

2 "New" or "revised" 1997 Constitution: it is not semantics

1. The Commission is reported to have stated that their work will lead to a "new" constitution.¹ It is easy to fall into this line of thinking given that Fiji appears to have had several "new" constitutions since political independence: the 1970 Constitution, the 1990 Constitution and the 1997 Constitution.
2. It should be pointed out however that even the 1997 Constitution was brought into being as the 1997 Constitution "Amendment" act. I submit that the end product of the process I set out here will be a "revised 1997 Constitution" and this distinction is not mere semantics, but critical for the legitimacy of the current Commission's work and the legitimacy of the eventual constitutional output.
3. To accept that the end product will be a "new" constitution will be to accept that the 1997 Constitution was lawfully abrogated by President Iloilo in 2009 with the support and at the behest of the Military Regime. I submit that to accept that would be reinforce the continuation of the "coup culture".
4. Professor Yash Ghai and Professor Christina Murray, as constitutional lawyers, will know that there is a substantive legal position regarding the purported abrogation of the 1997 Constitution in 2000 and the removal of the lawfully elected government in 2006. This legal position has a logical bearing on the purported abrogation of the 1997 Constitution in 2009 and the lawfulness of the current Commission's processes and output. Professors Ghai and Professor Murray will have read the three documents referred to below.
5. The first is the last legal and authoritative judgment of the 2009 Court of Appeal (Justices Powell, Lloyd and Douglas) available here:
<http://www.nswbar.asn.au/circulars/2009/apr09/fiji.pdf>
6. The Appeal Court judges carefully traversed all the previous arguments and judgements on the legality of all governments established since the military coups of 1987, 2000, and 2006. They made the clear judgement that all of the following were unlawful according to the 1997 Constitution:
 - (a) the assumption of executive authority and the declaration of a State of Emergency by Bainimarama
 - (b) the dismissal of Qarase as Prime Minister,
 - (c) the appointment of Senilagakali as caretaker Prime Minister,
 - (d) Bainimarama's order for the dissolution of Parliament,

¹ While the members of the Commission may derive greater personal credit for giving Fiji a "new" constitution, the far more important consideration ought to be the "lawfulness" of their endeavours.

- (e) Iloilo's appointment of Bainimarama as Prime Minister, and
 - (f) all subsequent decrees by President Iloilo attempting to legalize Bainimarama's actions.
7. The Appeal Court pragmatically recommended that President Ratu Iloilo appoint a caretaker Prime Minister to advise a dissolution of the Parliament and call for fresh elections. Instead, the next day, Ratu Iloilo claimed to "abrogate" the 1997 Constitution, and re-appointed Bainimarama as Prime Minister, whose regime has continued till today.
 8. I also refer the Commission to Professor Anne Twomey's "The Fijian coup cases: The Constitution, reserve powers and the doctrine of necessity" available here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1399803.
 9. The Commission may also wish to read "Dire Straits: a report on the rule of law in Fiji", an International Bar Association Human Rights Institute Report, March 2009, which documents how a few aggrieved Fiji High Court Judges in 2006, sacrificed constitutionality and the rule of law, on the alter of their personal vendetta against other judges who they thought had acted unfairly against them.
 10. These three documents strongly support the view that the 2009 alleged abrogation of the 1997 Constitution by Iloilo and the Bainimarama Regime were equally unlawful under Fiji laws. Implicit but damning proof of that is the Regime saw it necessary to issue Decrees which deny any legal challenge to their purported abrogation of the 1997 Constitution in 2009 as well as the demands for immunity made by Decrees 98 and 99.
 11. I draw on the excellent 2001 judgement by Justice Anthony Gates (currently the Military Regime's Chief Justice) in the case *Koroi v Commissioner of Inland Revenue*.² (Justice Gate's words are given here in blue italics, with my additional comments in black):
 12. *"It is not possible for any man to tear up the Constitution. He has no authority to do so".*
 13. Thus we may conclude that neither Commodore Bainimarama in 2000 nor President Iloilo in 2009, had any powers to abrogate the constitution.
 14. *"The Constitution remains in place until amended by Parliament, a body of elected members who collectively represent all of the voters and inhabitants of Fiji ...*
 15. *The fundamental law represented in a Constitutional document may only be changed in accordance with that Constitution."*

² Many of these quotes are referred to in Twomey's excellent paper referred to earlier.

16. *"Usurpers may take over as they have in other jurisdictions, and in some cases rule for many years apparently outside of, or without the Constitution. Eventually the original order has to be revisited, and the Constitution resurfaces ..."*
17. *"For the courts cannot pronounce lawfulness based simply on the will of the majority. Nor can lawfulness be accorded to the tyranny of the mob.... Such tyranny lacks universal morality and the courts will not assist usurpers simply because they are numerous, powerful, or even popular."*
18. The clear implication is that even the Yash Ghai Commission cannot suddenly create a "new" Constitution outside of Parliament, even if approved by some "Constituent Assembly" appointed by the "usurper".
19. Equally, no "popularly approved" Charter can ride roughshod over the 1997 Constitution, and courts will not assist the usurping Military Regime, even if it is "powerful, or even popular" six years later.
20. In an earlier 2000 judgement, Anthony Gates had justifiably admonished fellow judges Tuivaga, Scott and Fateaki:

"Judges should remember their oaths of judicial office to uphold the Constitution. The presumption is that the Constitution remains unimpugned until pronounced otherwise in court".
21. Professor Yash Ghai and Professor Murray, and Justice Gates himself, will know that the 1997 Constitution has not been "impugned in Court".
22. Gates also criticized Qarase's 2000 court action to declare the 1997 Constitution abrogated and begin a constitution review process (in 2001):

"But the rule of law means that the suspended state of affairs and the Constitution return to life after the stepping down of a responsible military power and after the conclusion of its work for the restoration of calm for the nation."

"There is no constitutional foundation of legality for the interim government or for the Constitutional Review Committee".
23. While Gates was referring to the Constitution Review Committee set up by Qarase Interim Government, the same could equally be said of the current Bainimarama Regime and the Yash Ghai Commission.
24. This Gates judgment in the 2000 Chandrika Prasad case was supported by a 2001 Court of Appeal (comprising Casey, Barker, Kapi, Ward and Handley JJA).

25. The Commission should also note that for six years, the Bainimarama Regime has been insisting that all future governments must be guided by the People's Charter which was allegedly approved by more than 80 percent. of all people in Fiji over the age of 18 i.e. virtually a referendum). I remind that the first clause of the Charter states clearly *"We the People of Fiji Affirm that our Constitution represents the supreme law of our country, that it provides the framework for the conduct of government and the people"*.
26. This commitment was however trashed by the 2009 purported abrogation of the constitution. It may be noted that the Yash Ghai Commission's recently issued pamphlet advertising their work has omitted all reference to the People's Charter!
27. In summary, the 1997 Constitution is still in place, and can only be "revised" following the Yash Ghai Commission's Report, by the processes which I recommend below.
28. ***This submission calls on the Yash Ghai Commission to acknowledge that the end product of their exercise will NOT be any "new" Constitution but a "revised 1997 Constitution".***
29. Failure to do so will simply reinforce the mentality that every time there is a possibility of some weakness in the Constitution, the call is made "let us have a new constitution, that will solve the problem", by mounting a coup.
30. This submission rejects those aspects of the Regime's most recent decrees (98 and 99) that clearly undermine the democratic processes which are the only means whereby they can be any degree of legitimacy to the final desired output of a genuine "people's constitution".