidence was presented by the petitioners.

116 Above n1 at para 17.

While the government ultimately recognised the untenability of this objection, it did not submit evidence until shortly before the High Court's decision and even then submitted only a few belatedly prepared affidavits.[117]

The Court of Appeal, however, consciously acted to correct this situation. In ruling on the government's application for a stay, it also granted leave pursuant to Court of Appeal Rule 22(2) to submit additional evidence on appeal.[118] The appellate bench noted that '[i]t is clear from the judgment under appeal that His Lordship had problems with the paucity of the affidavits and found it necessary to take a "more generous approach" to notorious facts than might normally be appropriate'.[119] The Court of Appeal was determined not to be placed in the same situation, and emphasised 'the importance of this Court having as much material as possible in order to determine the appeal with its overwhelming public interest'.[120]

Both parties responded to the Court of Appeal's invitation, with the government submitting some 13 affidavits and the plaintiff submitting 'five volumes' of proof.[121] At the start of the hearing on 19 February 2001, the government asked for and was given leave to submit still more evidence.[122] The court relied heavily on this proof in determining whether the interim government of Fiji employed public acceptance, citing 13 affidavits from Fijian citizens in support of the 1997 constitution and a further 10 affidavits concerning the manner in which the interim government stifled expressions of dissent.[123] As the court found, the former group of affidavits 'indicat[ed] a widespread belief that there was no proper justification for [the Constitution's] abrogation' while the latter established the impossibility of 'demonstrating real acquiescence on the part of the people'.[124] In addition, the court relied on affidavit proof to establish that the ousted People's Coalition Government retained the support of a majority of the elected House of Representatives and would be able to resume the government of Fiji.[125] The appellate court did not, of course, limit itself to consideration of affidavit proof. It took judicial notice of a number of historical background facts such as the promulgation of the 1997 Constitution and the events of the May 2000 coup, and also inferred from relevant constitutional provisions that a legally constituted government could not defeat indigenous land rights through stealth.[126] In addition, it relied on statistical evidence to demonstrate that indigenous Fijians had a spoiled ballot rate in the 1999 elections similar to that of the general population, and cited

117 *Republic of Fiji v Prasad (Decision on Stay Application)* (Fiji Court of Appeal, Sir Maurice Casey J, 17 January 2001).

118 Ibid.

119 Ibid.

120 Ibid.

121 Above n1 at paras 19, 88.

122 Id at para 19.

123 Id at paras 88–90. Excerpts from the affidavits are included as Appendices A and B to the decision.

124 Ibid.

125 Id at para 83.

126 Id at paras 26–34.

a report of the Commonwealth Human Rights Initiative in connection with the issue of popular acceptance.[127] But unlike prior courts, the Fiji Court of Appeal limited its use of judicial notice to background facts and those that could be established by reference to unimpeachable sources. With respect to the critical, disputed facts underlying its determination, the court insisted on evidentiary proof. Its decision attained a standard of intellectual rigour that had been unfortunately lacking in prior revolutionary legality cases.

This is not to say that the presentation of evidence is a panacea or that it will always guarantee a correct decision. Evidence is subject to misinterpretation; in fact, where evidence is submitted only by one side, it may permit a court to cloak its preconceptions with an unfounded air of truthfulness. The *Matovu* court was criticised for relying upon the affidavits of civil servants in this manner and concluding 'that the changes involved in the new Constitution were implemented without opposition, when any sort of real inquiry (or possibly even judicial notice) should have satisfied it that this was just not so'.[128]

Nevertheless, where evidence is properly canvassed and introduced by all parties, courts will have much less leeway to give expression to their conscious or unconscious prejudices. Moreover, the great majority of judges who are sincerely interested in achieving a just result will be able to make informed conclusions of law. An issue of such importance demands proof, and the Fiji Court of Appeal is to be commended for insisting upon it.

4. *The Burden of Proof*

The more technical aspects of proof also received much greater attention in the *Prasad* decision than in any of its predecessors. In light of the fact that the majority of prior revolutionary legality cases had been decided without any record evidence at all, it is not surprising that only one court prior to *Prasad* had considered the applicable burden of proof. This was the Lesotho High Court in *Mokotso*, and in doing so it parted company with traditional constitutional litigation.

Ordinarily, a strong presumption of constitutionality attaches to the legislative or administrative acts of government.[129] Because the government is legally constituted and the acts at issue were undertaken through an established process, courts have tended to assume that these are sufficient guarantees of regularity absent evidence to the contrary.[130] It goes without saying, however, that this rationale is inapplicable to revolutions, which involve assumptions of power by extralegal, and indeed illegal, methods.

Courts in the United States have long recognised certain exceptions to the presumption of constitutionality with respect to suspect categories of government

127 Id at paras 42, 91.

128 Martin, above n10 at 65.

129 *United States v Carolene Products Co* 304 US 144 (1938) (hereinafter *Carolene Products*), 152. See also *United States v Morrison* 529 US 598 (2000), 607.

130 See *Carolene Products*, id at 151–153. A similar view has been noted by Australian commentators: Brazil, above n9 at 79. See also Holmes, above n84 at 236.

action that pose a particularly great danger of infringing on public liberty. These include specific racial or gender classifications or prior restraints on expression.[131] In such cases, the presumption of regularity is reversed and the governmental action at issue is presumed invalid.[132] The reasoning of this line of cases was surely in the *Mokotso* court's mind when it noted that '[n]o presumption of regularity can operate in the regime's favour; indeed, there must be a presumption of irregularity'.[133] Consequently, it held that 'the burden of proof of legitimacy must always rest upon the new regime'.[134]

The Fiji Court of Appeal adopted this reasoning without hesitation.[135] It went beyond *Mokotso*, however, in determining not only the burden but the quantum of proof necessary to establish legitimacy. While the *Mokotso* court noted that a revolutionary regime faced a greater burden of proof where 'the people's acquiescence... is not a willing one',[136] it stopped short of establishing a specific standard. The *Prasad* court did so, holding that proof of legitimacy 'must be to a high civil standard because of the importance and seriousness of the claim'.[137]

What is the effect of demanding proof to a 'high civil standard'? In Commonwealth usage, this is an intermediate standard of proof between the ordinary civil standard of preponderance of the evidence and the criminal standard of proof beyond a reasonable doubt. While frequently cited, it has not been as frequently defined; at least one court, in fact, has found it 'too elusive to be susceptible of a precise definition'.[138] Some courts have suggested that it is equivalent to the criminal standard for practical purposes[139] while others have described it as a variation on the preponderance standard that simply required evidence of higher quality.[140]

In the United States and Canada, where the intermediate standard is more commonly referred to as 'clear and convincing evidence', courts have frequently relied upon the discussion of the United States Supreme Court in *Addington v Texas*.[141] The *Addington* court began its analysis by stating that '[t]he function of a standard of proof... is to "instruct the factfinder concerning the degree of

131 See, for example, *Adarand Constructors, Inc v Pena* 515 US 200 (1995), 227 (race); *Mississippi University for Women v Hogan* 458 US 718 (1982), 724 (gender); *United States v Playboy Entertainment Group, Inc* 529 US 803 (2000) (hereinafter *Playboy Entertainment Group*), 817 (prior restraints on speech). See also *Carolene Products*, id at 152 n4 (stating that the presumption of constitutionality might not apply to legislation that 'appears on its face to be within a specific prohibition of the Constitution', and listing actions that might not be protected by the presumption).

132 See *Playboy Entertainment Group*, id at 817.

133 *Mokotso*, above n26 at 132.

134 Ibid.

135 Above n1 at para 82.

136 *Mokotso*, above n26 at 133.

137 Above n1 at para 82.

138 *Hartlen v Falconer* [1977] 5 RPR 153 at 164.

139 See *R v Mid Herts Justices, Ex Parte Cox* [1995] 160 JP 507.

140 See above n138 at 164.

141 441 US 418 (1979) (hereinafter *Addington*); see also *Matter of Gordon* [1994] 23 WCB (2d) 160 (citing *Addington*).

confidence our society thinks he [sic] should have in the correctness of factual conclusions for a particular type of adjudication"'.[142] Thus, it noted that:

> The intermediate standard, which usually employs some combination of the words "clear," "cogent," "unequivocal" and "convincing," is less commonly used, but nonetheless "is no stranger to the civil law." One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his [sic] reputation tarnished erroneously by increasing the plaintiff's burden of proof.[143]

In addition, the intermediate standard was appropriate in civil cases in which individual liberty was implicated, such as commitment or denaturalisation proceedings.[144]

Curiously, the *Addington* court suggested that the clear and convincing standard 'might not always make a great difference in a particular case'.[145] Nevertheless, it stated that selection of a standard of proof was more than a 'semantic exercise' because it 'reflects the value society places on individual liberty'.[146] Thus, although *Addington* in many ways leaves us no closer to an understanding of the middle standard than before, it explains the standard's function: to alert judges that the individual and public interests at stake are more important than those involved in ordinary civil litigation.

Many explanations of the clear and convincing standard have accordingly been phrased more in terms of the attitude taken toward the evidence than the quantum of evidence itself. The New York Court of Appeal, for instance, has described the middle standard as 'a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory'.[147] The Nova Scotia Supreme Court has also addressed the clear and convincing standard in terms of quality rather than quantity, stating that it 'is generally considered to mean the witnesses are found credible and the facts to which they testify are distinctly remembered and that details are narrated exactly and in due order'.[148]

It cannot be gainsaid that the legality of a coup d'etat involves public interests important enough to justify this sceptical attitude toward proof. In fact, it is possible that the *Prasad* court did not go far enough, and that revolutionary regimes should be required to prove their legitimacy beyond a reasonable doubt. Certainly, a revolutionary legality case involves not merely the liberty of an individual but that of an entire nation. This standard may admittedly be impractical

142 *Addington*, id at 423.

143 Id at 424.

144 Ibid.

145 Id at 425.

146 Ibid; see also *S v Makwanyane* [1995] 3 SA 391 (requiring the South African Government to justify continued use of the death penalty by clear and convincing evidence).

147 *Backer Management Corporation v Acme Quilting Co* 46 NY 2d 211 (1978) (hereinafter *Backer Management Corporation*), 220. See also *Matter of Doe* 104 AD 2d 200, 201.

148 Above n138 at 164.

when considering a matter as inherently uncertain as the political complexion of a country, but the weightiness of the issues at bar should at the very least be a further caution against overuse of judicial notice or evidence of questionable reliability.

In addition to considering the overall burden of proof, the *Prasad* court also played a part in developing the standard of appellate review of constitutional fact determinations. Although it did not explicitly say so, the Court of Appeal clearly reviewed the trial court's factual findings de novo, disagreeing with many of its conclusions and considering evidence that was not part of the record below. Indeed, in ruling that new evidence would be admitted, the court acknowledged that it would be 'subjecting Mr Prasad to a virtual rehearing of the case', and that it was excusing a blatant procedural default on the part of the government.[149]

In doing so, the *Prasad* court adopted a standard of review that had first been articulated by American courts during the 1930s; namely, that appellate courts owe no deference to trial judges' findings of constitutional fact.[150] Independent review of constitutional facts represents an acknowledgment that 'the privileged position of the trial judge, who sees and hears the parties and witnesses and who assesses their evidence', is inapplicable to the sort of social science evidence upon which constitutional determinations depend.[151] While the continued existence of this doctrine has been called into question in the United States,[152] it has been adopted by Commonwealth courts, especially in Canada. As the Canadian Supreme Court has stated, 'unless the appellate courts retain sufficient discretion to review findings of the trial court on matters of legislative or constitutional facts, [they] will be denied their proper role of developing principles in this area of the law to be applied in the multitude of individual cases which come before trial judges'.

In light of the expanded role of the appellate bench in determining constitutional facts, Canadian courts have also proved willing to admit new evidence for the first time on appeal. The Canadian position is that, '[w]hile it remains desirable that evidence of legislative facts be led at first instance, such evidence may none the less be admitted on appeal, subject to considerations of fairness'.[153] South African courts likewise have discretion to admit new evidence on appeal and, although they are more sparing than Canadian courts or the Fiji Court of Appeal in doing so, will receive new evidence if a public interest is implicated and the additional proof is necessary to the court's determination.[154] Even in the United States, where appellate courts adhere more stringently to the

149 Above n117. See also above n1 at para 93 (stating that '[i]n light of the large volume of additional material put before the Court, this appeal became a rehearing, to be decided on the current situation').

150 See Monaghan, above n8 at 249–254.

151 See *RJR MacDonald, Inc v Attorney General of Canada* [1995] 127 DLR (4th) 1 at 58. See also id at 58–59 (noting that 'the traditional and accepted expertise of the trial court... does not extend to the less familiar and inherently less certain task of determining legislative or constitutional facts').

152 See Richard H Fallon, 'Some Confusions about Due Process, Judicial Review, and Constitutional Remedies' (1993) 93 *Colum LR* 309 at 335 n148 (describing de novo review of constitutional facts in American courts as 'moribund').

153 *Alex Couture, Inc v Attorney General of Canada* [1991] 38 CPR (3d) 293 at 335–336.

rule against admission of extra-record evidence, new proof can frequently be brought to the attention of appellate courts through Brandeis briefs.[155]

At least one factor in revolutionary legality cases counsels in favour of an even more liberal policy on admission of new evidence than in ordinary constitutional cases. Specifically, the political and social status of a country is subject to rapid change in the wake of a revolution or coup. The findings of a trial court, especially on issues as changeable as popular acceptance of the new government, might well be outdated by the time an appeal can be heard months later.[156] As the *Prasad* court acknowledged, it is important for an appellate court to have not only complete evidence, but up-to-date evidence, in order to determine the validity of a revolutionary regime.[157]

It is nearly impossible to quarrel with the standards of proof applied by the *Prasad* court. The only doubt that may be raised is whether all plaintiffs in revolutionary legality cases should be entitled to it. In *Prasad*, the plaintiff was a genuine victim of the coup he sought to overturn, but many parties in prior cases were not. In other cases, the doctrines of revolutionary legality have been invoked by corrupt bureaucrats seeking to retain their ill-gotten gains,[158] a government attempting to justify the arbitrary dismissal of a civil servant,[159] a common tax evader,[160] and accused murderers who had perpetrated a coup far more brutal than the one they challenged.[161] Such parties have invoked revolutionary legitimacy as a jurisdictional defence rather than out of any desire to redress grievances or effect political change; indeed, they would likely have had similar disputes if civilian governments had been in power. Such plaintiffs do not deserve the same deference as political detainees in Rhodesia or displaced farmers in Fiji; the admonition of

154 See *Prince v President, Cape Law Society* 2000 SACLR LEXIS 19 at 28–32. See also *S v Solberg* [1997] 10 BCLR 1348 (denying leave to admit new evidence because it could have been presented before with the exercise of due diligence).

155 See above n9 and accompanying text. Similar devices have been used in South Africa. See, for example, *Makwanyane*, above n146 at 419 n77 (citing statistical evidence discussed in *amicus curiae* brief filed by South African Police).

156 It is arguable that, given the fluid nature of the facts in revolutionary legitimacy cases and the need to resolve such matters quickly, the ordinary appellate process should not be used at all. It is almost certain that any such case will eventually be reviewed by the highest court of the land, and commencement of the action in a lower court will lengthen the litigation process and add little or nothing to the accuracy of fact-finding. The great majority of appellate courts, however, either have no original jurisdiction or have such jurisdiction in narrowly circumscribed areas. See, for example, *Constitution Amendment Act* 1997 s121(1) (providing that the Fiji Court of Appeal has jurisdiction only over appeals from the High Court). A unilateral assumption of original jurisdiction by an appellate court would thus itself be an extra-constitutional usurpation of power. If the judiciary is to maintain the rule of law in the aftermath of a revolution, then it must obey the law itself and remain within its constitutional and statutory jurisdiction.

157 See above n117.

158 See *Lakanmi*, above n26 at 205.

159 See above n42 at 503.

160 See above n32 at 1–2 (Hogan P).

161 See above n34 at 45. See also above n1 at para 82 (stating that 'the appellants in the Seychelles and Grenada cases... sought to manipulate the legal aftermath of a coup to avoid, in one case, payment of a tax and, in the other, a trial for murder').

Haynes P concerning the relevance of a revolution's goals is equally applicable to those of the plaintiff.[162]

Moreover, in many cases, the litigants did not seek to overturn a coup until it had already fallen, thus removing any considerations of national destiny from the case.[163] Such tactical invocations of the law of revolution do not implicate any of the compelling public interests that come into play when a sitting government is challenged. Accordingly, where a challenge to a revolution — or an invocation of a more mundane constitutional issue — is more in the nature of an ordinary civil dispute, then the court should give consideration to applying ordinary civil burdens of proof.

5. *The Method of Proof*

There is one respect, however, in which the *Prasad* court's generally admirable attention to matters of proof may arguably have fallen short — specifically, that no witnesses testified under oath and subject to cross-examination. Under Rule 22(2) of the Rules of the Fiji Court of Appeal, the court has 'full discretionary power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit or by deposition taken before an examiner or commissioner'.[164] However, the court chose to abide by the parties' decision to proceed by affidavit rather than by deposition or trial.

In this, the *Prasad* case followed a general Commonwealth preference for resolution of constitutional matters by motion rather than by trial.[165] As expressed by the Federal Court of Canada, 'the key test [in determining whether trial is warranted] is whether the judge can see that affidavit evidence will be inadequate, not that trial evidence might be superior.'[166] Moreover, the same court stated that '[w]e do not think a better factual basis is necessary for determining Charter issues in comparison with other issues.'[167]

This process is somewhat foreign to American constitutional litigation. To be sure, proof by affidavit is no stranger to American law; the Federal rules of civil procedure, for instance, permit affidavits to be submitted in support of or against dispositive motions.[168] However, American civil practice does not allow any issue

162 See above n34 at 72.

163 See above n2–4 and accompanying text.

164 See Court of Appeal Rules (Fiji) r22(2).

165 See Kenny, above n8 at 162 (stating that, although fact-presentation procedures 'have always been available to litigants... lawyers have almost always elected not to use them and, in particular, have chosen not to present evidence relevant to constitutional issues at trial'). See also Holmes, above n84 at 238–239 (response of EG Coppel KC) (noting preference for resolving constitutional matters through demurrer rather than trial); *Wilcox Mofflin Ltd v State of New South Wales* (1951–1952) 85 CLR 488 (hereinafter *Wilcox Mofflin Ltd*) at 507 (noting that Australian government attorneys 'usually prefer to submit [a constitutional] issue in the abstract without providing any background of information in aid of the presumption of validity and to confine their cases to dialectical arguments and considerations appearing on the face of the legislation').

166 *MacInnis v Canada (Attorney General)* [1994] 2 FC 464.

167 Ibid.

to be resolved without trial unless it can be resolved as one of law — in other words, unless there are no material issues of fact to be tried.[169] Given the greater role of factual disputes in American constitutional litigation, this means that trials on the merits are not uncommon.

In addition, although cross-examination is a central tenet of jurisprudence in all common law countries, American courts tend to discuss it in quasi-constitutional terms. Although the right of confrontation contained in the American constitution applies only to criminal cases,[170] at least some courts have determined that the right not to be deprived of life, liberty or property without due process of law includes the right to cross-examine witnesses in civil matters.[171] Possibly for this reason, American procedural rules tend to provide for mandatory presentation of testimony under cross-examination, even during pre-trial discovery.[172] Thus, even a case which is resolved by motion is generally adjudicated only after oral testimony is given by the key witnesses.[173]

Commonwealth civil procedure codes, on the other hand, tend to confer much greater discretion on the trial court. In some countries, courts are given complete discretion to dispense with cross-examination at any stage of a proceeding, including trial.[174] In others, although a preference is expressed for oral testimony

168 See Federal Rules of Civil Procedure (US), r56(c). This rule implies, however, that proof by affidavit is not the preferred method even in the context of a motion for summary judgment, as it refers to 'the affidavits, if any'. Ibid. Several other methods of proof, including deposition, are listed far more unequivocally as sources for American courts to examine in order to determine whether an issue of fact remains for trial. Ibid.

169 Ibid.

170 See United States Constitution Amendment 6.

171 See, for example, *Bonhiver v Rotenberg, Schwartzman & Richards* 461 F2d 925 (1972), 928–929 (stating that '[a] determination made by the trial judge based upon a private investigation by the court or based upon the private knowledge of the court, untested by cross-examination... constitutes a denial of due process of law' in civil cases); *South Carolina Dept of Social Services v Wilson* 536 SE2d 392 (2000), 394 (stating that due process guaranteed a right to cross-examine witnesses in civil matters in which 'important decisions depended on questions of fact' and which involve questions 'of more than ordinary gravity'); *In re ASW* 834 P 2d 801 (1992), 805 (stating that '[a] civil litigant's right to confront witnesses is... founded upon notions of procedural due process'); *In the Interest of MS* 343 SE 2d 152 (1986), 153 (noting that '[t]he argument that termination proceedings are entirely civil in nature will not support the conclusion that the appellants in this case had no due process right to confront the witnesses'); *MLL v Wesman (In re JSPL)* 532 NW 2d 653 (1995), 660 (stating that '[a] civil litigant's right to confront and cross-examine witnesses is generally secured by concepts of due process'); *Adam v Adam* 436 NW 2d 266 (1989), 269 (stating that 'suppression of all cross-examination' in a civil case 'may amount to a denial of due process'). But see *Struckman v Burns* 534 A2d 888 (1987), 892 (declining to decide whether Connecticut due process clause protects the right to cross-examine witnesses in civil cases).

172 See, for example, above n168, r30 (providing for deposition by oral examination as a standard discovery device in Federal cases).

173 Ibid (providing for up to 10 depositions as a matter of right without seeking leave of court).

174 See, for example, *Evidence Act* 1990 (Nigeria) s78 (providing that '[a] court may in any civil proceeding make an order at any state of such proceeding directing that specified facts may be proved at the trial by affidavit with or without the attendance of the deponent for cross examination, notwithstanding that a party desire his attendance for cross examination and that he can be produced for that purpose'.)

at trial, the court is nevertheless granted discretion to curtail or even eliminate oral evidence if it sees fit.[175] Moreover, at least some procedural codes specifically state a preference for presenting evidence by affidavit at proceedings other than trial.[176] It is thus unsurprising that evidence even in constitutional cases might be presented entirely by affidavit. The situation is no different when the issue at bar is a revolution or coup; while testimony has been taken regarding background facts in several cases, few if any have included testimony on the facts relevant to the status of the new government.[177]

A. The Advantages of Trial

Several reasons, however, counsel in favour of finding that 'affidavit evidence [is] inadequate' as a general rule, at least with respect to witnesses having knowledge of critical facts, in cases involving revolutions or similarly unsettled constitutional matters. The first is simply that the importance of the issues at bar requires the highest degree and accuracy of proof, and cross-examination is a time-tested means of ensuring such accuracy. The Supreme Court of the United States, citing Wigmore, has described cross-examination as 'the greatest legal engine ever invented for the discovery of truth',[178] 'the principal means of undermining the credibility of a witness whose testimony is false or inaccurate',[179] and 'the very starting point in "exposing falsehood and bringing out the truth"'.[180] Other commentators have likewise described cross-examination as a 'vital feature of the Anglo-American system' which 'sheds light on the witness's perception, memory and narration', and 'can expose inconsistencies, incompletenesses, and inaccuracies in his testimony'.[181] In light of the high standard of proof applicable to revolutionary legality cases, which requires rejection of evidence that is 'loose,

175 See, for example, Civil Procedure Rules 1998 s32.2 (UK) (stating that the 'general rule' is that 'any fact which needs to be proved by the evidence of witnesses is to be proved... at trial by their oral evidence given in public' but that this general rule was subject 'to any order of the Court'); County Court Rules 1981 (UK), Order 20, r5 (stating that evidence may be given by affidavit unless the court otherwise directs); *Circuit Layouts Act* 1989 (Aust) s38(2) (stating that, in certain intellectual property cases, affidavit evidence will ordinarily be precluded if a party 'requires in good faith that a person who made an affidavit... be cross-examined', but that court retains discretion to admit affidavit over such objection).

176 See Civil Procedure Rules, id at s32.2(1)(b) (stating that proof by affidavit is 'the general rule' at hearings other than trial); id at s32.6(1) (same).

177 In the *Sallah* case, for instance, testimony was taken concerning the plaintiff's fitness for employment and the facts surrounding his termination, but the question of whether his office was created by the revolutionary government was treated as an issue of pure law. See above n42 at 503 (Sowah JA). In *Macaulay*, testimony was likewise given as to the circumstances of the plaintiff's arrest, but the facts surrounding the legality of the government that detained him were resolved through judicial notice: see *Macaulay*, above n27 at 405–406, 417.

178 *California v Green* 399 US 149 (1970), 158, quoting John Wigmore, *Evidence* (Chadbourn rev ed, 1974) at 1367.

179 *United States v Salerno* 505 US 317 (1992), 328 (Stevens J, dissenting).

180 *Pointer v Texas* 380 US 400 (1965), 404. See also *Smith v Illinois* 390 US 129 (1968), 131; *Lee v Illinois* 476 US 530 (1986), 540 ('the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is our country's constitutional goal'); *Alford v United States* 282 US 687 (1931), 691.

181 Jack Weinstein, *Weinstein's Evidence* (1988) at 800[01].

equivocal or contradictory',[182] it would seem that cross-examination is indispensable.

It has been argued that cross-examination is of less utility in constitutional cases than in ordinary litigation because the facts on which such cases depend relate 'more to policy than concrete fact and are often not amenable to ascertainment by trial procedures'.[183] As a Canadian court has stated, '[c]ross-examining a social scientist on a particular theory is unlikely to produce a "truth" as understood in the context of adjudicative facts'.[184] Be that as it may, cross-examination is still an invaluable tool for exposing the weaknesses and inconsistencies in an expert's theory, and for revealing any built-in assumptions upon which it may rest. Submission of opposing expert affidavits without cross-examination will frequently fail to accomplish this, leaving the court essentially in the position of having to decide between two facially valid sets of numbers.

It is for this reason that the United States Supreme Court has strongly endorsed the holding of hearings at which experts may be cross-examined about the reliability of their theories and the data underlying their conclusions.[185] A South African court has also recently held that the best way to resolve conflicts in experts' theories is through cross-examination:

> It is clear that there is a vast difference of opinion between the various experts who have commented upon the desirability from an environmental view of allowing the development to proceed. Where such differences exist and where they appear, as here, to be irreconcilable, then experience shows that there is no better way of getting at the truth than through a hearing where the witnesses who hold and espouse opposing views can testify under oath and in public and where they are subject to interrogation. While Wigmore's statement... that cross-examination is "the greatest legal engine ever invented for the discovery of the truth"... may contain elements of exaggeration, it is generally recognised that a skilful interrogator can expose the inadequacies and fallacies in erroneous evidence in a manner which can seldom if ever be replicated by any other method for establishing the truth.[186]

It is thus somewhat incongruous to argue that the social facts relevant to constitutional and meta-constitutional litigation need not be tested via cross-examination.[187]

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182 *Backer Management Corporation*, above n147 at 220.

183 *Canada Post Corporation*, above n9 at 466.

184 Ibid.

185 See *Daubert v Merrell Dow Pharmaceuticals* 509 US 579 (1993), 590–593. See also *Kumho Tire Co Ltd v Carmichael* 526 US 137 (1999), 150–152 (extending the rationale of *Daubert* to non-scientific experts).

186 *Van Huyssteen v Minister of Environmental Affairs and Tourism* [1995] 9 BCLR 1191.

187 See Bell, above n82 at 249 (stating that '[t]he reception of expert... evidence by written submission would also deprive the Court and opposing counsel of the opportunity of subjecting the expert to questioning' and that cross-examination 'would not only allow the evidence to be tested by the Court but, more fundamentally, would be important in facilitating the Court's understanding of it').

This is even more so since proof of social facts will often not depend upon expert testimony at all. Certainly, the element of popular acceptance in revolutionary legitimacy cases will often turn on the evidence of lay witnesses rather than experts. The key testimony in establishing this element will frequently be provided — as it was in the *Prasad* case — by civil servants, political leaders of both the old and new governments, members of non-governmental organisations and aggrieved citizens. While their testimony in the aggregate will enable the court to determine whether the revolutionary government has been accepted by the people, each witness as an individual will testify about concrete facts. Moreover, given the politically charged nature of the case, many such witnesses will have obvious motives to shade the truth or omit relevant facts. The truth, therefore, can best be ascertained by subjecting them to the engine of cross-examination.

A second reason why trial should be the preferred method of resolving revolutionary legitimacy cases is that the standard of proof in this area of the law is, at best, under construction. Accordingly, the proof submitted by the parties might not conform to the evidence that the court requires to resolve the contested issues. This was apparent in the *Prasad* case itself, in which the court expressed its frustration with the inadequacy of the affidavit proof submitted by the government.[188] Specifically, the government took the position that effectiveness as set forth in *Dosso*[189] and *Matovu*[190] should be the sole test of the legitimacy of a post-coup regime.[191] Thus, its affidavits consisted of exactly the same sort of proof that was approved by the *Matovu*[192] court — namely, affidavits of civil servants 'directed at showing that [the government] is in full control and that all branches of government are working normally'.[193]

The Court of Appeal, however, settled on a standard of proof that required something more — the acquiescence of the people of Fiji.[194] Only at oral argument — after the presentation of evidence had ended — did the government concede that popular acceptance was necessary.[195] Thus, the government's affidavits were inadequate, as they '[made] no reference directly to acquiescence, and it was left to the Court to decide what conclusions should be drawn from them on that subject'.[196] Had the government's witnesses been present in court, the judges could have inquired of them to determine whether they had any knowledge relevant to the issues that truly needed to be decided.

It goes without saying that the same risk exists in any area of law where the legal framework or standard of proof is unsettled. In any such case, whether it involves a revolution or a more mundane constitutional issue, the evidence submitted by the parties may bear little relation to the issues ultimately framed by

188 See above n1 at paras 85-87.

189 *Dosso*, above n25.

190 *Matovu*, above n25.

191 See *Skeleton Arguments*, above n60 at paras xiii, 47–74.

192 *Matovu*, above n25.

193 Above n1 at para 93.

194 Id at para 82.

195 Letter from Professor George Williams to Jonathan I Edelstein, 20 April 2001.

196 Above n1 at para 93.

the court.[197] As litigation progresses, however, the court will increasingly come to a consensus of what the standard of proof should be and what facts are necessary to determine whether that standard has been met. If the witnesses are in court, then both the parties and the judges will be able to inquire of them to ensure that those facts are properly developed.

There is also a third reason peculiar to revolutionary legality cases that counsels in favour of trial. Specifically, a public trial will frequently be a method of influencing one of the very issues at stake — acceptance of the new government by the people. If the government is called upon to defend the necessity of its assumption of power, and its assertions that its programs are in the best interests of the country, against the skilled cross-examination of opposing counsel, the public will be able to make a much more informed decision as to whether the government should be accepted. The international community will likewise have the advantage of a public judicial record from which to determine whether the new government merits its support. While proof by affidavit and oral argument, especially if publicised, have some value in shaping the public debate, neither can match the drama of a public trial.

This is, at least, a partial resolution of the dilemma faced by courts when called upon to decide the legality of revolutions or coups. Often, such a case is a Catch-22 situation for the court, which is faced with three unpalatable options:

> There have been cases where Courts have upheld the success of a usurpation on the grounds of control by the new regime and acceptance of control by the populace, despite the regime having some unattractive characteristics. Where Courts have held coups invalid, the new regime has often responded by drastic curtailment of the power, independence and jurisdiction of the Courts. The resignation of Judges on conscience grounds in these situations opens the way for the usurpers to pack the Courts with sympathetic judges.[198]

A public trial opens up a fourth option. By creating a public record in which the new government's purposes and policies are subject to searching inquiry, the court can inform domestic and international opinion regardless of the final outcome of the case. In holding such a trial, the judges will help to constitute the very facts upon which the revolution will ultimately become legitimate or illegitimate.[199]

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197 Ibid; see also *Wilcox Mofflin Ltd*, above n165 at 507 (in action under s92 of the Australian constitution, lamenting the fact that 'the parties did not enter into formal or full proof of these and other matters which would have enabled us, at all events, to obtain an understanding which we felt more adequate of the real significance, effect and operation of the statutes').

198 Above n1 at para 82.

199 See (1967) Annual Survey of Commonwealth Law at 92–93 (stating that 'the judge's position differs radically from the pure scientist's in that the judicial decision helps to *constitute* the facts on which the pure scientist will later determine the efficacy or inefficacy of an order which to him is *given*').

B. The Disadvantages of Trial, and a Few Immodest Proposals

Trial, however, is not without its disadvantages in a post-revolutionary situation.[200] Not only would the potential financial burden on the parties be considerable, but a full trial would require substantial expenditure of time. Time is frequently on the side of a usurping government; the more time that has elapsed since the revolution or coup, the greater the chance that it will be able to demonstrate effectiveness and public acquiescence.[201] Moreover, as time passes, the revolutionary government will have an increasing impact on the life of the nation through legislation and administrative acts.[202] In many cases, courts' willingness to undo the acts of a usurper will decrease as the number and scope of those acts increases.[203]

Accordingly, if a trial is held, revolutionary governments might use it as a tactical device, calling hundreds of witnesses and stretching out the proceedings for months.[204] This might be an especially devastating tactic in countries that rely upon foreign judges who sit part-time, as in many of the nations where revolutions or coups have occurred. An intermittent trial under such circumstances might last years, with the usurping government becoming more firmly entrenched the entire time.[205]

In addition, due to the fluidity of the social and political situation after a revolution, trials might have to be held anew at each level of appeal.[206] In the *Prasad* case, the Court of Appeal acknowledged that it would be subjecting the plaintiff to 'a virtual rehearing' due to its need to obtain up-to-date evidence.[207] It is likely that oral testimony given before the trial court would likewise have to be updated at the appellate level, thus requiring the parties to bear the time and expense of two or more trials.

Nevertheless, the importance of revolutionary cases, and the court's need to inform the public and to decide the case in a manner that inspires public confidence, counsels in favour of allowing and requiring at least some testimony under cross-examination. In determining a method of appropriately limiting the evidence, the court will have to balance the need to obtain the most accurate proof and the educational value of a public trial with the necessity of resolving the case before the new government becomes irrevocably entrenched.

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200 See Letter from Professor George Williams to Jonathan I Edelstein, 17 April 2001. I wish to express my appreciation to Professor Williams for acting as devil's advocate and pointing out some of the practical considerations that face the attorneys for the parties in revolutionary legitimacy cases.

201 See *Liasi*, above n2 at 574 (stating that legitimacy can be achieved if the people acquiesce in a revolutionary government for a sufficiently long period).

202 See *Mokotso*, above n26 at 166 (listing the acts of the revolutionary government in Lesotho during the two years it had been in power).

203 Ibid.

204 Above n193.

205 Ibid.

206 Ibid.

207 Above n117.

Several alternatives suggest themselves, either singly or in combination. The problem of duplication of evidence on appeal, for instance, could be resolved by allowing the trial court record to be supplemented only as to events occurring after the initial trial. In this way, even though there would likely be two or more proceedings where evidence was received, the waste and expense to the parties would be reduced.

The process of trial might be further streamlined by limiting the number of witnesses or days of testimony absent leave of court, as is done in certain pre-trial and trial contexts in the United States.[208] This would result in an abbreviated trial at which the key witnesses would testify under cross-examination while the evidence of additional witnesses, much of which would be cumulative, would be presented via affidavit. The accuracy of fact finding would be conserved to a great extent by the presentation of the most important witnesses for oral testimony, but the government would be prevented from using delay as a tactical device. This procedure would have the additional benefit of creating a more dramatic trial, which would be more likely to catch domestic and international attention and inform public debate.

Another method of limiting testimony might be to allow proof to be presented by affidavit as a general rule, but to permit cross-examination of any witness on the motion of either party or the court.[209] This method, as well, would tend to limit the presentation of oral evidence to key witnesses, as such witnesses would be the most likely to be called for cross-examination. Accordingly, it would also conserve as much as possible of the accuracy of the fact-finding process while permitting the case to be decided within a manageable time.

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208 See, for example, above n168, r30(a)(2)(A) (limiting number of depositions in Federal civil cases to 10 absent leave of court); 26(b)(2) (providing that court could further limit taking of testimony during pre-trial disclosure); *Raniola v Bratton* 243 F3d 610 (2001), 628 (upholding limitation of depositions under r26(b)(2)); *United States v Holmes* 44 F3d 1150 (1995), 1156–1157 (holding that court had power to limit number of witnesses and preclude cumulative testimony even in criminal trial).

209 Professor Williams has suggested a variation on this scheme under which cross-examination would be permitted on application of the parties, above n195. This would result in a rule similar to that of certain Canadian courts, in which the opposing party has the right to cross-examine any witness who presents evidence by affidavit. See Federal Court Rules 1998 (Can), r83 (stating that '[a] party to a motion or application may cross-examine the deponent of an affidavit served by an adverse party to the motion or application'); Supreme Court Rules (Can), r20 (stating that a party may seek leave of court to cross-examine the deponent of an affidavit). It is important, however, that the court also have the ability to call for cross-examination of witnesses, especially in cases where the burden of proof is uncertain. Because it is the court that ultimately determines the standard and burden of proof, the judges are frequently in the best position to determine where more evidence, or evidence on additional topics, is necessary. See Kenny, above n8 at 156, 163 (stating that practical judicial guidance of the fact-finding process is necessary where 'burden of proof rules ... remain disputable and the litigants' task uncertain'). It should be noted that the rules of the Fiji Court of Appeal give authority to receive new evidence by oral testimony or deposition. See above n164.

6. *Conclusion*

It is to be hoped that the courts will never again be required to determine the legality of an extra-constitutional coup. Whether or not they are, however, the *Prasad* decision will be of more than academic interest to future courts and advocates. In addition to developing the theory of revolutionary legality, the *Prasad* case represents a step forward in the growing jurisprudence of constitutional fact determination. The meticulous attention given by the *Prasad* court to matters of proof should be the model in any future case where similarly weighty issues arise.

Not every constitutional case involves issues as weighty as those that are raised in the wake of revolutions. Nevertheless, many of the same considerations apply in determining an appropriate method of proving facts. Any constitutional case affects the fundamental law of the nation, and many such cases will also have a profound effect on its day-to-day life. As such, the court should ideally fulfil the same triple role that it must undertake in a revolutionary case — to decide the issues accurately, to do so in a manner that inspires confidence, and to inform the public and stimulate debate. This calls for the most accurate possible method of fact-finding. As a noted Australian commentator has stated, 'in a well-informed society, public confidence in constitutional review depends... as much on the manner of the reviewing court's inquiry (and on the persuasive force of its reasons) as on the Constitution itself.'[210]

This caution, however, applies with particular force to cases involving changes of government through revolution. In such cases, the court's findings of fact and conclusions of law must be unimpeachable if they are to be acknowledged and obeyed. Moreover, the court's ability to enforce its decision will frequently be less in revolutionary cases than in ordinary constitutional matters, which means that its educational role will assume greater importance. This requires that the facts surrounding the usurpation, and its acceptance or rejection by the people, be accurately determined and placed before the public.

Thus, in the event that another revolution is put to judicial test, the court charged with deciding the legality of the new regime should take a further step forward and hold a public trial prior to rendering its judgment. Not only does the importance of the interests at stake demand the highest and most accurate degree of proof, but a trial — even if reasonably limited — will enable the public to make an informed decision as to whether to accept the new government. In this way, even if the court can have no other influence on the political situation, it can at least assist all sides in determining the truth.

210 Kenny, above n8 at 165.