

15. The impact of the coup on Fiji's judiciary

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The December 2006 coup had important ramifications for Fiji's judiciary.¹ It was Fiji's fourth coup in a little under 20 years. What was significant about this one was the extent to which senior members of the Bench and Bar appear to have been complicit, either before the event or subsequently. There is as yet an incomplete awareness in the wider community about the sanctity of the rule of law. In circumstances such as a coup, where the ordinary person looks to lawyers for leadership and guidance and finds instead ambivalence and dissembling, the implications, both immediate and long term, are serious.

It is both instructive and revealing that those who overthrew the established legal order, whether in uniform or otherwise, nevertheless felt the need to legitimize their actions in legal terms. In his first remarks after executing the coup, military commander Commodore Frank Bainimarama invoked the 'doctrine of necessity'. It was the first indication that the military had been assisted by elements in the legal fraternity. The extent of the commander's familiarity with the principles relating to necessity indicated as much.

Perhaps the only caveat was that the doctrine had been misapplied: There *was* no crisis – other than the one created by the military by way of its public statements and its defiance of the government in the months preceding the coup.

It was the contention of the military that it had been left with no choice but to intervene, following the alleged refusal of the Qarase government to deal effectively with purported widespread corruption and abuse of office. The military claimed the President had been prevented from either dissolving parliament or declaring a state of emergency by the machinations of some of his advisers, including the Vice-President.

The truth is less inspiring: There was in fact no basis for the President to intervene constitutionally. There was no evidence that the Prime Minister had lost control of the machinery of government, other than by the military's gradual seizure of the state apparatus.

The military had originally sought to exploit the President by making him serve as a cloak to shield their actions. When that failed, they intervened directly.

The Commodore proceeded to appoint himself acting President on 7 December 2006, reposing in himself the executive authority of the State that is nominally vested in the President by section 85 of the constitution. Section 96(1) states that

authority is exercised only on the advice of cabinet or a minister or some other body prescribed by the constitution.

Subsection (2) provides that the President may act independently where there is specific provision for that course. It was pursuant to this assumption of executive authority that, on 3 January 2007, the Commodore purported to suspend the Chief Justice on unspecified charges.

Not since the coups of 1987 had the judiciary been directly assailed. At that time, a few of the judges were arrested and incarcerated. Several resigned, both after the first coup in May and the second in September.

In seizing power, the Commodore pledged, *inter alia*, to uphold the constitution, respect the independence of the judiciary and protect human rights. On 3 January 2007, the director of the Fiji Human Rights Commission (FHRC), Dr Shaista Shameem, a lawyer, issued a 32-page document, which was described as an 'investigation report based on an assessment of the commander's assumption of legal authority'.

It concluded thus:

The result of this investigation and assessment of the legality or otherwise of the assumption of executive authority by the RFMF is that authority was assumed over a Government that was first of all established on a foundation of illegality in 2001, and secondly over a Government that was elected unconstitutionally in 2006. Between 2001 and 2005, the Government put in place unconstitutional policies and legislation that, in addition, violated Fiji's obligations under the ICERD as pointed out by the CERD Committee in 2002.²

Dr Shameem asserted that the military had the capacity to invoke human rights and welfare powers pursuant to section 94 of the 1990 constitution and section 112 of the 1997 constitution. Leaving aside for a moment the better view, that the provision she sought to import from the 1990 constitution has been repealed, the position she assumed was not only problematic but also destructive of the rule of law. The claims of the unconstitutionality of the Qarase governments (2001, 2006) are hollow: No legal challenge was ever mounted during their tenure.

The FHRC report bears a remarkable resemblance to the Commodore's first post-coup remarks, where he set out at length the rationale and legal justification for the coup. The similarities do not end there. Dr Shameem has been openly supportive of the military's heavy-handed tactics in dealing with human rights activists and other dissidents since 5 December 2006. She has constantly reminded the public of the need to observe circumspection in an environment where human rights have been curtailed. Coming from the director of the Commission, in a situation where the legalities concerning the issue of human rights are a debatable issue, the credibility and standing of the Commission has been seriously

compromised. This is reflected in the relatively low number of human rights abuses reported to the Commission as compared with the matrix of cases compiled by several human rights organizations.

As if this developing symbiosis between the Commission and the military were not enough, the Fiji judiciary remains bitterly divided. The origins of this schism can be traced to the 19 May 2000 coup. At that time, the then Chief Justice, Sir Timoci Tuivaga, and two of his colleagues chose to engage with the military government that had taken control on the back of George Speight's failed putsch. These dealings were confined to vetting the Judicature Decree which, *inter alia*, improved the conditions of the Chief Justice. This provoked an outcry from colleagues on the Bench as well as from the then president of the Fiji Law Society (FLS). Sir Timoci Tuivaga was succeeded by Hon. Daniel Fatiaki as Chief Justice in 2002. Fatiaki was one of the judges who had supported his predecessor in his relations with the military government.

The division between Fatiaki and three other judges, Byrne, Gates and Shameem JJ, who adopted an appropriate legal distance, was not remedied and continues to the present day.

In one of her remarks at an international gathering of judges, Madam Justice Shameem put the lessons learnt from May 2000 eloquently:

What are those lessons? Firstly, to stay out of the fray in a political crisis. Secondly, to uphold the law as long as it is possible to do so. Thirdly, to avoid collaborating with those whose actions may become the subject of constitutional litigation. Fourthly, to resign only when it becomes impossible to continue in office without legitimising the usurpers.³

On 15 January 2007, while the Chief Justice remained suspended for unspecified offences, Madam Justice Shameem proceeded to chair the Judicial Services Commission (JSC). She justified her role on the basis of an opinion obtained from a Queen's Counsel. This, despite the fact that she, surely, would have known there was no specific provision in the constitution authorizing a substitute to chair the JSC in place of the Chief Justice.

Under Section 131(1) of the constitution of Fiji 1997, the JSC comprises three members: The Chief Justice, who is chair of the Commission, the chairperson of the Public Service Commission (PSC), and the president of the Fiji Law Society at the time being. Justice Shameem would have been aware that the chair of the Public Service Commission's appointment was legally suspect since he had been appointed by the army commander. Therefore, the only valid and justified member of the JSC at the time was the president of the Fiji Law Society

It was at that 15 January meeting that the JSC, as constituted, purported to appoint Mr Justice Anthony Gates as acting Chief Justice. The fact that he had apparently been consulted in advance and that Justice Shameem had obtained

an opinion justifying her chairing of the JSC indicates a measure of prior knowledge. It was Gates J. who made the following remarks in *Jokapeci Koroi & Ors v Commissioner of Inland Revenue & the Attorney-General* Lautoka High Court:

Unruly persons are unlikely to seek validation for their usurpations from judges. Nor should the courts give their sanction when application is eventually made under the doctrine of effectiveness, for there is no such force behind it. In this regard, I respectfully differ from Kelsen. Judges should expect and anticipate that the usurpers will see them removed. So be it. Judges do not represent the law. The doctrine of effectiveness has no moral underpinning, and judges do no honourable business therefore in according lawfulness to de facto administrations.⁴

Yet it troubled neither of them that the Chief Justice had been illegally suspended. The apparent minutes of the meeting have since been made public by the interim Attorney-General.

Although the acting chair of the JSC is reported as saying the pressing purpose of the JSC meeting was appointments to the Bench, the sole business appears to have been the appointment of an acting Chief Justice.⁵

On 18 January 2007 the President purported to issue a 'Presidential Instrument Of Notice Of Suspension Of Chief Justice Upon Establishment Of A Tribunal To Investigate Serious Allegations Of Misbehaviour Made Against Him'. Executive power had ostensibly been returned to the President on 4 January 2007. He proceeded to appoint the Commodore as interim prime minister on 5 January 2007, and the members of the interim cabinet on 8 and 9 January 2007.

Chief Justice Fatiaki was also suspended from office pursuant to section 138(4) of the constitution. Over four months since notice to that effect was published in the *Fiji Republic Gazette*, charges have still to be laid and the Tribunal is still to be appointed.

The fact that the country's highest-ranking judicial officer can so blatantly be sent on leave for constitutionally dubious reasons is shocking. The response of the legal profession was, regrettably, supine and insufficient. It was reduced to insipid mutterings about 'following the law'.

There has similarly been arbitrary removal of senior public servants and members of statutory boards and directors of state corporations without any semblance of natural justice. Those chief executive officers in the public service who had remained unscathed since 5 December 2006 were removed by the Termination of Contracts of Employment (Public Service Senior Executive Service) Promulgation 2007, gazetted under Presidential fiat on 18 January 2007. These measures have been allegedly undertaken as part of the military's commitment to 'cleaning up' the government and its related entities.

Human rights abuses continue, albeit at a reduced level.

Since 5 December 2006 there have been two deaths in military custody. I respectfully cite their names, Nimilote Verebasaga and Sakiusa Rabaka, in order that they are more than footnotes in history.

Verebasaga, aged 41, left a wife and four children. Sakeasi was only 19 and is mourned by his mother and father. The depth of their pain cannot be imagined. And yet the military have stonewalled efforts by the police to investigate while pledging their full cooperation.

There have also been instances of blatant thuggery, as policing and security roles have become blurred. In June 2007, a civilian, Tevita Malasebe, was reportedly assaulted and died while in police detention. Human rights activists and other dissidents are subjected to intimidation. Who does one complain to or seek relief from when the Commission is compromised, and the courts are yet to pronounce on the legality of the military takeover of 5 December 2006?

Let me acknowledge that the level of abuse and degrading treatment is not on the scale as that inflicted elsewhere. But that is of little comfort or assurance to our citizens, men and women, who have been placed in harm's way.

One is reminded of John Donne's words, 'And every death diminishes me for I am part of the main'.

What is hard to forgive is the air of uncertainty, apprehension and fear that the increased profile of the military has created in our midst. The sense of helplessness in the face of the arbitrary power of the state, as deployed by the military, is a palpable reality.

At one level, the courts continue to function unfettered, as the interim Attorney-General would have us believe. The business of trying civil and criminal cases does indeed continue. At the same time, the acting Chief Justice, as *de facto* chair of the JSC, proceeds with appointments to both the magistracy and Bench.

The reappointment of Mr Justice John Byrne has not been widely publicized. A further two appointments have also allegedly been made but apparently kept *in pectoram*. Despite the fact he is an appointee under the present regime, the acting Chief Justice has allocated to Justice Byrne a case brought by the chair of the Bose Levu Vakaturaga (BLV) (the Great Council of Chiefs) challenging its recent suspension by the interim government.

In like vein, one may well question the decision by acting Chief Justice Gates to hear the case brought by ousted Prime Minister Qarase against the Commodore and the interim government.

Following the takeover of 5 December 2006, Fiji's Vice-President was 'removed' from office by the military. He was simply told to vacate both the position and his residence. Both the head of state and the deputy are appointed by the BLV,

a body that advises the government on matters concerning the welfare of indigenous Fijians.

Although the BLV met post 5 December 2006 and passed resolutions recommending a gradual return to democratic rule, the Commodore and the military ignored them. Finding his position increasingly untenable, the Vice-President tendered his resignation to the BLV on 26 January 2007. The BLV met on 11 April 2007 to appoint his successor. In such circumstances, the President makes a nomination and forwards it to the BLV for endorsement or otherwise. The process has hitherto been a formality.

On this occasion, the BLV rejected the nomination on the ground that the nominee was part of the interim government.

Angered by this decision, the latter suspended the BLV. While its reaction was understandable, the decision can only be characterised as a fit of pique. Whatever the motives or the reaction, the BLV was perfectly entitled to act as it did.

The FLS has not been as robust in its opposition as it was in 2000.

Then, it and the military were largely allies, although the former did attempt to abrogate the constitution and declined to reinstate the Chaudhry coalition government in accordance with the ruling in the Chandrika Prasad case.

There is a serious rift in the legal profession, which lends every appearance of not being independent.

Some senior lawyers tacitly support the military coup, driven to do so by their dislike of the ousted government and its policies. The legal profession has been found wanting and compromised. One of the two persons who visited the Chief Justice in January this year, and effectively caused him to be sent home, was a lawyer, admitted to the Bar and still practising.

The vice-president of the FLS was publicly admonished on national television by a former president of the society for telling Australian television viewers that the legal profession felt that the judiciary was compromised.

This has had the effect of confusing the general population. However, most lawyers are totally against the interim administration and are dismayed by the subtle but serious way in which the rule of law has been undermined.

Since 5 December 2006, the president of the FLS and other lawyers have had concerns about their personal safety. Two lawyers involved in the case against the interim government brought by the BLV were taken to the army barracks for questioning. In the weeks after the coup, a leading legal practitioner was treated similarly and, reportedly, assaulted in what was clear intimidation. In what may have been an unrelated incident, the house of Janet Mason, a New Zealand lawyer who was advising the Great Council of Chiefs, was burgled. She and her husband were, reportedly, assaulted at the time of the home invasion.

The FLS president, somewhat naively, allowed himself to be persuaded by initial reasoning that the 15 January 2007 session of the JSC (discussed above) was for purely administrative purposes.

The benefit of hindsight has proved otherwise. What must not be lost sight of is this: The opprobrium in which the previous government was held by some because of its affirmative action policies and ambivalence about 'rule of law' matters, in no way justifies or excuses the events of 5 December 2006.

It is a sad indictment on the legal profession in Fiji that it has been less than united in its position on the coup of December 2006. The commander and the military were emboldened in their actions by the succour they received from some of our number, as well as by well-intentioned members of civil society who welcomed the social objectives espoused by the military.

Parallels with totalitarian regimes were erroneously and extravagantly drawn to tarnish the ousted government and justify the military intervention.

The result was a bemused general population, perplexed over the legal arguments offered for and against the coup.

The world must know that things in Fiji are not normal, despite what the spin doctors and their apologists will tell you.

After the Fiji coup of December 2006, ousted Prime Minister Laisenia Qarase was effectively banished to his remote home island of Vanuabalavu in eastern Fiji until September 2007.

Despite having filed a legal challenge against his ouster and the legality of the current military administration, he was not been permitted to return to Fiji's capital Suva for many months. The judge presiding over the constitutional challenge, acting Chief Justice Gates, declined to make any order that the military not impede any attempt by Qarase to visit Suva. It is hard to explain why an administration which has the backing of the military would be apprehensive about allowing an unarmed individual back onto the mainland.

Some judges lend the appearance of not being independent and impartial. When aspersions are cast on the independence of the judiciary, it is cause for alarm.

Freedom of expression is severely curtailed. The media practises self-censorship, and many people are afraid to speak openly against the interim administration or to criticize it. Some of those who have done so have been summarily taken to the barracks. All have returned sullen and silent.

Peceli Kinivuwai, the acting national director of the SDL, (the political party headed by the deposed prime minister) was taken to the barracks for questioning many times during 2007. On one occasion, he was seen looking bruised on television the following night. As a result of the covert suppression of dissent, overnight a number of 'blogs', 'bloggers' and 'blogsites' have appeared. This

has allowed a free flow of ideas and kept alive, for those who have access, a large measure of freedom of conscience and expression. The military succeeded in shutting off completely one blogsite that vociferously criticized it and its backers.

Government-sponsored students at the University of the South Pacific have been warned that if they were caught blogging they would have their scholarships removed. On 3 June 2007, the vice-president of the FLS, Tupou Draunidalo, was prevented from leaving Fiji for the LAWASIA conference. She was told she was on a travel ban; this despite having been told by the head of immigration a few days earlier that she had the freedom to leave Fiji.

She returned home and negotiated with the authorities. She was eventually allowed to leave.

And yet the world and Fiji were advised that the six-month state of emergency that the country had been under had ended prior to these events.

Draunidalo has been particularly vocal against the coup and events in Fiji since December. It is not difficult to make the connection as to why she was stopped at the airport. At a special general meeting of the profession in February 2008, I made a short unremarkable statement along the lines that all coups, wherever they happened and whatever the circumstance, were wrong and illegal. A few days later, however short-lived, I was placed on a travel ban.

The country's 85-year-old President is being asked to promulgate new policies despite the fact that, under section 45 of the constitution, law-making powers are vested in a bicameral legislature of which he is the titular head. Earlier this year the President 'promulgated' a new law establishing a so-called Fiji Independent Commission Against Corruption (FICAC).

Esala Teleni, the deputy commander of the Fiji army, became deputy commissioner of FICAC, until he relinquished the position to instead become chief of police. The legality of that law is now under scrutiny before the courts. Even more worrying are reports that FICAC is apparently investigating homicides. Such crimes, in a normal democratic state, are ordinarily within the province of an independent police force.

Fiji's rulers do not have the mandate of the people. They do not have any proper legal basis or legitimacy. While the regime professes that the constitution of Fiji is intact and has not been abrogated, all the signs point to grave departures from constitutional procedures that are corroding the lawful and proper governance of Fiji.

To paraphrase Dame Sian Elias, while Fiji is ruled by rules, it is not ruled by law.

Tyranny, arbitrariness and spite have perverted the rule of law.

In future, the only effective protection for the rule of law, and indeed democracy, is a basic awareness by ordinary people of what the principle means, and how critical it is to their rights and their day-to-day existence.

So much so, that it may well demand the ultimate sacrifice, for history demonstrates that an ideal is far more hallowed when its *raison d'être* has been struggled for and defended.

The legal profession in Fiji has little to celebrate. If it is to consider itself worthy, it must redeem itself and reject the easier path of ambivalence, equivocation, silence and cowardice.

I again harken to the advice of Dame Sian: 'Law is a thinking profession'.

I extend an invitation to every 'thinking lawyer' of Fiji to join this glorious march towards freedom and democracy. Posterity will judge Fiji's lawyers – and whether or not, in the country's hour of need, they stood up for the rule of law.

In the aftermath of Fiji's coup, many of our friends have been perplexed, and wondered how and what assistance they could render, not just the profession but the country as a whole. Such well-intentioned sentiments are appreciated.

It reminds us that, in the struggle to uphold the rule of law, we are not alone. A word of advice. Fiji is a complex country. It has had four coups in 20 years. It has its fair share of failed politicians, troublemakers and opportunists. It is easy to be seduced by the charm and smiling faces, not to mention the beaches.

But the unsophisticated and untrained outsider who does not understand the political architecture of Fiji and the machinations of its politicians runs a real risk of stepping into the lion's den. I would respectfully suggest that this is a lesson that one ignores at one's peril.

ENDNOTES

¹ This chapter draws on remarks made by the author at the 20th Biennial LAWASIA Conference, Hong Kong, 8 June 2007.

² Shameem, S. 'The Assumption of Executive Authority on December 5th 2006 by Commodore J. V. Bainimarama, Commander of the Republic of Fiji Military Forces: Legal, Constitutional and Human Rights Issues', 3 January 2007, available online at <http://www.humanrights.org.fj/publications/2007/Investigation%20Report%20on%20Events%20of%20December%206%202006.pdf>. ICERD stands for International Committee on the Elimination of Racial Discrimination.

³ Justice Nazhat Shameem, Paper presented at a meeting of the International Commission of Jurists, Queensland Branch, 21 July 2004.

⁴ *Koroi v Commissioner of Inland Revenue* [2001] FJHC 138; HBC0179.2001 (24 August 2001), High Court, Lautoka, available at: <http://www.paclii.org/cgi-bin/disp.pl/fj/cases/FJHC/2001/138.html?query=Koroi%20Indland>.

⁵ *The Fiji Times*, 17 January 2007.