

Dodgy Australians and Kiwis abroad

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Whatever the merits of the Australian Government's failed attempt to charge Julian Moti for "Child Sex Offences outside Australia", that incident raises a wider legal question regarding Australian and NZ citizens who commit, or aid and abet other crimes in foreign countries.

Under the Australian Criminal Code Act 1995 (Division 272 and 273), Australian citizens, residents and corporations may be charged for Child Sex Offences or child pornography or child abuse material, even if committed outside Australia. The offences also include "benefiting from, encouraging or preparing for sexual offences against children outside Australia".

The principle behind this legislation is undeniable: being a citizen (or Permanent Resident) of Australia not only gives the person privileges and protections in Australia and abroad, but it also imposes responsibilities on the citizen, when abroad, to follow the laws of the host country, and not bring disrepute to Australia.

The child sex legislation is also predicated on the principle that Australian citizens should not be engaging in child sex activities abroad which would be considered to be criminal under Australian laws, if perpetrated within Australia or NZ.

So why does Australia not have comparable legislation for other activities abroad, which would also be considered criminal, if committed in Australia and abroad as well?

Is the over-throw of a lawful government, support of an illegal Regime which denies its citizens' basic human rights as defined by United Nations, not as serious as child sex or international terrorism activities?

Specifically in the case of Fiji, when would Australian and NZ citizens' support for the Military Regime amount to clear support of "unlawful" activities, which the Australian and NZ governments would like to discourage?

I suggest that April 2009 would be the watershed date to separate out the legally safe "do-gooders", from those who can be said to knowingly disregard the rule of law and courts in Fiji.

Overthrow of a lawful government is serious

Clearly, the Australian and NZ governments had the view from 2006 that the overthrow of Fiji's lawfully elected government by the Fiji Military Forces was unlawful and totally unacceptable to them. Despite the expulsion of their High Commissioners from Fiji, they have steadfastly maintained their stance for the last five years.

Also sharing and supporting this stance have been Forum Secretariat, the Commonwealth, and the EU, which are solid regional and international organizations, and extremely valuable part of Fiji's historical external alliances.

Those Australian and NZ citizens who put up their hands to support the Regime after 2006 may have had some legal legitimacy with the Gates, Pathik and Byrne 2008 judgment that the coup was "legal".

That semblance of legality ended when the 2009 Court of Appeal judged that Gates, Pathik and Byrne were wrong in their judgment. Iloilo and Bainimarama put a stamp on their illegality by purporting to abrogate the 1997 Constitution the day after.

Since then, the Regime followed that up with a large number of Military Decrees, which all additionally state that their actions cannot be challenged in court- i.e. no Fiji court or rule of law would be allowed to apply to these Military Decrees.

The Military Regime continues to deny its citizens a whole range of basic human rights such as freedom of speech, media freedom, freedom of assembly, freedom to form unions and engage in collective bargaining, protection of private property, accountability for the use of tax-payers funds, and most importantly, the right to take one's grievances to an independent court for resolution.

All these rights are taken for granted in Australia and NZ, by those very people who actively support and defend the Military Regime in Fiji, some pathetically claiming with paternal condescension that it is OK for some of these rights in Fiji to be eroded for some "greater good" yet to be seen.

What about Australian and NZ citizens?

Given the official Australian and NZ government stance, it is strange that there have been many Australian and NZ citizens and Permanent Residents who have been directly and indirectly, supporting the Fiji Military Regime, even after the 2009 Court of Appeal judgment.

As in the legislation on child sex offences outside Australia, a legal case can clearly be made that since 2009, they have been "benefiting from, encouraging or preparing for" the over-throw of a lawfully elected government.

If they perpetrated or supported similar activities in Australia or NZ, they would be prosecuted by the Australian and NZ states, and condemned by society at large.

But there appear to be no Australian and NZ laws which discourage their citizens, residents and corporations from aiding and abetting military coups and unlawful regimes abroad, whether for money or personal satisfaction.

Indeed, it is a total contradiction that Australia and NZ allow their citizens to return home to enjoy all the basic human rights there, that they directly or indirectly, help to deny others in foreign countries.

What is more contradictory is that Australia and NZ impose sanctions on ordinary Fiji soldiers' relatives (such as rugby and netball players), thereby denying their basic human rights: by no stretch of the imagination could they be held responsible for the actions of their relatives.

The case of FNPF's foreign consultants

Look at the strange media statement put out by two foreign consultants to the FNPF.

One consultant was from a prominent Australian firm, hired by FNPF to provide technical assistance on the reforms of the FNPF Act) and other from a NZ university, hired by FNPF to develop actuarial and data analysis capacity.

It would have been quite acceptable if these consultants' role had been only to offer consultancy services to help FNPF's sustainability over the long run, through lawful means allowed in the FNPF Act and Fiji laws.

But their media statements effectively justified Military Decrees whose very legality was being challenged in the High Court through the Burness/Shameem case.

These two consultants wrote a Fiji Times article purporting to counter 10 alleged “myths” about the FNPF reform. Read it here (and look at the faces of the pensioners in the photo). <http://www.fijitimes.com/story.aspx?ref=archive&id=188644>

They footnoted their article with a strange statement "Disclaimer: The opinions expressed are the authors' own and are not intended as legal or financial advice".

There is no need to rebut their arguments on the alleged 10 Myths, as my own detailed submission for the Burness/Shameem legal case (censored from the Fiji media) implicitly did that. A reader-friendly version may be read here: <http://narseyonfiji.wordpress.com/2012/03/18/why-the-burnessshameem-case-is-not-likely-to-be-heard-fiji-pensioners-23-february-2012/>

The consultants' allegation on Myth 2 however claimed that the FNPF reforms did not involve FNPF “breaking contracts with pensioners”; they claimed that the FNPF was paying the pensioners an annuity not because they had a contract, but because the “Minister” decided what annuity they should receive under the “old Act”, and when the “old Act” was “abolished” by the 2012 Military Decree, then the pensioners' entitlement also vanished, ipso facto.

The consultants boldly stated “The legal correctness of this analysis has been confirmed by the Solicitor General”. Really? "Confirmed"?

The issue is not whether this interpretation was correct or whether the David Burness/Shameem case would have been successful (as the pensioners' lawyer and I thought).

The real issue is that these foreign consultants were making a statement clearly in contempt of the Fiji High Court, which had already accepted that case and set a date for the hearing to decide that very issue.

Would they be allowed to peddle such a view in Australia or NZ that it was acceptable for the Australian Solicitor General and the Attorney General, who were named parties in a legal case to become judges, jury and executioners in their own case.

Burness (and all the adversely affected pensioners) could of course ask the consultant: "if the Attorney General and Solicitor General were so sure of the correctness of this analysis, why did their Military Decree state that the Registrar of Courts must throw out any related case already in court"? Why not let the allegedly independent judiciary decide on the case?

[Bored readers should read these expert consultants' views on their "Myth 3" claiming that the contributors to FNPF and the pensioners do not own FNPF, but the Board does. What a gem. What horrendous implications for the accountability of anything owned by taxpayers in Fiji].

Consultants' employers and rogue multinationals abroad

There is a much broader issue here for the Australian and NZ governments whose companies operate under illegal regimes abroad, whether in Fiji or elsewhere.

Globally, multinational corporations, try to ensure that they receive favorable treatment in royalties, taxes, labor legislation and environmental regulations covering their investments in minerals, oils or major commodities.

They have shown themselves to have no scruples about helping in the overthrow of lawfully elected governments in order to install puppet governments (hence the term “Banana Republics” describing countries in Latin America who were totally subservient to the American banana multinationals).

Thankfully, multinationals are being increasingly taken to task by international watch-dogs for unlawful or bad corporate practices that lead to bad governance and often devastating political instability in Third World countries.

Multinationals have to be also on guard that their employees in foreign countries, do not aid or abet illegal practices there. Some, like Nike, have had to clean up their employment practices in Third World countries such as China, which are not illegal per se, but just considered unfair in their home countries where the products are sold.

The Australian consultant for FPNF worked for a global company with offices all over the world, and whose website prides itself on "unparalleled regulatory credibility and insight". Presumably this company is also glad to operate in a world where independent judiciaries could always be counted upon as the bastion of last recourse to any disagreements they might have, with either governments or other corporate entities.

This Australian consultant had also worked for World Bank, Asian Development Bank and AusAID- which would ordinarily be expected to give her professional credibility.

While the two consultants stated in the Fiji Times article that their views were personal, they did not explicitly state, as is usually the case in the Fiji Times articles, that the article did not represent the views of their employers in Australia and NZ.

These questions may very legitimately be put to them:

1. As Australian and NZ citizens, were they justifying the Regime's illegal Military Decrees in Fiji which broke the pensioners' contracts and eroded their basic human rights, especially to personal property?
2. Were they implicitly justifying the Military Decree which removed the pensioners' legal case already before the High Court, thereby denying their basic human right to take their just grievances to court, as well as compromising the independence of the judiciary and the High Court judge concerned?
3. Were their respective employers in Australia and NZ supporting their statement in the media?

4. Were they knowingly taking part in this media propaganda, while being aware that all opposing statements by the pensioners' lawyer (Dr Shameem), opinion pieces by academics, and even letters from aggrieved pensioners, all Fiji citizens, were being totally censored in the Fiji media?

The pensioners' lawyer (Dr Shameem) was reported on the Fiji Pensioners' Website as being "certain that neither (the consultants) nor indeed the Solicitor General ... would be allowed to get away with this type of blatant abuse of power in their own countries, namely Australia and New Zealand".

And that "The NZ Law Society has already commented on Decree No 51 as purposely interfering with the power of a judge to decide a case already in the High Court."

While Dr Shameem described the foreign FNPF consultants as "carpet-baggers from Australia and NZ" (I would not, as they probably did give some valuable technical advice), the real question is, why Australia and NZ do not have laws to discourage unethical behavior by their own citizens' abroad, as they do with respect to child sex offenders?

Unfortunately for Fiji, such undesirable activities by Australian and NZ citizens are not isolated cases, and they may be expected to continue in the future.

Other Coup Supporters

Australia and NZ urgently need to examine what should be their laws regarding dozens of their citizens who are, or who have been aiding and abetting illegal activities, infringing on basic human rights in Fiji, especially after the 2009 Court of Appeal judgment.

One FNPF board member is enjoying his safe property rights and other basic human rights in NZ, while helping the FNPF Board and the Military Regime to deny them to Fiji citizens. (The Chairman of FNPF is a Sri Lankan).

Two former ADB employees and NZ citizens rapidly touched down in Fiji to help the post 2006 coup Regime, allegedly because of their great love for Fiji, their former home. (Except that when these former Fiji citizens retired from their lucrative international jobs, they invested all their savings and pensions in NZ, where they enjoy all the human rights and property protections of the law, that are denied to Fiji citizens by the very Military Regime they supported).

One of them was the driver of the "Charter" exercise which has been one ideological justification used by the Regime to hold on to power, and he kept the Regime powered till 2009 (he also he helped to push out another star, while another star was born, shining on till today).

This paid consultant has said nothing publicly (and neither has the Head of the Catholic Church, the Co-Chair of the NCBBF which allegedly approved the Charter), when the Constitution was abrogated in 2009, although the first paragraph of the Charter stated that Fiji would be guided by the 1997 Constitution (no doubt an important factor in many people putting their signatures in support of the Charter).

[Quite strangely the Regime mouthpieces keep parroting that the Yash Ghai Commission will not be allowed to revisit the 1997 Constitution, and in the same breath, their Leader keeps saying the Charter will be their guiding document for Fiji. How terribly sad that an entire country accepts this charade, day after day].

In this paid Charter consultant's most recent interview, he even accused the Australian and NZ governments of cynicism towards the Fiji Regime!

Many of the Australian and NZ citizens who have taken up key employment positions in the judiciary, civil service, statutory corporations and boards, may be excused if they took up these posts before April 2009.

But many have remained there even after the 2009 Court of Appeal judgment, when all doubt was removed about the Regime's illegality.

Some help to implement the draconian media censorship (which censors the views of citizens, while shamelessly giving prominence to Regime supporters); some assist with the judicial applications of illegal military decrees; some continue to provide ideological justification of the coups, shutting their eyes to all the abuses.

Of course, it would be difficult to prove in a court of law that they are "aiding and abetting an illegal Military Regime" and that their behavior is "criminal" in some clear way.

Of course, some may still be genuine in their views especially those who are clearly not benefiting personally: "we were just helping to return Fiji to lawful democratic rule" and to "make sure that the ordinary people do not suffer" and "anyway, look, Bainimarama is really popular amongst many Fiji citizens".

But as current Chief Justice Anthony Gates correctly stated in 2001, constitutionality and law and order are not about popularity: *"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."*

It is sad for Fiji, that not only is the post-2009 Regime an unlawful government undermining basic human rights of Fiji citizens, but the end result after five and a half years of rule, is economic stagnation and increasing poverty, which the public cannot read about because of the continuing media censorship.

It is indicative that even die-hard pro-Regime supporters (to this day) like Father Kevin Barr, have had to resort to international blog-sites to get his views to the Fiji public, while his Wages Councils which have been trying to help the poorest workers in Fiji for the last five years, have been thoroughly hamstrung and effectively trashed by this Regime.

But that matters little to the elite pro-Regime supporters in Fiji and abroad.

"Arc of instability" for Australia and NZ

When the first 1987 coup took place in Fiji, Australia and NZ tended to laugh it off as a bit of blimp in the South Pacific paradise.

But in the last twenty years, there have been more Fiji coups, and civil disturbances in other Pacific countries like Solomon Islands, Tonga and PNG, and the totally ignored West Papua.

For the last year or so, there have been bitter political struggles to take control of the PNG government, with the lure of making personal fortunes from dealing with the global corporations involved in the massive natural resource boom in liquid natural gas and mining.

In the recent crises, the police and the military in PNG may have remained marginally neutral, although there was a special police unit which had to be disarmed as their loyalty was in question.

I suspect that a hundred professionally trained Fijian soldiers could have easily done a coup in PNG, for any group of disaffected politicians with the money.

There is a very real possibility that in future, political groups may begin to hire mercenaries among former army personnel from Australia, NZ and Fiji, with experience in the Middle East, Iraq and Afghanistan, to provide backup to their political maneuverings.

Military coups cannot be ruled out, with many Melanesian leaders admiring and echoing the words of Rabuka, Speight and Bainimarama.

Ominously, the PNG judiciary, which is supposed to be the final arbiter in political stand-offs, has also had a murky role in recent weeks.

There is no guarantee that for their own financial gain, Australian and NZ nationals will not get involved in the kinds of activities that they have engaged in, in Fiji, supporting the Regime through civil service and other roles.

It is also unfortunately true that to the western world, white faces prominent in illegal regimes still imply "oh perhaps, they are OK", whatever their actual capabilities.

Which is why illegal Third World regimes hire them.

Also a matter of legal justice for Fiji victims

Many of the Military Regime's actions are unlawfully harming property interests in Fiji of not just citizens, but foreigners.

Currently, most of these victims have no recourse to the judiciary in Fiji, as the Fiji courts are explicitly prevented by the Military Decrees from hearing their cases.

Paradoxically, some of the active coup supporters have their own homes and private personal assets safe and sound in Australia and NZ, happily protected by the laws of these two countries, while they support a Regime which erodes the same rights of Fiji citizens.

However, should any of these Australian citizens, Permanent Residents, and corporations be convicted in Australia for "crimes" against people abroad, then it is possible that the victims abroad may be able to sue them and their assets in Australia and NZ.

However hard it may be to implement such laws in reality, their mere existence would discourage Australian and NZ citizens who currently and with impunity, assist in the breaching of basic human rights abroad, as in Fiji.

For certain, Australia and NZ need to bring in new legislation that will discourage their own citizens from aiding and abetting activities abroad, especially if they help to worsen the "arc of instability" around Australia and NZ.