

FIJI FIRST PARTY

The Neutralising Force

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The Supreme Law of Republic of Fiji

The 1997 Constitution 'Lives On'

When the long 3 years of state of emergency went, so did the abrogation of the 1997 Constitution go with it. The 'life of abrogation' remained in force only until the day of uplifting the state of emergency.

There has been no revolution and this abrogation in question only arose purely at the Presidents own discretion that could only run until the uplifting of the state of emergency.

The Court of Appeal on 1 March 2001 in Chandrika Prasad Case comprising five-judge Bench held it does not authorize permanent changes to a written Constitution let alone its complete abrogation.

The 1997 Constitution provided, inter alia, that: "The executive authority of the State is vested in the President" (s 85); "The President is the Head of State and symbolises the unity of the State" (s 86); "The President is the Commander-in-Chief of the military forces" (s 87); "The Constitution also prescribes the circumstances in which the President may act in his or her own judgment" (s 96(2)).

Prerogative power by the President either under "state of emergency" or under "the doctrine of necessity" to completely abrogate the Constitution or part thereof, appears not within the President's jurisdiction but only concurrently running with state of emergency. In Chandrika Prasad case initiated by the victims of 2000 coup, the refugee camp at Lautoka Giritmit Centre has most answers to this serious question the country is facing today which is explained separately further below, when that case law was about powers under doctrine of necessity.

The 1997 Constitution Law of the Republic of the Fiji Islands states:

- 1) Section 1. The Republic of the Fiji Islands is a sovereign, democratic state.
- 2) Section 2 (1) This Constitution is the supreme law of the State.
- 3) Section 2 (2) Any law inconsistent with this Constitution is invalid to the extent of the inconsistency.
- 4) Section 120 (2) "The High Court also has original jurisdiction in any matter arising under this Constitution or involving its interpretation."
- 5) Section 123, "The President may, in the public interest and on the advice of the Cabinet, refer to the Supreme Court for its opinion any question as to the effect of a provision of this Constitution that has arisen or appears likely to arise, and the Supreme Court must pronounce in open court its opinion on the question."

Therefore without High Court gives its opinion whether the 1997 constitution is indeed abrogated, how can Fiji First Party or anyone for that matter take part in consultation on developing a new constitution?

John Sami's Peoples Charter recommending amending or review of the electoral provisions of the constitution appear to be bunk as it is inconsistent with the 1997 Constitution and therefore invalid to the whole extent of the inconsistency, hence the recommendations appear to be unlawful.

Mahen Chaudhry who supported the changes has publically said his FLP was a minority Party and majority did not support his party's recommendation in 1996. So FLP chose to unlawfully engage through Peoples Charter to defy the 1997 Constitution. Chaudhry must take full responsibility to hoodwink the RFMF Commander in the wrong direction.

Instead of the Peoples Charter Committee working on the issues of addressing abuse of the Constitution between 2001 and 2006 and working on 'code of conduct' based on those abuses of politicians' and political parties and what is expected of them to do, this committee went ahead to pretend they had lawful jurisdiction to do whatever they liked to do when all matters they discussed in the Peoples Charter

document were in fact part of the civil service manual and Constitutional procedures to be adopted if they were yet followed or developed.

Chaudhry announced in 2007 that the interim government in which he was the Finance Minister needed to run for 5 years instead of one year or thereabouts that the letter of appointment he received from the Military Council in 2007.

Laws made, and administrative and judicial actions taken, after the commencement of the 1997 Constitution are subject to the provisions of Bill of Rights section as governing principles to all laws. Acts done by those actually in control without lawful authority may be recognised as valid or acted upon by the courts, with certain limitations, namely, so far as they are directed to, and are reasonably required for the ordinary orderly running of the state; so far as they do not impair the rights of citizens under the lawful Constitution; and so far as they are not intended to and do not in fact directly help the usurpation.

Because the issues of purported abrogation of the 1997 Constitution in 2009 has not been ultimately brought before the court, so until those matters are considered by an independent Court of Law, it must not be assumed that the actions of the interim government are lawful and valid based on the provisions of the 1997 Constitution and/or under the said prerogative powers of the President pursuant to the 'doctrine of necessity'.

Notice is drawn to Presidents Emergency Powers under Section 187 (2), (4) and (5)

- (1) The Parliament may make a law conferring power on the President, acting on the advice of the Cabinet, to proclaim a state of emergency in Fiji, or in a part of Fiji, in such circumstances as the law prescribes.
- (2) **The law may include provisions conferring on the President the power to make regulations relating to the state of emergency.**
- (3) A measure authorised by or under the law may derogate from the rights and freedoms set out in section 23, 24, 30, 31, 32, 33, 34 or 37 (but not from other rights and freedoms set out in the Bill of Rights) if each of the following conditions is satisfied:
 - (a) the Cabinet has reasonable grounds for believing that, because of the emergency described in the proclamation of the state of emergency, the life of the State is threatened and the exigencies of the situation are such that they cannot be dealt with effectively without derogating from the Bill of Rights;
 - (b) the proclamation of the state of emergency is laid before the House of Representatives, is confirmed by it within 5 sitting days after the proclamation is made and remains in force at the time the measure is taken;
 - (c) the proclamation of the state of emergency remains in force for no longer than 3 months or for such further successive periods of up to 6 months as the House of Representatives determines;
 - (d) regulations relating to the state of emergency are laid before the House of Representatives within 2 sitting days after they are made and remain in force at the time the measure is taken.
- (4) **A law made under this section that is inconsistent with the obligations of the State under an international convention or covenant is invalid to the extent of the inconsistency**
- (5) **Regulations made pursuant to subsection (2) remain in force only so long as the proclamation of the state of emergency remains in force.**

It appears that after the Court of Appeal decision in *Qarase –v- Bainimarama* [2009] FJCA 67; [2009] 3 LRC 614 (9 April 2009) case, the head of state was in an extremely different, special and singular category to having abrogated the constitution. This would fall under his emergency powers section 187 (2) that led him to purportedly abrogate the constitution.

However the President's prerogative powers to purportedly abrogate the 1997 Constitution in April 2009, had far lesser severity of issues than those placed before the court to abrogate the Constitution in 2000 whilst dealing with the gravity of releasing of parliamentary hostages.

But ever since the Late President abrogated the constitution in April 2009, he also had state of emergency going hand in hand and had remained in force and was regularly renewed which we assume is under constitutional law section 187 (3) (c). But on the date that the state of emergency was finally lifted, with that the regulations made pursuant to subsection (2) which was abrogation of constitution

lapsed. The abrogation remains in force only so long as the proclamation of the state of emergency remained in force.

Therefore after uplifting the state of emergency, the 1997 constitution naturally starts to relive from the date of uplift of state of emergency.

So how can ANYONE now talk about putting up a new constitution when the 1997 Constitution in effect is deemed no longer abrogated without even having to do anything?

Courts during 2001 had also ordered to disband constitutional review commission, hence precedent case is already against the currently announced process to draft a new constitution is therefore seriously flawed. The past court rulings give no legal basis to any constitutional review.

Authoritative Opinion: It is now incumbent upon the Interim Attorney General to therefore recommend to the President to first and foremost get a declaration from the High Court and Supreme Court to declare a ruling or opinion as to whether the 1997 constitution under section 187 (5) or any other provisions remains purportedly abrogated before any validity can be given to the work on any new constitution.

Without this any work on purported new constitution can be invalid in process as precedent cases of 2001 are also directly related to the Attorney General and President's Office hence they should know much better of their lawful responsibility than those politicians who could not run a government for 6 years the way it was supposed to be.

Independent Judiciary

The much spoken about judiciary that was not independent, it can now hear all Constitutional matters given the Courts now revert back to pre 2009 state of emergency and abrogation, therefore back to 1997 Constitution with the automatic lapse of the abrogation, reverting their oath of allegiance to the 1997 constitution without even having to take another oath!

However, due to state of emergency lasting long 3 years, the SDL Party cannot take any comfort from this to mean that the Court of Appeal decision of 2009 is any longer enforceable.

If the President acts in a crisis without mala fides and addresses the grave problems in a way that he believes honestly addresses those problems whether in peacetime or war, the courts will uphold his action: *Juan Ponce Enrile v Ramos, Chief, Philippine Constabulary* [1974] PHSC 353.

While the ruling stands for future case laws, 3 years is a very long time and that decision has lapsed for all due purpose in our opinion, but the issue of abrogation no longer exists under President's prerogative powers or under any powers vested to the President in the 1997 Constitution.

The prerogative or ultimate reserve power resides with one person only and that is the President. Fiji First Party believes we can argue until the cow comes home on whether an emergency had in fact arisen justifying the exercise by President of prerogative power or that the Executive considered the step necessary for the national security and in fact acted on that basis.

Notwithstanding it was recently pointed out in a blog that the advice from the institution having power vested to them as final Bastion of law, the Military Council is said to have recommended to the Commander to uphold the Court of Appeal Judgment. But given that the Court of Appeal ruling had in effect removed the Interim Government of the President headed by Military Commander, Any advice taken by the President would have either arisen out of Presidents own office or from the Solicitor General's Office or his own personal decision.

Whatever the case. The 1997 Constitution now Lives following uplifting of the state of emergency.

RFMF'S Departure from Being Final Bastion of Law

It was reported in Fiji Live on 13 March 2012 that Fiji's Military Force will not have a special role in the constitution consultation process, says Land Force Commander Colonel Mosese Tikoitoga. He said the

military will stand by and support Commodore Voreqe Bainimarama totally in whatever decisions he makes about the country.

This is indeed a departure from military being the final Bastion of law and protector of Constitution and Sovereignty and passing that responsibility to Interim Government is inconsistent with the governing law.

Fiji First Party believes RFMF does have a bona fide role to play to stop any work on developing a new constitution when there is no directive from Supreme Court that confirms 1997 Constitution no longer exist in any form for The Republic of Fiji.

FFP as the next government will ensure that RFMF remains an active member in the Security Council once parliamentary governance returns. This is because the preamble of the 1997 constitution is very clear that has not deleted that role that RFMF had as final Bastion since 1990 constitution despite the fact that Reeves Commission discussed this matter at length. It appears when legal advice to each institution is arising out of a singular office at the time of crisis, there are undesired advice or are directed to do so.

The Chandrika Prasad Case Law and the Five-Judge Bench

The Lautoka Girit Centre Refugee Camp took up the task to challenge the purported abrogation of the constitution following George Speight coup in 2000 and acted at the time when the Peoples Coalition Government remained hostage in Parliament.

The High Court ruled that the 1997 Constitution was not abrogated. The Court of Appeal later upheld this decision.

Recently, it has been revealed that RFMF following that ruling took a legal consultation from Constitutional Expert Mr Ghai. It is reported in C4.5 Mr Ghai to have met with military in October 2000 offering legal consultation following the victory judgment to Chandrika Prasad.

“When I was in Fiji in October 2000, the Head of the Armed Forces invited me for consultations, particularly in view of the impending Court of Appeal decision on the legality of the coup. All senior officers were carrying copies of the Constitution. During our conversation, I was told that the Army had begun to study it, and, to their surprise, found it was an excellent constitution and a better one could not be imagined.

“But they had not known this when they more or less supported the coup! Not that the army came out in support of the constitution at that time. But is interesting to note that within a few years of the coup, the Army became one of the institutions in the nation that was relatively supportive of the Constitution.’

A landmark Precedent Case within the jurisdiction of Fiji that has confirmed the constitution remained valid after its purported abrogation has also set clear standards and directions for the Solicitor General's Office and their advisors.

Clear direction from this case is that the purported abrogation of the Fiji Constitution was not made in accordance with the doctrine of necessity and as such was of no effect. The Court of Appeal on 1 March 2001 comprising five-judge Bench held ***it does not authorize permanent changes to a written Constitution let alone its complete abrogation.***

Court of Appeal further held that a revolutionary regime should not be accorded legitimacy by the courts unless the regime has the people behind it and with it, and the burden of proof of which is on the new regime.

Accordingly, the Court of Appeal held that the Fiji Constitution had remained in force at all times declaring the 1997 Constitution remains the supreme law of the Republic of The Fiji Islands and has not been abrogated.

Therefore, as suggested above Attorney General should file a case under section 123, of the 1997 constitution for advisory jurisdiction in Supreme Court for an Authoritative Opinion as to whether the 1997 constitution is indeed abrogated. The regime will get an opportunity to legalize their position and shut everyone up who opposes (like us) any permanent changes to the written constitution by showing the courts the people are behind it and with it.

There is No Revolution, No Popular Support & Now No More GCC

While the 5 judge bench in The Chandrika Prasad Court of Appeal did not recognize hostage taking and rioting to constitute popular support, the Bose Levu Vakaturaga meeting held with RFMF's protection had passed a resolution that law must be followed at all times after the RFMF had retaken control of the State following failed 2000 mutiny and always thereafter.

This re-established there was no popular support for overthrow of the Peoples Coalition Government according to the highest honourable office of the Fijian Administration and Fijian Affairs Board despite aspirations or old guard mindset that continued to exist within some chiefs at personal level. This however did not lawfully allow the August House to take the role of judiciary into their own hands was a sensible thing to do.

These demonstrated clear direction for those who continue to claim Fijian aspirations and supremacy is above the law, and that the constitution is only good if Fijian voter influence is going to be what should decide who should be the Prime Minister, etc. Past errors and past mindset no longer existed in the New forward looking Fiji as the chiefly house demonstrated that they are chiefs of all the people and not just for the indigenous people in the new and modern Fiji.

Then when in 2007 the neck of the state which is the Great Council of Chiefs has been chopped off, then where does the revolutionary regime think they will find legitimacy to convince the people or the courts the regime has the people behind it and with it. Notwithstanding GCC also has no role to play in any constitutional abrogation or review process unless there is a major anarchy and the 1997 Constitution is proven through proper jurisdiction to be the cause of it.

However, in a situation arising where another hostage crisis where Military Commander, President and Parliament and Judiciary are all under seize by a rebel group, GCC can play most crucial role and exercise doctrine of necessity to help resolve the crisis at hand in advisory role only as the institution that is seen with respect by the people.

GCC under the 1997 Constitution themselves gave away their own supremacy by approving to become independent of all political influence as they left SVT to be on their own. The Constitution approved a full time Secretariat to GCC to ensure the GCC does not go back to old ways as the new Fiji had new law and new direction. After each crisis the final decision out of that office has always been that law must be followed at all times despite some heavy handed extremists within the GCC having their say also. Question whether the Secretariat did his job well to keep them independent is something we reserve to address later.

Under Fiji First Party as the next Government, rest assured GCC is here to stay after correcting the wrongs of the past. We will fix the problem with strict code of conduct and not throw the august body.

Politicians Have No Mandate

When The Court of Appeal on 1 March 2001 in the judgment handed down in Chandrika Prasad Case held it does not authorize permanent changes to a written Constitution let alone its complete abrogation; and given Fiji has not had a revolution; President's abrogation lapsed with the uplifting of state of emergency, no politician is above the law to join in to amend or re-write the constitution.

No politician has any mandate to represent the constituents on any constitutional talks as their 5 years since the 2006 General Elections also expired in 2011. These political parties cannot choose to pretend they can speak for the people and make us all believe they remain key stakeholders. Political parties and politicians will come and go but the 1997 Constitution is here to stay.

Some of these politicians tend to think parliament term is still running so they have welcomed the work on new constitution to start when the 1997 Constitution is now already valid with the uplifting of the state of emergency.

But when the parliament was indeed running, and when they did have some mandate they defied the good governance and showed no regard for law giving opportunity to the Military to make noise from the barracks and placing no blame on themselves and all on to the Military.

Those ex-politicians and those who suggest any talks on the changes to the 1997 Constitution are part of the political problem rather than the solution for Fiji. These so called educated politicians were part of the case law regarding the abrogation of the constitution in 2000 and challenged by Girit Centre Refugee Camp well known as Chandrika Prasad Case. If anyone they should know better.

In the absence of parliament for past 6 years all political parties as well as each individual over the age of 21 years have equal value and equal suffrage, but none have any lawful authority to discuss a new constitution due to section 187 (2) and 187 (5) has lapsed the abrogation decree and that abrogation decree has now come to an end, resulting out of uplifting of the emergency decree. Notwithstanding precedent Chandrika Prasad case stands.

Therefore until there is a proper interpretation of the currently purportedly abrogated 1997 Constitution, these ex-politicians are committing a serious crime, if not treason, by participating in development of a new constitution when the 1997 Constitution is deemed to remain a living document until the courts declare otherwise.

These same politicians and NGO's were all sleeping on their job when they had the legal mandate to discuss any serious issues in the constitution when it came for a review. Not a single one of them raised these purported flaws in the constitution then. So now if they want to do it unlawfully, please pass our best regards to George Speight when you meet him. You cannot hide behind ignorance over the same issue over and over and expect to be exempted and yet want the others in the Military and elsewhere to face the full blunt of law.

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