FIJI LABOUR PARTY

Preliminary submission to the Constitutional Commission

Suva Civic Centre
12 September 2012

We deem it necessary to make this preliminary submission at this point because we believe that the Constitutional process as sanctioned under Decrees 57 & 58 is fundamentally flawed and lacks credibility and integrity. It is driven by the regime to achieve its own self-serving agenda as is evident from the various repugnant provisions in the two decrees promulgated on 18 July 2012.

Itis manifestly clear that the process is not going to be inclusive, participatory or even credible.Further, it has been unilaterally imposed on the people of Fiji without any consultation with their legitimate representatives.

We note that the Commission itself has expressed strong reservations about the manner in which the process is being driven. This was clearly stated in amedia statement issued on 19 July by its Chair,Professor YashGhai

Among the issues Professor Ghaicommented onwere those of immunity for the perpetrators of Fiji's coups and the absolute powers conferred on the Prime Minister in appointing members of the Constituent Assembly which will determine the final constitution. Professor Ghai rightly contended that the process should be kept independent of the regime given the probability that some of its members may be contesting the forthcoming elections.

This is a stand The Fiji Labour Party has maintained from the very beginning – that the process back to democracy and constitutional rule should not be driven by the regime. We now submit that there is only one legitimate and credible way back to constitutional rule. And that is to abide by the advice rendered in the decision of the Fiji Court of Appeal (FCA) on 9 April 2009(*Qarasevs Bainimarama-Civil Appeal No ABU 0077 of 2008s*).

The Legitimate Way Forward

The FCA judgment advised that a caretaker Prime Minister be appointed with the specific mandate to oversee the process of holding general elections and restoring constitutional rule within a realistic time frame. Paragraph 156 of the judgment reads:

"*The only appropriate course at the present time is for elections to be held that enable Fiji to get a fresh start.*

Taking cognizance of the principle of necessity… for the purposes of these proceedings, it is advisable for the President to appoint a distinguished person independent of the parties in litigation as caretaker prime minister to advice dissolution of Parliament and direct the issuance of writs for an election under s60 of the Fiji Constitution. This is to enable Fiji to be restored to constitutional rule in accordance with the Constitution."

We submit that His Excellency the President has the powers (Executive Authority Decree 2 of 2009) to take the following course of action appropriate to establishing a credible and legitimate process of returning Fiji to constitutional rule:

1. Based on the advice rendered in the Fiji Court of Appeal decision, His Excellency to appoint a caretaker Prime Minister – a distinguished person, independent of the political parties and the regime and one in whom our people can repose confidence - to advice dissolution of Parliament and direct the issuance of writs for an election under Section 60 of the Fiji Constitution.

2. A caretaker administration isthen set up with the specific mandate to oversee the process of holding general elections and restoring constitutional rule, within a realistic timeframe. This should be no longer than 12 months as we deem it is possible to hold credible elections within that period.

3. The caretaker administration to assume full responsibility for the constitutional and electoral process.

4. A President's Political Dialogue Forum (PPDF) is established following the appointment of the caretaker administration. The mission of the PPDF would be to assist the caretaker government and the Constitution Commission in obtaining consensus on the roadmap for the restoration of constitutional government via free, fair and credible general elections.

5. The following appointments will be essential to oversee the entire electoral process:

    - Electoral Commission
    - Boundaries Commission
    - Supervisor of Elections

In the absence of a Constitutional Offices Commission (1997 Constitution), these appointments can be made by the President on the advice of a caretaker administration after due consultations with key stakeholders.

6. We believe there is no need to re-write an entirely new constitution. The 1997 Constitution should be used as the base document and amended to meet changes deemed necessary, such as, the electoral provisions, once consensus on these is reached at the PPDF level.

What is wrong with the current process?

As stated earlier, the Process as sanctioned by Decrees 57 & 58 is fundamentally flawed - it is driven by the regime to achieve its own agenda. It lacks credibility, integrity and legitimacy.

Decree 57 of 2012 and the Question of Immunity

1. Section 7 (4) of the Decree directs the Commission to include in the draft Constitution provisions for broad immunity to the President, members of the security forces including the Fiji Corrections Services, individuals appointed to Cabinet or to any State service with regard to the 2006 and earlier coups;the immunity to cover their unlawful actions up to the first sitting of parliament elected under the new constitution. It excludes common crimes committed after the date of the two decrees. Such provision shall not be reviewed by parliaments in future or be challenged in the Courts of Law.

Decree 58 also requires the immunity provision as a mandatory element to be included in the new Constitution, before it is forwarded to the President for assent.

The directive to the Commission to include such a provision undermines its independence. Further, the immunity provisions are to be absolute and "*shall not be reviewed, amended or revoked by the new parliament or any subsequent parliament*".

We submit that in a democracy Parliament is bound only by its own decisions taken in accordance with the procedures and Standing Orders applicable at the material times.

The Commission itself has publicly stated that this type of :

> "*retrospective immunity is most unusual, perhaps unique, and, we believe, undesirable… questions of immunity must be considered in the process of transitioning to democracy – it could be discussed through public submissions and debate in the Assembly. It is to be noted that those who have so far appeared before the Commission have rejected the notion of immunity".*

By providing blanket immunity in the past we have taken away the penal and punitive element from such heinous crimes and have simply encouraged more treasonous activities. If Fiji is to counter this coup-culture, the practice of writing immunity into constitutions must cease.

Non-negotiable elements

The Prime Minister says the subject of an electoral system is non-negotiable. The regime's position here is for proportional representation based on one man, one vote, one value.

This is a crucial issue in ensuring racial harmony in the future and must be put to open discussions so that a fully representative system can be found which respects the rights of the minority communities and assures them due representation in Parliament and Cabinet. This factor needs to be addressed now so that a decision is reached on the way forward.

It should be remembered that the criteria set by the international community is for the consultation process to be inclusive, participatory, with a defined time limit and without any pre-determined conditions. Prescribing non-negotiables hardly meets this criteria.

As regards the Peoples Charter, many of the principles embodied in the Charter are commendable but nothing new. It must be acknowledged that the Charter does not have the full endorsement of the people of Fiji.

More importantly, it needs to be emphasized that the policies, decrees and actions of the regime to date are in gross violation of the universal principles and values the Charter enunciates. If they donot follow their own Charter, what right havetheyto parade it to the people?

This is yet another instance of the kind of hypocrisy inherent in their agenda. Let me list a few:

1. alarming lack of accountability and transparency in the affairs of the State

2. gross financial and economic mismanagement; rapid decline of the sugar industry threatening the livelihood of thousands of rural dwellers

3. high level of official corruption

4. promulgation of decrees that violate the human rights and freedoms of our people

5. compromised independence and authority of the Courts

We shall be elaborating on these and more in our substantive submission to be presented later.

Lack of an Open and Free environment

Despite certain relaxations to the *Public Order Amendment Decree 2012,* iesuspension of the requirement for permits to hold meetings on the constitutional process, this Decree remains in force and is being used to carry out arbitrary arrests and to intimidate the people.

The Constitution Commission expressed concern that, despite the temporary lifting of requirements for permits for meetings, the current atmosphere in Fiji was not conducive to

> *"…an open process in which Fijians can debate their future properly". Controls on the media and the wide reaching powers of the security forces in this regard are particularly worrying, as is the fact that generally people have no redress for actions taken against them by the State because the right of access to the Courts has been removed".*

It is to be noted that the period of suspension of Section 8 of the Public Order (Amendment) Decree terminates when the draft constitution is presented to the President by the Commission, thus reactivating the requirement to obtain permits to hold meetings.

This effectively means that no organized avenue would be available to the people to voice their opinions on the draft constitution given the fact that applications for permits were refused or made conditional in the past.

The most abhorrent features of the Decree continue in force ie.:

- Courts are denied the jurisdiction to deal with any challenge or redress to acts or powers exercised by the authorities under the Decree. The Chief Registrar has powers to terminate any such proceedings and this decision also cannot be challenged.

- The extraordinarily wide discretionary powers given to the Police Commissioner and Divisional Police Commissioners; as well as the sweeping powers of search, arrest and detention, without a warrant and on mere grounds of suspicion, available to ordinary police and army officers

- Powers exercised by the authorities to deny or withdraw permits for meetingsetc to any group or organisation deemed to have a past record of, among other things, having "undermined or sabotaged or attempted to undermine or sabotage the economy or financial integrity of Fiji".

- Powers given to the Security Forces (police and army) to use force of arms to break up protests, meetings, processions etc for which permits have been withdrawn; whilepowers given to army personnel to operate as police officers will result in further militarization of our society.

- Legitimate trade union activities can be targeted under the Decree if interpreted as an "attempt to undermine or sabotage the economy or financial integrity of Fiji". Fines are excessive - $50,000 or a 10-year jail term or both for those found guilty. Participation in a meeting, assembly or procession without a permit can be liable to a $10,000 fine or a 5-year jail term.

- The powers given to the Prime Minister (Minister) to order detention beyond 48 hours and up to 14 days without recourse to legal proceedings is reprehensible. "Terrorism" is widely interpreted to include even legitimate trade union activities - any act perceived as "undermining or sabotaging the economy or financial integrity of Fiji".

Intimidation by the authorities

The regime is using intimidatory tactics to stifle dissent. Thisis evident from the running commentaries of the Prime Minister in the media crossing swords with submittees who have questioned the credibility of the process, particularly those relating to the immunity provisions, the powers vested in the Prime Minister with regard to the appointment of the Constituent Assembly, the non-negotiables etc.

We are aware that many prominent citizens, business leaders, professionals and academics are reluctant to appear before the Commission to present their views because of fear of reprisal.

State Proceedings (Amendment) Decree 2012

This Decree grants privileged protection to the Prime Minister and his team in the lead up to the general elections. It is another blatant denial of individual rights and freedoms.

What it means is that the prime minister and his Cabinet colleagues can malign and slander any of their opponents and have this reported in the media for public consumption without fear of being sued for libel.

As such, it provides an unfair and unjust advantage to the prime minister and his ministers in the lead up to the elections while it denies their victims the right to legal redress. This can hardly be described as setting up a level playing field.

The regime claims that privileges accorded to its ministers under theDecree *"is consistent with Parliamentary privilege as was applicable in Fiji and which is applicable in countries throughout the Commonwealth;"*

This is absurd. Parliamentary privilege is restricted to proceedings in Parliament. **Fiji has no parliament**.Moreover, parliamentary privilege only applies to statements made in the House or the Chamber. The same statement made outside the House is not covered by parliamentary privilege.

The Decree violates the Media code of ethics based on principles of accurate, balanced and fair reporting. It violates the principle of transparency and accountability. Together with the Public Order (Amendment) Decree 2012, it will undermine any chance of the next elections being free, fair and credible.

Nor will it "*facilitate open and frank discussion between Government, the public and other stakeholders…"* as claimed by the regime.

Television (Amendment) Decree 52 of 2012 - This Decree was promulgated following reports that the Attorney General had threatened not to renew the operating licence of Fiji TV (due to expire at the end of June) because it had run interviews on its television network with former Prime Ministers LaiseniaQarase and MahendraChaudhry. Its simply another tactic to gag the media.

Fiji TV was warned that it would be closely monitored over the month. Although it publicly denied the report, Decree 52 confirmed the incident.

The Decree prohibits the Minister's decision in such matters to be taken to any Court, Tribunal or Commission, thereby, denying the aggrieved licensee the right to redress or justice.

Censorship of the Media

The regime denies any censorship of the local media but the reality is that despite the lifting of the PER, the media in Fiji continues to operate as though it is still under strict censorship.

Indeed, the environment is still quite substantially coercive and threatening as evidenced by the incident that led to the promulgation of the *Television (Amendment) Decree 52 of 2012.*

We do not have an independent, free, liberated media in Fiji. The fines for incurring the wrath of the regime are so excessive that no media organization would dare fall foul of it.

The repercussions of such a cowed media are fatal for the success of a "free and open" consultation process. Articles, opinions or comments that question the regime or oppose its views are rarely, if ever, run. For instance, not a single mention was made in the news pages of the Fiji Times of the Constitution Commission's media conference held on 19 July 2012. The Fiji Times ran a feature article two days later buried in the inside pages of its publication. How many people would have read the strong criticism voiced by Commission Chair Professor YashGhai, particularly of Decrees 57 and 58?

How can a fair and proper consultation process be conducted in an environment where the people of Fiji are given only one side of the picture– that of the regime?

There is no public debate on important issues facing our nation, no balanced coverage of views and opinions. News items that may put the regime in a negative light are not reported eg. the arrest and detention of former SDL parliamentarian Mere Samisoni on Friday 3rd August.

It should be kept in mind that the majority of our people can be fairly vulnerable to influence peddling and if only one point of view is constantly paraded before them, they will tend to believeit.

Decree 58 of 2012 - the Constituent Assembly

Decree 58 [Section 9 (1) &(2)]gives the Prime Minister full controlover the size and composition of the Constituent Assembly and its Chair. The Commission itself has expressed strong dissatisfaction with this provision and has articulated the need for the Assembly to be kept independent of the regime because of the probability that some of its members may wish to contestthe next elections.

In our earlier communication with the Commission we had raised fears about the Constituent Assembly being stacked in favour of the regime. These doubts have now been confirmed. We also questioned why appointments to the Assembly were being withheld until December, almost to the eve of its sitting.

- More importantly, the prescribed groups [s9(2) i-xiv)] should be allowed to nominate their own representatives to sit in the Assembly; the interim Prime Minister should not decide who should represent them. One must also question the representation of the military in the Assembly when the regime too is represented in the guise of government. Is the military separate from the regime?

- Section 10 (1) & (2) – prescribe eligibility requirements for appointment as members of the Constituent Assembly. Some of these requirements are harsh and seem to be deliberately inserted to exclude representatives and leaders of certain political parties from membership.

  Section 10 (2) (b): *A person is not eligible to be appointed as a member of the Assembly if the person has been convicted of an offence of dishonesty or an offence carrying a penalty of more than six months in prison;*

The 1997 Constitution restricts eligibility as a Member of Parliament to persons "serving a sentence of imprisonment of 12 months or longer". Why has this criteria now been reduced to a conviction for an offence (whenever committed) carrying a 6-month jail term? Is it to serve a certain political agenda?

- Schedule 2 Section (3) of the Decree on Code of Conduct of Constituent Assembly Members prohibits a member from expressing dissent, publicly or privately, with the decisions of the Assembly outside the Assembly. This is preposterous –it is tantamount to gagging and a denial of the right of expression. Why is the regime afraid of any public expressions of dissent? What is so sacrosanct about the deliberations of the Assembly? Doesn't the public have a right to know?

There is an obvious contradiction between Section 3 (d) (i) and (ii) and Section 7 (4) of Decree 57. Section 3(d) states the purpose of the Decree is to draft a Constitution for Fiji that includes provisions appropriately designed to achieve, among others:

(i) true democracy
(ii) respect for, and protection and promotion of human rights

But Section 7 (4) makes it mandatory for immunity to be granted to the usurpers of democracy under whose rule grave violations of human rights of our citizens were officially sanctioned and enforced through the promulgation of draconian decrees.

We submit that it would be ridiculous to write-in absolute immunity provisions for these usurpers and simultaneously claim that the constitution is designed to achieve "*true democracy and respect for and protection and promotion of human rights*."

<u>Public comments</u>

We refer to Section 7(l) (j) of Decree 57 which requires the Commission to present a draft constitution together with an explanatory report to the people of Fiji for their comments but note that no allowance for this has been made in Schedule 1 - Stages of the Process.

Is this an inadvertent omission? Can it be clarified as to when exactly will the documents be presented for public comments and how much time will be given for public comments? Will the Commission undertake to have the comments from the people published in the media?

Conclusion

It is discernible from reports we have been able to gather about views expressed at the public consultation sessions of the Commission, that there is significant opposition to the granting of immunity to the coup makers while there is support for the retention of the 1997 Constitution which the Court has ruled remains in place and has not been abrogated.

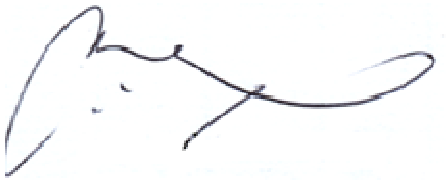
This brings us back to the point made earlier. This process is being driven by the regime in a direction that suits its agenda. It is fundamentally flawed, is not participatory and not conducive to a free and open environment for discussions and debate on important national issues that confront us.

The question we pose is: How does the Commission propose to deal with the provisions of Decrees 57 and 58 that, according to its own admission, undermine the independence, integrity and credibility of both the Commission and the process itself?

How do the Commissioners propose to deal with this dilemma given that their oath of office requires them to discharge their duty "faithfully and conscientiously with the best interests of the people of Fiji at heart and without fear, favour, bias, ill will or prejudice".

We implore members of the Commission to carefully consider transitional arrangements to democratic rule and make adequate provision in the draft constitution for the same, including the appointment of a caretaker government to take charge of the process of returning Fiji to constitutional rule via free, fair and credible elections.

The Fiji Labour Party submits that a number of issues raised in this submission need to be addressed **now.** We also feel strongly that the members of the Commission must not regardthemselves bound by those unethical provisions of Decrees 57 and 58 which they consider inhibit theproper discharge of their duties and responsibilities in accordance with their oath of office.



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