Submission to Yash Ghai Commission
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It is reassuring that Professor Yash Ghai has publicly stated that his Constitution Commission will listen to all the submissions being made, and presumably incorporate "what the people want" into their final Report.

But I would strongly urge that the Commission also needs to ensure that its recommendations maintains the letter and spirit of Fiji law as defined by the 1997 Constitution, without any preemptive declarations by the Bainimarama Regime, and to clarify fully the processes that will be followed in order for the Commission to finalised its Report, and the processes that will be followed in ensuring that the Ghai Report is lawfully implemented.

To ensure this the Ghai Commission needs to address several dilemma.

First, the most authoritative Fiji courts have concluded that the 1997 Constitution cannot be abrogated by the President, the Military, or merely replaced by anyone, including some "Constituent Assembly" established by "usurpers" (using the words of Anthony Gates- see below).

The second dilemma is that while Fiji's political leaders insist that the 1997 Constitution must be retained (with amendments if necessary), Bainimarama keeps undermining the independence of the Ghai Commission by insisting that the 1997 Constitution will not be revisited.

On this issue, the Ghai Commission only needs to point to the Regime's insistence 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), and 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”.

The Ghai Commission can also fruitfully quote the excellent 2001 judgement by Anthony Gates- which I repeat below.

(Note that Justice Anthony Gates' later judgement (with Justices Pathik and Byrne) was overturned by the 2009 Court of Appeal).

The third dilemma is how the military decrees will be incorporated into a post-election legal framework, when the authoritative legal interpretation is that infringement of basic human rights (as in some of the military decrees) cannot be legalized ex-post.

A possible fourth dilemma (which may not eventuate) is how the Ghai Commission will resolve internal disagreement: will there have to be consensus, in which case they may sink to the lowest common denominator? Or will there be voting by majority, in which case the three Regime non-legal appointees could hypothetically out-vote the two legal experts; or will Minority Reports also be allowed, and what standing they will have?

It would be useful for the Ghai Commission to inform the public at the outset, how they will resolve any internal disagreement amongst the Commission members:
I first set out my layman's reading of the current legal situation and then suggest a set of recommendations at the end of this article for consideration by our people in their submissions.

The Last Legal Judgement on the coups.

A central document for the Ghai VCommission should be the last legal and authoritative judgment- that of the 2009 Court of Appeal (Justices Powell, Lloyd and Douglas:


The 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 on the 2006 coup: that all of the following were unlawful according to the 1997 Constitution: the assumption of executive authority and the declaration of a State of Emergency by Bainimarama, the dismissal of Qarase as Prime Minister, the appointment of Senilagakali as caretaker Prime Minister, Bainimarama's order for the dissolution of Parliament, Iloilo's appointment of Bainimarama as Prime Minister, and all subsequent decrees by President Iloilo attempting to legalize Bainimarama;s actins.

The Appeal Court pragmatically recommended that the 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 allegedly "abrogated" the 1997 Constitution and re-appointed Bainimarama as Prime Minister, whose regime has continued till today.

It is also useful to read Professor Anne Twomey's "The Fijian coup cases: The Constitution, reserve powers and the doctrine of necessity":


As well as: "Dire Straits: a report on the rule of law in Fiji" (An International Bar Association Human Rights Institute Report, March 2009) (google the title).

Reading just these three documents, any intelligent lay person would understand that if there was another independent court today, its finding would be that the 2009 alleged abrogation of the 1997 Constitution by Iloilo and the Bainimarama Regime were equally unlawful.

The 1997 Constitution still exists: Anthony Gates

Twomey's article ended with a quote from a 2001 judgment by Justice Anthony Gates in the case Koroi v Commissioner of Inland Revenue. (Gate's words are given here in red italics, with my comments in black):

"It is not possible for any man to tear up the Constitution. He has no authority to do so".

(i.e. neither did President Iloilo have any powers in 2009 to abrogate the constitution)

"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 ... The fundamental law represented in a Constitutional document may only be changed in accordance with that Constitution."

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(i.e. even the Ghai Commission cannot suddenly create a "new" Constitution outside of Parliament, even if approved by some "Constituent Assembly" appointed by the "usurper").

"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 ...

Even the Glorious Revolution must eventually be tamed by the Constitution. 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.”

(i.e. 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")

In an earlier 2000 judgement, Anthony Gates had justifiably admonished some fellow judges:

"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".

Gates also criticized Qarase's 2000 court action to declare the 1997 Constitution abrogated:

"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".

This Gates judgment in the 2000 Chandrika Prasad case was supported by a 2001 Court of Appeal (Casey, Barker, Kapi, Ward and Handley JJA).

In summary, Bainimarama's demand that the 1997 Constitution must not be revisited has to be rejected by the Ghai Commission.

Similar arguments may be also made about the alleged elimination of the Great Council of Chiefs, which is also an integral part of the 1997 Constitution.

**The Great Council of Chiefs**

The record of the Great Council of Chiefs is a very poor one, by many criteria important not just for the modern day indigenous Fijians, but for all Fiji citizens whose lives have been fundamentally affected by decisions of the GCC: Read my 2007 article here:


The Military Regime is correct in pointing to the GCC's politicisation during the coups of 1987 and 2000. But the Regime was also guilty of using the GCC's authority during the 2006 coup, when the GCC's appointee as President, Ratu Iloilo, accepted being shunted aside by Bainimarama, and after Bainimarama illegally removed Qarase as Prime Minister, accepting re-appointment as President.
The GCC also did not make a stand when a "President" was illegally imposed on the nation, without their consent and ultra vires the 1997 Constitution.

A strong case can be made that while individual chiefs continue to provide strong leadership to their people in their own local areas, collectively, they have not served Fiji well.

Nevertheless, whatever the GCC's failings, it is not for the Bainimarama Regime to abolish an institution which has a central role in the 1997 Constitution for nominating the President and a half of Senate, whose approval is also required for many issues affecting indigenous Fijians, such as land matters.

I strongly advise the Yash Ghai Commission to recommend that following the 2014 elections, there be a thorough review of the GCC, led by the GCC itself, with inputs from the next elected government.

**What of the military decrees?**

The Ghai Commission faces a third legal dilemma: what can they recommend on all the military decrees promulgated by the Bainimarama Regime?

The 2009 Court of Appeal recognized (repeated by Twomey) "the principle that the laws or acts of an invalid government that is in actual control of a territory may still be valid insofar as they concern the ordinary orderly running of the state, do not impair the rights of citizens and do not directly help the usurpation of power" (my emphasis). The Military Regime fails on all three qualifications.

First, they have ventured (disastrously) into numerous aspects of public policy, such as the FNPF restructuring and its investments, the Air Pacific shareholdings, fundamental changes in the tax laws, etc.- all actions far more than the "ordinary running of the state"

Second, many of the Military decrees have taken away basic human rights of citizens to property (FNPF case, Nadi Airport leases, Momi assets), the right of recourse to courts, the freedom of speech and assembly.

Third the Decrees have prevented any legal challenge to be made to their assumption of authority.

The resolution of some of these issues (like the FNPF pension restructuring) will be a nightmare for the judiciary, after a normal elected and accountable government returns.

The Ghai Commission might help by giving some general directions.

**The Constituent Assembly must not repeat the mistakes of the Charter exercise**

The Yash Ghai Commission expects that their Recommendations will be presented to the "Constituent Assembly" yet to be named by the Bainimarama Regime.

This Constituent Assembly is supposed to consider the recommendations and agree on some final course of action.
I call upon the Yash Commission to insist that the Terms of Reference for this "Constituent Assembly" be totally clarified before the Yash Ghai Commission begins to sit and hear submissions.

The Yash Ghai Commission needs to note that the Bainimarama Regime will face a large credibility gap with any "Constituent Assembly" that they set up, given the public's experience with the NCBBF and the Charter exercise.

Many who served on the NCBBF may have originally believed in the objectives and the rhetoric of the Military Regime.

They, like hundreds of thousands of people throughout Fiji, would also have been reassured by the clear statement in the Charter, of strict adherence to the 1997 Constitution.

But they were all left high and dry and "effectively betrayed", when Bainimarama abrogated the 1997 Constitution following the Appeal Court ruling in 2009.

The public who will be making submissions to the Yash Ghai Commission need to know exactly

(a) who will be in the Constituent Assembly

(b) how the decision-making will proceed in the Constituent Assembly (whether by consensus, majority voting, and with the provision for minority reports);

(c) whether the Bainimarama Regime will accept the recommendations of the Constituent Assembly in entirety; or whether they will "pick and choose".

The public need to be given the opportunity to also comment on the above processes to the Yash Ghai Commission.

Failure of the Ghai Commission to clarify the above matters may lead to the public being "stuck" with some process not meeting their approval.

**General recommendations to the Ghai Commission**

I suggest the following:

(1) Before any submissions are heard,

   (a) the composition of the Constituent Assembly must be clarified and agreed upon with all the political parties

   (b) Before any submissions are heard, to clarify the Terms of Reference for the Constituent Assembly and the nature of decision-making.

   (c) to obtain from the Bainimarama Regime the commitment that they will abide by the consensus recommendations of the Constituent Assembly.
(d) to give the public the opportunity to also comment on the above processes to the Yash Ghai Commission.

(2) to declare that the 1997 Constitution is still in place and must be abided by, including for its revision following the Ghai Commission Report and approval by the "Constituent Assembly".

(3) to ensure a lawful implementation of the Ghai Commission Report (approved by the Constituent Assembly and if unanimously supported by the political parties) the 2006 Parliament and Senate be recalled for the sole purpose of approving the Recommendations for the revision of the 1997 Constitution, including the following:

   (a) electoral system;

   (b) the removal of all ambiguity in the 1997 Constitution for the appointment of Presidents and Prime Ministers and the dissolution of Parliament

   (c) the maintenance of the President as a "symbolic head" above all party politics, independent of passing governments, providing moral and ethical leadership for all Fiji citizens; with no executive powers which would merely replicate the elected government.

   (d) agreement on a post-2014 election initiative for the reform of the GCC

   (e) agreement on a post-2014 election initiative for the reform of the Senate

   (f) agreement on a post-2014 election initiative for the regularization of military decrees, consistent with the 1997 Constitution

   (g) explicit provisions for the legal and state response to any further military coups.

   (h) the nature of amnesty provisions which may be provided

   (i) the establishment of a Truth and Reconciliation Commission.

   (j) the running of a referendum on the revised Constitution at the first national elections, with any remaining significant contentious issues, to be placed for approval or rejection on that Referendum Ballot paper.

4. Following the approval of the above (and anything else thought necessary to ensure continuity of legality) to call for the lawful dissolution of parliament following resignation by the last elected Prime Minister (Mr Lai Qarase) and call for fresh elections under the revised electoral system;

5. The appointment of a "bare-bones" civilian administration comprising members who will not stand in the 2014 elections, and who will only conduct the "ordinary business" of the state, and conduct the national elections, nothing more.