

Submission by Individual Lawyers for Universal Periodic Review – Fiji

INTRODUCTION

This is the submission of individual lawyers from Fiji. The individuals are some of the current and former leaders of the Fiji Law Society ('FLS').

The current political climate particularly the Public Emergency Regulations imposed by the military administration has restricted the FLS from meeting to discuss current affairs or any other matter.

This also means that the FLS is not permitted by the military administration to meet to discuss the drafting and endorsement of submissions for the Universal Periodic Review.

This wholly diminishes the role of the FLS in the maintenance and advancement of the rule of law which is central to the protection of individual and collective human rights.

BRIEF ON THE FLS

The FLS was established in 1956 as an association of practicing lawyers in Fiji to look after and represent their professional interests, pivotal to which is the rule of law.

In 1997 the Parliament of Fiji enacted the Legal Practitioners Act ('Act') to give the FLS – powers to issue practicing certificates to members upon terms set by the FLS; powers to investigate complaints against lawyers practicing in Fiji; powers to discipline lawyers practicing in Fiji; a seat on the Judicial Services Commission to appoint Judges, Tribunals and Magistrates; a seat on the Board of Legal Education to oversee the standards to be met by persons seeking admission to practice in Fiji and, funding from part of the interest earned from private lawyers trust accounts.

BRIEF ON THE RULE OF LAW IN FIJI THROUGH SUCCESSIVE MILITARY COUPS

Fiji experienced its first military coups on 14 May and September, 1987 led by the then Lt. Colonel Sitiveni Rabuka.

The leaders of the 1987 coup abrogated the secular and multicultural 1970 Constitution in favour of a one that discriminated about forty per cent (40%) of the population on the basis of race and religion (1990 Constitution).

Under the 1990 Constitution, the Indo-Fijian people were made second class citizens in their country of birth. Government policies and associated assistance were made based on race with favour given to the indigenous community.

In 1992, the then Brigadier General Sitiveni Rabuka contested and won the leadership of the indigenous and favoured political party the Soqosoqo ni Vakavulewa ni Taukei ('SVT') and, he and the SVT won the general elections in 1992 and 1994 under the 1990 Constitution.

In July, 1997 the then Prime Minister Rabuka together with the parliamentary opposition leader Mr. Jai Ram Reddy and his National Federation Party passed through a vote of the special majority of parliament, the 1997 Constitution - after many months of nation-wide dialogue, consultation and negotiation.

The 1997 Constitution (which can be found at http://www.paclii.org/fj/legis/num_act/ca1997268/) is a sophisticated constitution containing the hopes and aspirations of a nation that was divided

along racial and religious lines since 14 May 1987. The 1997 Constitution replaced the divisive and corrosive 1990 Constitution.

Most importantly for lawyers and the rule of law, the 1997 Constitution contains a Bill of Rights and the foundation for an independent Judiciary at Chapters 4 and 9 respectively.

After the first general election under the 1997 Constitution, a coup was attempted by a group of civilians on May 19 2000 through their taking hostage 56 of the 71-members of parliament. The Fiji Military Forces through its Commander Commodore Voreqe Bainimarama then attempted to abrogate the 1997 Constitution arguing that it was necessary to restore peace and release of the parliamentary hostages.

Through subsequent court challenges, the Fiji Court of Appeal in *Republic of Fiji Islands v Prasad* [2001] FJCA 2; Abu0078.2000s ruled that the 1997 Constitution remained the supreme law of the land. The then constitutional Prime Minister requested the Acting President to take Fiji to early general elections in 2001.

It is important to mention here that between 19 May 2000 and the end of 2001, the judiciary was badly split with three High Court Judges accusing three of their colleagues of collaborating with the Commodore in his purported abrogation of the 1997 Constitution.

Those accusations have never been substantiated but the circumstances of the animosity amongst the Judges continued up to the removal of the Chief Justice from his Chambers on January 2006 and, the subsequent resignation and non-renewal of tenure by High Court and Court of Appeal Judges after the 2006 coup.

FLS AND ITS MEMBERS THROUGH FIJI'S SUCCESSIVE MILITARY COUPS

Like the aftermath of the 1987 and 2000 political and legal crises, the FLS leadership condemned the December 2006 coup and its effect on the rule of law. The military retaliated. The detail of this aspect of the coup which affronted the rule of law and human rights is set out below.

LAWYERS & the MILITARY ADMINISTRATION POST DECEMBER 2006 MILITARY COUP

- (a) On 5 December 2006 the military administration purported to dismiss the Vice President of Fiji Ratu Joni Madraiwiwi from his office. Ratu Madraiwiwi is a senior member of the Fiji Bar and Judge of the High Court of Fiji prior to being appointed Vice President of Fiji. Prior to the 2006 coup, he tried to mediate between the Prime Minister and Commodore Bainimarama;
- (b) On 6 December 2006 the military administration announced in the media that the Commissioner of Police (an independent and constitutional office), Andrew Hughes had been dismissed from his office;
- (c) A few days after the elected Council of the FLS suspended the practicing certificates of lawyers in the military pending receipt of their affirmations that they will continue to uphold their oaths to the rule of law especially the 1997 Constitution;
- (d) On 3 January 2007, Fiji soldiers and police requested Chief Justice Fatiaki to leave his Chambers pending an investigation into allegations yet to be put to him;

- (e) On 4 January 2007, the military appointed President of Fiji (Iloilovatu Uluivuda) purported to suspend Chief Justice Fatiaki pending the said investigation;
- (f) On 5 January 2007, Justice Nazhat Shameem purported to convene and Chair a meeting of the independent constitutional body – Judicial Services Commission (“JSC”) – to appoint an Acting Chief Justice. The JSC is established under the Constitution to appoint Judges, Magistrates and Tribunals. It is comprised of the Chief Justice, Chair of the Public Service Commission and, President of the FLS;
- (g) On that day, the purported meeting of the Judicial Services Commission appointed Justice Anthony Gates as Acting Chief Justice of Fiji and subsequently, the JSC comprising Justice Gates and the military appointed Chair of the Public Service Commission made many appointments to the Judiciary and Magistracy. The FLS resumed participation in the JSC after October 2008;
- (h) At about 9pm on 23 January 2007 a senior member of the Fiji Bar, Mr. Richard Naidu was taken by soldiers from his home and taken to an unknown location where he was bullied and assaulted for a few hours for comments he made to the media against the military and its “puppet” President (Iloilovatu Uluivuda);
- (i) On 30 January 2007, the then Vice President of the Fiji Law Society Ms. Tupou Draunidalo and her client Ms. Angenette Heffernan were questioned by the Police on sedition charges while they were on their way to filing applications for injunctions inter alia the Bill of Rights at the High Court of Fiji in Suva. At the time, Ms. Heffernan and her young children were evading soldiers who they believe had intimidated them in Suva including their family home;
- (j) In April 2007 the FLS filed in the High Court for Judicial Review of the purported meeting of the JSC in appointing Justice Gates Acting Chief Justice;
- (k) On the afternoon of 25 May 2007, a senior member of the Fiji Bar Mr. Kitione Vuataki was taken to the military barracks in Lautoka for questioning about statements he made to the media;
- (l) On the afternoon of 26 May 2007, Mr. Vuataki’s colleague Mr. Savenaca Komaisavai was also taken in by the military for questioning regarding statements he is alleged to have made to the media. Both Messers Vuataki and Komaisavai were at the time representing the Great Council of Chiefs (a body with constitutional powers) which had been purportedly suspended by the military administration;
- (m) On 3 June 2007 the then former Vice President of the FLS was stopped by the military administration at the airport from leaving Fiji for a conference on the rule of law in Hong Kong. She was allowed to depart on the following day;
- (n) On 15 June 2007, the military appointed Attorney-General Mr. Aiyaz Sayed-Khaiyum sought leave of the High Court to apply for an Order of Committal against the then Vice President of the FLS for Contempt of Court in the making of the following statement, “the confidence of lawyers in the judicial system let alone the public is shattered.” The military administration

later withdrew its application and was ultimately ordered by the Fiji Court of Appeal to pay costs to the Respondent;

- (o) On 26 June 2007 a senior member of the Fiji Bar Dr. John Cameron was detained upon arrival and deported from Fiji by the military administration. Dr. Cameron was Counsel of choice for Ms. Angenette Heffernan and, one of the lawyers for the FLS in its Judicial Review proceedings against the FLS;
- (p) On 17 July 2007 a former President of the FLS and lawyer for Chief Justice Fatiaki Mr. Graham Leung was stopped at the airport by the military administration from leaving Fiji for a law conference overseas. Mr. Leung took the matter to Court where the matter was settled;
- (q) On 24 October 2007 Mr. Justice Pathik (whose term as a Judge was extended by the JSC seating after the 2006 coup) ordered Mr. Dor Sami Naidu as Solicitor on record for Ms. Angenette Heffernan to personally pay costs to the Judges and others named as Respondents in the total sum of \$FJD9,500.00. The matter was for constitutional redress and it sought the recusal of various Judges appointed after the 2006 coup on the ground of “apprehended bias”. The costs were summarily assessed and, the highest of its kind in the jurisdiction. It was only surpassed on appeal in May 2008 when the appeal Judge (also appointed after the 2006 coup) ordered that Mr. Naidu pay the total sum of \$FJD18,600.00 for costs, summarily assessed. Mr. Naidu paid all costs when the lawyers for the Respondents levied execution against him;
- (r) On 9 April 2009 the seminal case challenging the legality of the 2006 military coup was decided by the Fiji Court of Appeal in – the Court upheld the 1997 Constitution and declared that pursuant to that Constitution, the actions of the Commander of the Fiji Military Forces in dismissing the elected Prime Minister and Cabinet (amongst other things) from 5 December 2006 was unlawful;
- (s) On 10 April 2009 the military appointed President purported to abrogate the 1997 Constitution. Thereafter the military President promulgated the following regulations and decrees: Public Emergency Regulations 2009 (**‘PER’**); Decree No. 1 - Fiji Constitution Amendment Act 1997 Revocation Decree 2009; Decree No. 2 - Executive Authority of Fiji Decree 2009; Decree No. 3 - Fiji Existing Laws Decree 2009 and Decree No. 4 - Revocation of Judicial Appointments Decree 2009. The PER restricts freedom of association, movement and speech while Decree No. 4 interferes with the appearance of judicial independence - all of the things fundamental to the rule of law and, the sanctity of individual and collective human rights;
- (t) The Courts of Fiji remained closed for some time pending the appointment of judicial officers by the military administration.
- (u) On 14 April 2009 the President of the FLS Mr. Dor Sami Naidu was taken in by the Police for questioning on allegations that he called on the members of the FLS to gather at various court houses and show solidarity for the Judges and Magistrates whose tenure arbitrarily

ended upon the purported abrogation of the 1997 Constitution. Mr. Naidu was remanded overnight in an insect and rodent infested police cell, no charges were laid;

- (v) On May 20 2009 three senior members of the Fiji Bar – Mr. Tevita Fa, MR. Richard Naidu and Mr. Jon Apted were questioned by Police at CID Headquarters for about five hours on allegations of breaches of the PER. The allegations were published by anonymous pro military bloggers. The lawyers computers were searched and copies of documents therein copied by the Police. No charges were laid;
- (w) On 25 May 2009 the military administration promulgated Decree No. 16 - Legal Practitioners Decree 2009. This Decree emasculates the FLS. It makes the FLS a voluntary organisation without its regulatory role in issuing practicing certificates and, disciplinary role in investigating complaints against lawyers practicing in Fiji. These roles have been transferred to the office of the Chief Registrar ('CR') - the executive arm of government. The current CR is a senior military officer, Major Ana Rokomokoti;
- (x) The CR began issuing practicing certificates under the Legal Practitioners Decree effective from 1 July 2009. Many practicing lawyers received practicing certificates valid for a 3 month term only pending investigations by the CR. Practicing certificates previously issued by the FLS were for a period of 12 months for annual renewal after deliberation by the elected Council of the FLS;
- (y) In the last month, the CR has acted under section 23(3) of the Administration of Justice Decree 2009 to CERTIFY to parties that various proceedings before the High Court of Fiji and above are wholly terminated pursuant to section 23(3) (e) (g) of the Administration of Justice Decree 2009. The certificates from the CR are for proceedings that refer to the 1997 Constitution in any manner whatsoever. One such proceedings is Civil Action No: HBC 12 OF 2007 IN THE HIGH COURT OF FIJI AT LAUTOKA, CIVIL JURISDICTION, Jagannath Sami vs. Military Commander Voreqe Bainimarama, The Royal Fiji Military Forces, Ministry of Home affairs and Immigration, The Attorney General of Fiji, The President of Fiji Islands and Sugar Cane Growers Council;
- (z) In the current term of the annually elected Council of the FLS, two of the eight members were employed by statutory bodies and recently had their employment arbitrarily terminated.

RECOMMENDATION

It is submitted that the overall effect of the experience of lawyers and the FLS after the December 2006 coup has been one of intimidation and interference from the military authorities. These acts inhibit lawyers from doing their work to the best of their ability to represent clients against arbitrary rule. In such an environment, human rights abuses will only flourish.

The only recommendation of this submission is that the judgment of the Fiji Court of Appeal in the seminal case of *Laisenia Qarase & Others vs. Josaia Voreqe Bainimarama & Others, Civil Appeal No. ABU 0077 of 2008* be obeyed by the military administration in letter and spirit.