

**SUBMISSIONS**  
**TO**  
**THE CONSTITUTION COMMISSION**

**WELCOME**

1. I wish to congratulate the appointment of the Constitution Commission (Commission hereafter) and am confident that it will perform its duties diligently and in accordance with the wishes of the people.
2. May I preface my submissions by reading a paragraph of a speech given by John Githongo, a Kenyan journalist, civil rights leader and an anti-corruption advocate who said:

*“By a quirk of history the Kenyan people have imposed a constitution upon their rulers. The next 18 months will be defined by the legal and political processes of implementing the constitution. A major counter-reform initiative by vested interests is understandably underway...Constitution making is never benign as a process, it makes or unravels nations. Kenya is at the cusp of a historical opportunity to reshape its future whose failure cannot be contemplated.”*

3. The first sentence of the above quote was borrowed from the Chair of this Commission, Professor Yash Ghai. The remaining sentences also have much relevance to Fiji and her constitutional dialogue process that is currently underway.
4. Yours is an important task. It is to prepare a document that will be the supreme law of the land. In doing so I am comforted by comments by the various Commission members who have reflected on the need for the Constitution to embody the views of the people.
5. It was Abraham Lincoln who said:

*“This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending it, or exercise their revolutionary right to overthrow it.”*

6. I am sure that the people of Fiji will lawfully remove a government that it does not want to govern it. To think of any other option is to

give fodder to the arguments of legitimacy of the current interim regime.

7. I remain optimistic that the Constitution Commission will not be influenced by statements from the interim Prime Minister and others with vested interests on how it will discharge its duties.

#### **DECREES 57 AND 58 OF 2012**

8. I trust also that your (Commission's) work will not be compromised nor impeded by Decrees 57 and 58 of 2012.
9. Of particular concern to me, and as it relates to the work of the Constitution Commission is Decree No 57 of 2012 titled: *Fiji Constitutional Process (Constitution Commission) Decree 2012*.
10. This decree gives the interim prime minister great powers as it relates to appointments and removals of Constitutional Commission members. This is inappropriate as the interim Prime Minister is an interested party to the process and as such should not have any influence direct or indirect. The Commission has been appointed by the President pursuant to Decree 58 of 2012 and only he has powers to revoke (if necessary) such appointments and not the interim prime minister – who himself is an appointee of the President and can be removed for cause.
11. The second issue is the direction given to the Constitution Commission under Section 7 (4) of this decree as it relates to immunity. Section 7 (4) Decree 57 of 2012, is also a clear indication that the interim regime appears to be running scared of the prospect of being subjected to the rule of law post-election.
12. Similar provisions are also mirrored in Decree 58, as it concerns the Constituent Assembly and where it has been directed to include the immunity clause in the new Constitution. There is also a very clear threat of consequences for the Constitutional Commissioners and the members of the Constituent Assembly if they do not include immunity in the constitution. Such pre conditions clearly cast a dark shadow over the whole constitutional process.
13. Further, such decrees clearly show that the interim regime seeks to manipulate the process of constitution review to suit its own agenda

and I am comforted by the chair of the Commission Professor Yash Ghai for his strong stand on the independence of the work of the Commission. At best these decrees should only be considered by the Commission as submissions by those in power for their self-preservation. The existence of these decrees cannot be denied but the context in which it should be treated by the Commission should be limited to it being submissions and not fettering the Commission's discretion.

### PRELIMINARY COMMENTS

14. Let me start by quoting Article 21 of the United Nations Declaration on Human Rights:

*(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.*

*(2) Everyone has the right of equal access to public service in his country.*

*(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.*

15. It is important to emphasize at this at the outset of my submissions given that it has been universally accepted that the will of the people shall be the basis of the authority of government. Anything less will not meet this requisite universal standard and I note from comments by the different Commissioners that they also hold this position.

16. James Madison once said:

*"The people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived."*

17. In so far as the Commission is concerned, it is my firm belief that the consultation process must be free of all political, religious, economic, social, personal or regime influence.

18. Further, it is my submission that the Constitution Commission must report to the President and not work to the dictates of the interim

Prime Minister. The interim Prime Minister cannot hijack this process and comment on every submission made to the Commission. If he intends to stand for elections, he must resign as military commander or resign as interim prime minister and return to the barracks.

19. Further, with the constitution review process now in train, the President must appoint a care taker administration to prepare the country for elections. The President has these powers pursuant to Section 11 of Decree No. 2 of 2009, which provides for the President to dismiss (for cause) ministers and ministers also include the Prime Minister (See Section 8 of Decree No. 2 of 2009).

### **WHY AM I SUBMITTING?**

20. It is an important decision that I made to appear before the Constitution Commission to submit to it what I and many others like me believe should or ought to be considered by the Constitution Commission.
21. Firstly, it is rather embarrassing that Fiji is going to have its fourth Constitution within 42 years post-independence. Since 1987 the new Constitution will be the third Constitution for Fiji – that is the third constitution in 25 years.
22. Ironically, Fiji has not had new Constitutions because the people have so willed but that they have been forced to by the direct and or indirect actions of the military in one form or another since 1987.
23. I have been directly affected by all 4 coups. The experience has not been pleasant and I have lost many friends and family who decided to leave this beautiful country after each of these extra constitutional calamities. Some have had their lives end prematurely as a result of the stress, loss of income and other forms of stress associated with such events.
24. I believe that it is important for views of a wide cross section of the community to be heard and a constitution drawn up that is representative of the submissions as made by the people to the Constitutional Commission.
25. Much work will need to be done to balance the competing interests of different groups to arrive at a constitution that will reflect the views of the people and to this end I wish the Constitution Commission well as

it embarks on the onerous task of preparing an acceptable constitution for the people of Fiji. Albert Einstein said: *As long as I have any choice, I will stay only in a country where political liberty, toleration, and equality of all citizens before the law are the rule.*

26. Charles Dickens said it another way:

*I only ask to be free. The butterflies are free. Mankind will surely not deny to Harold Skimpole what it concedes to the butterflies!*

27. I am here today making this submission because we do not have a Constitution after the 1997 Constitution was purportedly and unlawfully abrogated by the former President, Josefa Iloilo.

28. The 1997 Constitution, as we all know, was abrogated subsequent to the military takeover of Government on 5<sup>th</sup> December 2006, after the Court of Appeal, on 9<sup>th</sup> April 2009, ruled the takeover to be unlawful.

29. The military takeover was under the pretext of a clean-up campaign and ending the coup culture. Army Commander Frank Bainimarama also swore to preserve the 1997 Constitution and assured that the nation that no military officer would benefit from the takeover. We all know now that none of the commitments given by Mr Bainimarama during the takeover was honoured.

30. On 10<sup>th</sup> April 2009, after the Fiji Court of Appeal held that the takeover on 5<sup>th</sup> December 2006 was illegal, the President then abrogated the Constitution. It remains to be seen whether he was acting on his own deliberate judgment or by acts or omissions of others. The legal advisers to the late President also failed, deliberately, in my view, to advise His Excellency, that the Constitution could not be abrogated and that any amendment to it could only be by Parliament.

31. If Mr Bainimarama stood by his words of 5<sup>th</sup> December 2006 not to abrogate the Constitution, clearly he could have simply disregarded the President's action and acted as Commander Republic of Military Forces (RFMF) and to restore the Constitution as he did in 2001.

32. The question is why he did not do so? On both occasions (2001 and 2009) it was the decision of the Fiji Court of Appeal which ruled that the Constitution had not been abrogated.

33. Why has Mr Bainimarama not publicly stated that he supported the abrogation of the Constitution or what he saw wrong with the 1997 Constitution – which he upheld after with the Fiji Court of Appeal ruling in 2001. Mr Bainimarama has also not given any explanation to the people as to why he deviated from his 5<sup>th</sup> December 2006 statement that the Constitution would be preserved and in light of this one can clearly evince that the abrogation of the Constitution was clearly engineered to preserve the political life of Mr Bainimarama and the interim administration.

34. As said earlier, this is the fourth Constitution process for Fiji since independence. The circumstances by which each new Constitution came about were really a cause of shame and embarrassment rather than any sense of pride or nation building. Similarly, I believe that this Constitution exercise, and with deepest respect to the Commissioners, is one which has been foisted on the people, with conditions, by a military dictatorship, parading itself under the guise and contrived legitimacy of an *'interim administration.'*

#### **WHY A NEW CONSTITUTION?**

35. As said earlier, this is the fourth Constitution process for Fiji since independence.

36. Do we really need another Constitution?

37. The 1970 Constitution was abrogated and replaced with the 1990 Constitution. This latter document provided for a review within 7 years (Section 161) and subsequent reviews every 10 years thereafter.

38. The 1997 Constitution was therefore, an amended 1990 Constitution, which was amended by Parliament. This 1997 Constitution provided the mechanism for its review. The 1997 Constitution also repealed the 1990 Constitution and the immunity given to the military.

39. Was there anything wrong with the 1997 Constitution? The answer is not simple because people have differing views on the 1997 document. What is clear is that it was passed as law by Parliament which is the repository of the voice of the people.

40. The preamble to the 1997 Constitution is significant as it sets the platform for the document – as mandated by the people through their elected representatives. I consider it necessary to reproduce it below:

**WE, THE PEOPLE OF THE FIJI ISLANDS,**

**SEEKING** the blessing of God who has always watched over these islands:

**RECALLING** the events in our history that have made us what we are, especially the settlement of these islands by the ancestors of the indigenous Fijian and Rotuman people; the arrival of forebears of subsequent settlers, including Pacific Islanders, Europeans, Indians and Chinese; the conversion of the indigenous inhabitants of these islands from heathenism to Christianity through the power of the name of Jesus Christ; the enduring influence of Christianity in these islands and its contribution, along with that of other faiths, to the spiritual life of Fiji:

**ACKNOWLEDGING** our unique constitutional history:

- (a) first, the Deed of Cession of 10 October 1874 when Ratu Seru Epenisa Cakobau, Tui Viti and Vunivalu, together with the High Chiefs of Fiji, signifying their loyalty and devotion to Her Most Gracious Majesty, Queen Victoria, and their acceptance of the divine guidance of God and the rule of law, ceded Fiji to Great Britain, which cession was followed in November 1879 by the cession to Great Britain of Rotuma by the Chiefs of Rotuma;
- (b) secondly, our becoming an independent sovereign state when Her Majesty Queen Elizabeth II promulgated the Fiji Independence Order 1970 under which the Fiji Constitution of 1970 came into being;
- (c) thirdly, the abrogation of that Constitution in 1987 by the Constitution Abrogation Decree 1987;
- (d) fourthly, after a period of 3 years, the giving to Fiji of the 1990 Constitution by His Excellency the President, Ratu Sir Penaia Kanatabatu Ganilau, Tui Cakau, GCMG, KCVO, KBE, DSO. KStJ, ED, with the blessings and approval of the Great Council of Chiefs;
- (e) fifthly, the review of that Constitution undertaken under its provisions; and
- (f) sixthly, the conferral by the High Chiefs of Fiji in their abundant wisdom of their blessings and approval on this Constitution:  
**RECOGNISING** that the descendants of all those who chose to make their homes in these islands form our multicultural society:

***AFFIRMING** the contributions of all communities to the well-being of that society, and the rich variety of their faiths, traditions, languages and cultures:*  
***TAKING PRIDE** our common citizenship and in the development of our economy and political institutions:*  
***COMMITTING** ourselves anew to living in harmony and unity, promoting social justice and the economic and social advancement of all communities, respecting their rights and interests and strengthening our institutions of government:*  
***REAFFIRMING** our recognition of the human rights and fundamental freedoms of all individuals and groups, safeguarded by adherence to the rule of law, and our respect for human dignity and for the importance of the family,*  
**WITH GOD AS OUR WITNESS, GIVE OURSELVES THIS CONSTITUTION.**

- 41.** Is not the preamble to the 1997 Constitution all and perhaps more than what is being proposed in the interim administration proposed Peoples Charter? The 1997 Constitution was a product of interaction, opposition, debate and consensus. Most importantly it was what the people's representatives had endorsed in Parliament.
- 42.** The 1997 Constitution was well researched and much praised. It was not entirely what the Reeves Commission had recommended with respect to the electoral provisions but the majority in Parliament decided what was to be the final document. Further, despite the reversal of the electoral provisions as recommended by the Reeves Commission, elections were held on the endorsed electoral provisions and a party which has always espoused multiracialism won with an overwhelming mandate. It also affected the power sharing arrangements and was governing well till the political crisis of 19<sup>th</sup> May 2000 and was also the governing law of the land after the 2001 High Court and Court of Appeal rulings on whether the Constitution could be abrogated.
- 43.** There were no other issues that I am aware of, with the 1997 Constitution. The Compact, Group Rights, Social Justice, Code of Conduct and the Freedom of Information provisions were all forward looking and designed to promote harmony and encourage transparency of government. Is there really a need to change something has no fault with it? Is there a need to make a new

constitution on the whim of a certain few at the expense of the vast majority of the people?

**44.** Gates J in *Prasad v Republic of Fiji* [2000] FJHC 121; Hbc0217.20001 (15 November 2000)) said:

***Procedure for making changes to the Constitution***

*Man long ago realised that he could not live in a world without laws. In order to defeat tyranny, despotism, untrustworthy and arbitrary princes, robber barons, provincial nabobs and court favourites, he came to see a capacity for good governance in the State was to be had through the assistance of a Constitutional document. In some countries such supreme law was unwritten but obeyed as a matter of established convention, and upheld and developed by the courts. Most countries nowadays have a written Constitution, as does Fiji.*

*Fiji's 1997 Constitution is to be described as rigid or inflexible as opposed to flexible within the categorisation of Bryce [see **Bryce: Studies in History or Jurisprudence** (1901). See also **A.V. Dicey** "The Law of the Constitutions 10<sup>th</sup> Edition by Wade."] It is also a supreme Constitution as opposed to a subordinate one within the Wheare categorization. Fiji's Constitution states in **section 2(1)** that it is supreme. As with that other rigid Constitution, the United States Constitution, Fiji's Constitution has special procedures for the making of alterations to it. (see Chapter 15).*

*Section 190 states:*

*This Constitution may be altered in the way set out in this chapter and may not be altered in any other way.*

*The purpose of such a provision is to ensure due and careful consideration before the supreme law of the land is changed, including the safeguard of a 2/3 majority of both Houses, 60 day lapses between the 2<sup>nd</sup> and 3<sup>rd</sup> readings of bills so as to allow for proper debate, and provided certain veto provisions are not exercised against the Bill.*

**45.** Why didn't the High Court use the same reasoning in *Qarase & Others v Bainimarama & Others* (Civil Action Numbers HBC 60.07S and HBC 398.07S, 9<sup>th</sup> October 2008) as it did in *Prasad (supra)*?

46. Clearly, such contradictions from the Courts on important constitutional pronouncements, raises a number of issues on the role of courts and judicial officers in times of constitutional crisis.

47. Paul Weyrich, the American founder of the New Right once said:

*Absent scandal, a federal judge can serve for decades on the bench, underscoring the importance of appointing judges who have a proper understanding of their constitutional role.*

48. The question that must be asked is did our judges know their proper constitutional role after the extra constitutional crisis of 2006? I will speak more on the role of the judiciary later on in these submissions.

### **WHERE TO START FROM?**

#### **Why the 1997 Constitution should form the bases for review**

49. My starting point for these submissions is that the 1997 Constitution should be retained with any changes best left to an elected Parliament. My reasons for such a statement is supported by the following facts:

- i. *The 1997 Constitution was formulated after consultation and consensus and was affirmed by the GCC and adopted by Parliament and its purported abrogation was held to be unlawful by the Court of Appeal on 9<sup>th</sup> April 2009.*
- ii. *Like all Constitutions, strident views of persons and organisations were harmonised with those who thread the middle ground for the sake of getting a Constitution for purposes that they deemed necessary, whether it was political, social or academic.*
- iii. *While many had expected, and perhaps hoped, that the three Commissioners would agree to recommend a move away from the overwhelmingly communal nature of the country's electoral system and the racial biases inherent in the 1990 Constitution, no one fully anticipated the breadth of change that was being proposed.*
- iv. *The Commission had boldly defined a new vision for Fiji, one that aimed to ensure that all racial groups could feel confident and secure in the land of their birth. The report, titled Fiji: Towards a United Future, had at its core the position that all races must be able to share in the government of the country, and this required the emergence of multiethnic parties or coalitions, which was not possible under the present communal electoral system. In order to promote multiethnic power sharing, the Commission recommended*

*the introduction of a common roll system for 45 seats in the 70 seat House of Representatives. The remainder should be communal (at least for the time being) and be allocated according to population as follows: 12 Fijian seats, 10 Indian seats, 2 general electors' seats, and 1 Rotuman seat. While the Upper House would not be based on ethnicity, the provinces would form the bases of the constituencies, with two candidates elected from each province. This system would probably favour Fijians.*

- v. On the question of Fijian paramountcy, the Constitution Review Commission's position was that while Fijian interests needed to be given special protection, this should not be through relegating other races to a lesser status. "We find no basis on which the paramountcy of Fijian interests or Fijian political paramountcy can be elevated into a right," the Commissioners declared. Thus, apart from the position of president, no positions or proportions of public offices should be reserved for people of a particular race. The approach they recommended was "entrenchment" in the Constitution of provisions concerning Fijian interests relating to land, natural resources, chiefly titles, customary law, and dispute settlement. Under the current system, policy over such areas may be subject to amendment or appeal by act of Parliament. Entrenchment was also recommended for the role and powers of the BLV.*
- vi. Among other things, the Commission recommended that the Great Council of Chiefs be given direct power to veto legislation that might affect Fijian interests. In general the Commission elevated the Great Council of Chiefs to a position of political power not currently enjoyed under the present Constitution. This was seen as providing greater protection for Fijian interests than the current system provided – and perhaps as a trade-off for the reduction in the communal seats.*
- vii. Addressing the joint sitting of Parliament, Rabuka said: "The country needs a Constitution that gave all citizens a feeling that this is their home". He also mentioned the need to meet international obligations and to restore local and foreign business confidence. But it was clear that building consensus around this report would not be an easy task. Bowing to pressure from his party and Mr Reddy from certain sections of the business and Indian community, these two leaders refused to adopt the most important recommendation of the Reeves Report on Constitution Review (Reeves Report) that being of 2/3 open seats and 1/3 communal seats. Instead the Rabuka/ Reddy position was that 2/3 should be communal and 1/3 open seats. The only premise that I*

*can see in this reversal was to preserve the communal and or racial segmentation of the support that each of the political parties headed by these leaders.*

50. The other parts of the 1997 Constitution was generally accepted by the large majority and should be retained in any successor Constitution.
51. The only problem with the 1997 Constitution, as I see it, was that it was a negotiated document premised on power sharing. The paradox however was that power sharing, which many assumed should be on the basis of race, was the very opposite of what the Reeves Commission had recommended but the then Prime Minister Sitiveni Rabuka and Opposition Leader Jai Ram Reddy thought otherwise and reversed the proposed ratio of Open and Communal seats. One cannot have a unifying constitution if it is based on the concept of power sharing on racial grounds. This arrangement effectively entrenched rather than removed communal politics **but it was what had been negotiated by the people's representatives in Parliament who had the legitimate and lawful authority to do so.** If the people so willed a constitution it was only the people who could make changes to it through their representatives in Parliament.
52. Further, the 1997 Constitution provided the mechanism for periodic review and any changes could have and should have been lawfully made within the prescriptions of the 1997 Constitution rather than to seek to abrogate it to rewrite a new Constitution.

## SOVERIGNTY OF PARLIAMENT

### **1997 Constitution and supremacy of Parliament and the subservience of the Judiciary to Parliament**

53. Notwithstanding my comments on the 1997 Constitution, any new Constitution must recognize the supremacy of Parliament. Parliament must be the sovereign body of the State. All other arms of State, albeit independent, will be subservient and in accordance with the intention of Parliament. I will, at this juncture, refer to the words of former High Court judge, Nazhat Shameem, who wrote in one of her judgments on the supremacy of Parliament. Her Ladyship said:

*“It is for Parliament to pass laws, and for the judiciary to give effect to them. Most legislation will have a valid constitutional purpose because it would have been passed after much research, discussion and debate. A recommendation for legislative change normally comes from a group or department after a need for the change has been acknowledged. A Minister, having discussed the matter with his/ her own Ministry will then present a Cabinet paper. The matter will be discussed in Cabinet before it is prepared in Bill form. Once in Bill form, it is published so that the public and concerned parties can discuss it and make representations to their Member of Parliament. The Bill, if it is not channeled to a Sector Committee for Parliament to hear further representation from the public and from government, will be debated in Parliament, both in the Lower and Upper House. It is only after this process that a Bill might become law. The law when passed by Parliament, and assented to by the President, has the status of a law passed through a democratic process. There is an assumption that Parliament speaks for the people and passes laws with the assent of the people. This is the essence of democracy. It is a powerful reason why the judiciary should defer to the will of Parliament. Legislation passed by Parliament reflects in principle, the will of the people.”<sup>1</sup>*

**54.** Yet this was the same Nazhat Shameem who as a High Court judge held the validity of the FICAC Decree when it was not an act of Parliament. It was this same former judge who then actively became a paid consultant to FICAC shortly after the abrogation of the 1997 Constitution. Lip service and actual deeds are quite divorced from Ms Shameem in the context of her obiter in *Audie Pickering (supra)*. Not only has Ms Shameem ruled decrees passed by this interim administration to be valid, she acts as a consultant to the interim regime in promoting these decrees to different organisations.

**55.** It would also appear that certain individual judges are confused about sovereignty of Parliament. Let me give you some examples other than Ms Shameem.

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<sup>1</sup> Shameem J in *State v Audie Pickering (unreported) Suva High Court Misc. Action No. HAM0007 of 2001S 30 July 2001.*

**56.** Our current Chief Justice, Anthony Gates in in *Koroi v Commissioner of Inland Revenue* [2001] FJHC 138; HBC0179.2001 (24 August 2001) said:

*A proper role for the courts when extra-constitutional change occurs is to pronounce on matters of necessity, where actions have been taken whilst accompanied with sufficient justice and rightness see **Jilani v. Govt. of the Punjab [1972] PLD SC 139**. Even then the supreme law can only be changed securely by traversing the path provided for such change within the Constitution. Decrees or proclamations purporting to abrogate the Constitution, or to act in conflict with it, are of no effect and are unlawful. They are made without the scrutiny, debate and approval of parliament*

**57.** Yet it was the same justice who, together with Byrnes and Pathik JJ, in 2008 in the case of *Qarase (supra)* said:

*“The President’s decision to make and promulgate legislation in the interest of peace, order and good government in the intervening period prior to a new Parliament is upheld as valid and lawful”.*

**58.** Which of the two Court decisions above should the ordinary person rely on as it relates to the supremacy of Parliament, the role of the President in making decrees, and the duty of courts during times of extra constitutional crisis? The inconsistencies are stark and confusing to even a trained legal mind.

### **Amendment to the Constitution**

**59.** Parliament should be able to amend the Constitution as per the amendment provisions provided within the Constitution and in no other way. It must be expressly stated that save as to what is provided for in the Constitution, any other form of amendment shall be unlawful.

**60.** The term of Parliament should be reduced to four years as five years is too long for a country the size of Fiji.

### **Qualification/s to stand for Parliament**

**61.** There should be the usual qualifications to stand for Parliament and any person who has been convicted and has served his term of punishment should be allowed to stand for Parliament. Further, the

same qualifications as per Section 55 (7) in the 1997 Constitution should apply as to qualification to stand for Parliament.

#### **Age restriction for candidates**

62. It is my submission that there should be an age restriction of 65 years, on the date of nomination, for persons wishing to enter the contest for parliamentary elections. Parliament should not be the retirement recreation of civil servants and other retirees – it must be seen as a professional, long term and serious profession.

#### **Limit on term in office**

63. The Prime Minister must be barred from holding office for more than 2 terms. This is the practice in the United States with its Presidency and was the same in the 1997 Constitution with the tenure of Presidency not exceeding two terms. This restriction will promote greater participation of persons seeking to hold public office.

#### **Parliamentary offices to be funded by State**

64. Parliamentary offices and staff must be established and funded by the State in each of the constituencies and funds provided must be approved by Parliament and be subject to annual audits. It must be State funded as parliamentarians, serve their constituency and not just their political party and for this State funding must be provided.

#### **Speaker to the House of Representatives**

65. The Speaker to the House of Representative must be a person entitled to practice law and preferably a retired High Court judge who takes a judicial oath of office before the Chief Justice. This will ensure that the Speaker is independent of the political parties and will perform his/her functions in such a manner. The term of Speaker is to run concurrently with that of Parliament and he/ she shall not be subject to non-confidence motions.

#### **All decrees to be reviewed by an elected Parliament**

66. All decrees promulgated by the interim regime must be reviewed by an elected Parliament and decrees penal in nature must be set aside and its predecessor legislation to replace it.

67. On the issue of electoral provisions, it is my submission as follows:

### **Proposed Composition of the House of Representatives**

68. The Lower House of Parliament should comprise of 70 seats and be broadly representative of the people.

### **Electoral regions**

69. It is my submission that there should be 7 electoral regions and each of these regions should then be divided into ten constituencies of roughly equal population. This of course may not be possible given the change in demographics and a greater concentration in the urban and peri urban areas. Without there being independent statistics on population distribution, it is difficult to make proper empirical assessments as to boundaries and population numbers per constituency. To a large extent, and given the time and resource constraints the constituencies should be the same or similar in terms of geography and in accordance with those under which the 2006 elections took place.

70. However, where it is apparent that smaller constituencies cannot be avoided then these should smaller constituencies being a subset of the larger electoral regions. It may then become necessary for there to be larger and smaller constituencies (population wise) within the electoral regions but each of these must be roughly equal in numbers. The overarching objective of the constituency boundaries and numbers should be to ensure that the franchise of vote of equal value is achieved.

### **Electoral boundaries**

71. Boundaries must only be drawn up after a census and population in each electoral boundary must be roughly equal. In default of this, the boundaries under the 1997 Constitution should act as a guide.

### **The case for Reserve Seats**

72. The issue of reserved seats is important and it is my submission that there should be reserved seats for Fijians, Indians and General Electors. This may be an affront to what the interim administration is advocating but this constitutional hearing exercise is to gather the views of people and not what the current regime wants us to accept. As Aristotle once said: *If liberty and equality, as is thought by some, are chiefly to be found in democracy, they will be best attained when all persons alike share in government to the utmost.*

73. For Fijians, reserved seats are necessary to protect their customary rights to land, sea and natural resources. Further the 7 years of military

rule has seen a systematic erosion of Fijian rights as it relates the GCC, the Methodist Church, native land and the *qoliqoli* rights. Unlike the 1997 Constitution, where the GCC had a very clear mandate to protect Fijian interest, it appears that the current regime is not favourable to the restoration of this mandate to the GCC. If this is not to be so, then clearly, Fijians must have reserved seats in Parliament as a safeguard for their traditional rights as mentioned earlier in this paragraph.

74. For Indians, as citizens of this country, without full citizenship rights and without automatic access (*and not ownership*) to land, natural resources and related issues as it impacts their security as citizens by birth of this country and many being now 5<sup>th</sup> generation Indians. Issues such as civil service appointments, scholarships and right to religious, cultural and social freedoms are all issues that Indians feel very strongly about.
75. General Electors and Rotumans have also been traditionally and electorally recognised as a group and have been given separate or reserve seats under the previous Constitutions in recognition for the role they play in this country and this should also apply with this Constitution.
76. For the purposes of discussion on this subject, it is suggested that 5 seats be reserved for Fijians, 5 seats for Indians and 5 seats for other races **but all persons, irrespective of race, should be entitled to vote for persons whom they want to occupy these reserve seats.** Such voting will not be communally confined but will be on the basis of a national list of reserve candidates as nominated by political parties.
77. It is proposed that the 15 reserve seats will cover the national constituency boundaries and all ethnic persons will have a choice of voting for their preferred candidates in the reserve seats.
78. I have suggested 5 seats per major population grouping on the basis of equal recognition to rights of each community and to avoid racial horse-trading to gain ascendancy or numerical supremacy.
79. The proposed reserve seats will serve the purpose of safeguarding interests and rights that are unique to these races and will obviate the need for them to agitate in one form or another.
80. Further, the proportion of reserved seats as proposed, will only serve the purpose for which it is intended and will not overtake the broader

and unifying and harmonising role of the Constitution as the supreme law of the land. As Einstein said: *Laws alone cannot secure freedom of expression; in order that every man present his views without penalty there must be spirit of tolerance in the entire population*

**81.** The remainder of the 55 seats should be considered on an open roll, with electors voting in their respective constituencies. **The issue of proportional representation must also be looked at pragmatically and in view of where such arrangements have often led to hung Parliaments and an unworkable legislature.**

**82.** In time to come and depending on what the people want, there can be a gradual move away from reserved seats but at this juncture it is in my view essential to have reserve seats – if not for anything else to give people a sense of security and belonging to Fiji given our turbulent political past.

#### **Should there be separate seats for women?**

**83.** There may be some criticism of such a proposal and women’s groups will seek to ask why there are no reserve seats for them. In doing so I will refer to an interesting article by Indian journalist Vir Sanghvi and which I have added as an endnote to these submissions. <sup>i</sup>

**84.** Further, did New Zealand or England advance the cause of women when they had prime ministers for lengthy periods who were women?

**85.** I believe that political parties of this generation must realise the aspect of the need for women in politics and field women candidates – it should not be a statutory and or constitutional requirement. This country has a strong women’s rights lobby and concerns on women can be advanced through them. Fiji has never reserved seats on a gender basis and it should not start now. The object of the new constitution should be to have a Parliament that is unifying rather than divisive – not only on racial but gender issues as well.

#### **Proposed Composition of Senate**

**86.** The Senate has traditionally been by way of appointment. The Prime Minister, the Leader of the Opposition and the GCC all had their nominees in the Senate under the 1997 Constitution and this arrangement should be reaffirmed in the new Constitution.

87. There has been a call, from some quarters, for the Senate to be abolished. It is my submission that this call for its abolishment is misconceived. There must be an Upper House to review legislation as passed by the Lower House and more importantly to ensure that the concerns of various interest groups are addressed.
88. The Senate should at this time be partly elected and partly appointed. 50% should be elected and the remainder by way of appointment by the Prime Minister (7 seats), Leader of the Opposition (6 seats) and the GCC (4 seats) and 1 appointed by the Province of Rotuma.
89. It is proposed that the Senate have 32 seats and the 14 electable constituencies are to be from the 7 electoral regions, that is, each electoral region will also have elections for the Senate, where 2 members will be elected to the Senate from each electoral region. Unlike the past arrangement of Senate seats being based on provincial boundaries, my proposal is that it is based on the electoral regions as this application will have greater substance rather as it relates to nation building.
90. The Senate, ought to have veto power over legislation that concerns land, traditional rights, GCC and religious rights and this will be in line with its traditional and legislative role in the history of Fiji.

#### **Proposed method of voting**

91. The voting system, with the proposal of reserved seats to cater for special interest groups, should be first past the post.
92. Proportional representation and other methods of voting have caused complications and are really at this time not really applicable to our situation. For an election after 7 years of non-democratic and dictatorial rule, it is imperative that election results are conclusive and not subject to court challenges and or political horse trading in Parliament in the formation of government.
93. Those that fear that the first past the post system will allow for race based results on majority appear still to cling to the vestiges of communal politics. The focus of political parties must be to move away from race driven issues but rather to focus on social and economic issues.

94. Political debate must be driven in this direction and not on racial grounds. The 1999 general election results are a good example of how race base politics was largely negated by the Fiji Labour Party, which focussed on basic needs issues on a national rather than on racial grounds.
95. The challenge must be for political parties to modernise itself into being issues driven and not race focussed. Again this can only come about by political will and not any statutory and or constitutional impositions.
96. Each person will have three ballot papers – one for their Reserve seat member, one for their Open seat member and one for their Senate member. They should place a tick on the name and or party symbol of their preferred candidate.

### **Voting age**

97. It is submitted that the voting age be set at 18. Persons who are 18 years of age are voters in other jurisdictions and the same ought to apply in Fiji. In Wales, Parliament recently debated lowering the voting age to 16.

### **Powers of Parliament to impeach President and to discipline and or remove the Chief Justice for cause**

98. Parliament must have powers as prescribed in the constitution and it must have the powers to impeach the President and remove the Chief Justice for cause by a simple majority.
99. Any extra constitutional act as it relates to usurping the mandate of Parliament must be punishable by death.

## **THE EXECUTIVE AND RELATED MATTERS**

### **Independent civil service**

100. An independent civil service is essential to good governance. The civil service must not be loyal to the government of the day but be apolitical in the discharge of its functions. It must provide accurate and professional advice to the government as well as the opposition as well as to the ordinary citizen. It was Martin Van Buren, the 8<sup>th</sup> President of the United States, who said:

*“The national will is the supreme law of the Republic and on all subjects within the limits of his constitutional powers should be faithfully obeyed by the public servant.”*

### **Freedom of Information Legislation**

101. Linked to the duties of an apolitical civil service must be Freedom of Information legislation that will provide citizens with timely and accurate information as it concerns them and the institutions of State. Such legislation has often been promised but never enacted.

### **Bill of Rights**

102. The Bill of Rights in the 1997 Constitution was well drafted and should be retained in the new constitution.

### **Appointment of the President**

103. The President should be appointed by Parliament after consultations with the GCC. The usual qualifications, as per the 1997 Constitution, should apply in the appointment of the President.

104. The President, in any event should be appointed and not elected as elections would mean subsequent political considerations and this would detract from the role traditionally played by the President and or the Governor General.

105. The President must be subject to the Code of Conduct for public officials.

106. These same submissions, as it relates to the President, must also apply *mutatis mutandis* to the Vice President.

### **Powers of the President**

107. The President must only act on the advice of the Prime Minister and Cabinet. S/he must have no residual powers. In cases of public emergency, the President must act in accordance with the *Public Safety Act* and the *Public Order Act*.

108. The President must have no powers to dismiss the Prime Minister and or the Cabinet except as provided for in the Constitution or only where the ruling party has lost a vote of confidence on the floor of the House and the Opposition is ready to form a minority and or alternative Government.

### **Queen as Head of State**

109. At this stage, it may be appropriate to raise the issue of whether Fiji should re-embrace the idea the Queen being the Head of State and to be represented by the President in the discharge of her role as the Head of State.

110. I am aware of the sentiment of many older citizens who seek to have the Queen as Head of State with the President her representative here in Fiji. The appointment of the President by the Queen could be subject to endorsement by the Great Council of Chiefs and Parliament.

111. This is however for the people to decide and opposing views may be predicated on the basis of moving away from the vestiges of colonial rule.

### **Appointment of the Prime Minister**

112. The criteria under the 1997 Constitution were appropriate and should be retained. The Prime Minister must not hold office for more than two terms. No person in the interim regime must be allowed to hold the office of Prime Minister.

### **Appointment and removal of the Prime Minister**

113. The Prime Minister must be appointed in accordance with widely held conventions. The Prime Minister must be a person who has the majority in the House of Representatives and shall be appointed by the President. His removal should also be in accordance with the requisite conventions and or legislative prescriptions.

### **The Military**

*"Even when there is a necessity of military power, within the land...a wise and prudent people will always have a watchful & jealous eye over it."*

*Samuel Adams*

114. The military's role in the national body politic needs to be carefully scrutinised. The genesis of all coups has been the military, directly and or indirectly.

**115.**In *Federalist* No.28, Alexander Hamilton<sup>2</sup>, a founding father of the United States, wrote:

*Independent of all other reasoning upon the subject, it is a full answer to those who require a more peremptory provision against military establishments in times of peace to say that the whole power of the proposed government is to be in the hands of the representatives of the people. This is the essential, and, after all, the only efficacious security for the rights and privileges of the people which is attainable in civil society.*

**116.**The Anglo Saxon cultural heritage, dominant at the time of the founding of the United States, was another, more general, reason for this aversion to the military and military institutions, especially during peacetime. The British reaction to the Cromwellian period of the 1640s, when the British army was used to suppress political opposition, was a vivid memory in the 18th century. In addition, one of the major tensions leading to the American Revolution was the stationing of British troops on American soil after the French and Indian Wars (1754-63). The colonists rejected such an intrusion based on their concept of their rights as Englishmen, on the grounds that this would be unacceptable in Great Britain. This same wary attitude was reflected throughout the Revolution itself. In order to get the Continental Congress to authorize and provision the army, General George Washington had to assure Congress he would not use that army to usurp its authority. Thus, even in the heat of battle, Americans were suspicious of military authority.

**117.**The interim regime seeks to give the military greater say in the governance of this nation. This proposition is fraught with danger.

**118.**In peacetime, there is no need for the military to have any active role in the governance of a nation. This must be left to an elected civilian government. If those in the military aspire for public office, they should resign from the military and contest the elections as civilians. This also applies to Mr Bainimarama. He cannot wear two hats as he doing now: that of interim prime minister and military commander. By

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<sup>2</sup> Alexander Hamilton (January 11, 1755 or 1757 – July 12, 1804) was an American politician, statesman, writer, lawyer, and soldier. One of the United States' most prominent and brilliant early constitutional lawyers, he was an influential delegate to the United States Constitutional Convention and one of the principal authors of the *Federalist Papers*, which expounded and urged the ratification of the U.S. Constitution to skeptical New Yorkers. The *Federalist Papers* and Hamilton's contributions to them remain today a standard source on the original intent of the document.

choosing to retain both positions, Mr Bainimarama is showing his extreme insecurity.

**119.**It is my submission that any suggestion or submission to give the military any other role than accorded to it by legislation, enacted by Parliament, must be opposed.

**120.****The military must be a servant and not a master of the nation.**

**121.**It is my submission that the role of the military must be reviewed in light of its involvement in one form or another in extra constitutional acts. I am not going to unfairly target the military in these submissions as it has decent officers within its ranks who did not and do not support the actions of its current commander. The need is to make the military accountable to the people just like any other government institution.

**122.**The Commander RFMF must be accountable to the Minister Home Affairs or Defence. He must not hold the position of commander for more than one (1) term of four (4) years as is the practice in countries where the military is accountable to Parliament and the people. The military commander must serve at the pleasure of the government of the day for reasons that clearly need not be enunciated in these submissions.

**123.**Within the Republic of Fiji Military Forces there must be structures to keep the Commander RFMF in check and to avoid him acting in conflict with the aims and objectives of the RFMF Act. To this end there would need to be amendments to the RFMF Act to reflect the need to keep the Commander RFMF accountable and to ensure that there is greater transparency and accountability of funding of the military.

### **The Great Council of Chiefs (GCC)**

**124.**Ratu Sir Lala Sukuna said:

*"We are the High Chiefs of these islands. We are the leaders of the people. On us is the duty of pointing out to them the right course. Bear this in mind. We have to lead on two points- hold back those who advocate radical changes (for which we are not sufficiently educated) and enliven the laggards before their ignorance destroys us."*

**125.**It must be accepted that in times of political crisis it was the GCC that was the voice of reason and moderation for the coup makers. Without

the GCC, the political impasses of 1987 and 2000 would not have had the outcome that it had. Of course, there are some within the chiefly system that have radical and extremist views, but these are a minority and their views have often been ameliorated by the majority who see Fiji's future as a multi-cultural and multi-racial country.

126. It must also be noted that historically it was the chiefs who had ceded Fiji to Britain and Fiji was then returned to the chiefs upon independence. As such, the chiefs have an important role in the making of traditional leaders and acting as trustees of the Fijian people.

127. Instead of focussing on only the political role of the GCC, we should also focus on the cultural, social and leadership roles of the GCC. As the trustees of the rights of the Fijian people, chiefs should also have a voice, albeit a limited one, to raise issues as it relates to their people.

128. The chiefs and Christianity have historically been entwined since Fiji embraced Christianity. There has always existed a strong bond between the chiefs and the church and this further augments the role of the chiefs as leaders of their people together with the church.

129. The biblical verse of Romans 13.1 is apposite in the current instance and reads:

*Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God.*

130. The Fijian people have stated time and again in various forums their respect for their chiefs and of them being divinely ordained. Prudence would therefore suggest that the Constitution respect the traditional and leadership role of the GCC constitutionally.

131. The GCC as well as the confederacies must be preserved and the GCC given constitutional recognition to act in an apolitical manner in its deliberations as it concerned national issues. To rid the confederacies will be an invitation to internal strife and some will see it as a justification of the continued participation of the military in civilian government.

132. The GCC must be constitutionally recognised. Its traditional role in the affairs of State must be given due consideration. It must be independent of the arms of State and act in an advisory capacity as and

when required and shall advise the President on *i Taukei* matters if such advice is sought. It must also have a role in the appointment of the President.

### **Police**

133. The police force under the military administration has come under much public scrutiny. One clear point that seems to be hitting home is that military officers do not make good police commissioners. The police force is a civilian body governed by strict rules of operation and accountability. The Constitution must make very clear and specific reference to the role and appointment of the police commissioner and the qualifications must also be clearly stated. The citizens of this country expect no less.

### **Parliamentary protection of pensions and retirement age**

134. The downsizing of pensions will affect thousands of retirees. The decision to do so was made by an unelected government. There must be constitutional protection of pensions and any changes to the pension must be with a prescribed majority of Parliament. It should not be lawful for changes to pension rates to be made with simple amendment to the provident fund legislation.

135. Retirement age must be restored to 65 and this should be a constitutional prescription.

### **Lawyers, the Law Society and disciplinary proceedings against lawyers**

136. The current Independent Legal Services Commission is hardly independent. It is headed by a person who also wears a judicial hat. Its funding and appointment of its Commissioner is subject to approval of the Attorney General. It provides a fully facilitated office for the prosecutors of the Chief Registrar's Office but no such provision is made for lawyers who are charged to appear before the ILSC. Calling an entity independent does not make it independent.

137. The ILSC should be an investigative prosecutorial body and should refer complaints or prosecute if it decides to do so in the High Court (under a new Legal Services Jurisdiction).

138. The ILSC should serve the purpose of providing workshops, offering mediation services and counselling for lawyers. It should not be a body

under political control which receives, investigates, charges, prosecutes and sentences lawyers. Where is the fairness in such a tribunal?

139. Lawyers must not practice under fear of recrimination or any other form of coercion and or duress. Complaints can be handled by the ILSC but the prosecution of these complaints must be separate from the ILSC and as said earlier a special division of the High Court should be assigned to conduct such prosecutions.

140. The current structure of the ILSC must be dismantled as it has become a regime tool to silence and emasculate lawyers.

141. On a parting note under this section, I believe that the Law Society must be given its due recognition as the apex body of lawyers. It must be the regulating institution for the licensing of lawyers (after the necessary statutory requirements have been met).

## **THE JUDICIARY**

### **Introduction**

142. It was the former United States President, Andrew Jackson who said:

*All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary.*

143. Some say that the judiciary is the bulwark of any civilised society. It has a duty to be vigilant of the laws passed by the Legislature and to strike out laws which offend the Constitution or are repressive or an affront to the acceptable standards of law making. Ordinarily any commentary on the judiciary is with great circumspection and deference given its important and independent functions.

### **Interference with the Judiciary**

144. In Fiji, numerous concerns have been raised by various quarters on the independence, functionality and appointments to the judiciary and I would have to say that some of these concerns are quite relevant. The recent petition to the interim Prime Minister and the Military Council by former Appeal Court President, Justice William Marshall is nothing short of extraordinary and confirms the interference in the judiciary by the interim Attorney General. Marshall J also looked at judicial politics and how it affected the ordinary person. Marshall J explained the role

of the interim Attorney General in seeking to have him recused in the *FICAC v Mau and Motibhai* appeal by getting his driver to depose an affidavit which was false in the material facts. He also talks of numerous other issues that affect the Judiciary and of having trumped up charges against this submittee by a client.

145. Marshall J was not the first judge to raise issues of concern in the Judiciary. The orbiter in the case of the *Citizens Constitutional Forum v the Attorney General* [2001] FJHC334 reads:

*Obiter dicta – (1) It is unfortunate and unprecedented for fellow Judges to publicly reveal their opinions and seek to disqualify the trial Judge from hearing the substantive application on the basis of his involvement in certain activities. Although motivated by higher ideals, the clumsy attempts have unwittingly intruded upon the trial Judge's personal integrity and judicial independence. They characterise an atmosphere of absence of collegiality, backbiting, envy, hidden-agendas, hypocrisy and disloyalty.*

146. Further on in the CCF case (supra), Fatiaki J said this of the role of judges:

*I have no difficulty with my colleagues sharing a different opinion from me as to the disqualifying nature of the judges private collective activities between the 19th and 25th of May last year. Plainly my colleagues consider that they are disqualified from hearing this case as a result of what occurred, and I respect their opinions, but that they should choose the occasion of this application to disqualify me for my involvement in the same activities, to publicly reveal their opinions is unfortunate as it is unprecedented.*

*My colleagues would do well to remember the salutary remarks of Jacobs J. in his dissenting judgment in **The Queen v Watson ex-parte Armstrong** (1976) 136 CLR248 at p.294 where the learned judge said:*

*'... let it be remembered that it is confidence in his own integrity which supports (a judge) not only in his judgment but in all his words and conduct, both that which may be approved and that which may be disapproved. Let none by conjecture or base imputation undermine that confidence, however much they may criticise his judgment or the way he*

*conducts his court. To do so is to shake the foundations of justice.'*

*I do not doubt that my colleagues in swearing their affidavits were motivated by what they must have considered were higher ideals than 'base imputation' but there is not the slightest doubt in my mind that in doing so they have unwittingly intruded upon my personal integrity and judicial independence as a judge of this court.*

*As was said by Dickson C.J.C. of the Canadian Supreme Court in **The Queen v Beauregard** (1987) 30 D.L.R. (4TH) 481 at p.491:*

*'...the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider - be it government, pressure group, individual or even another judge should interfere in fact, or attempt to interfere with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.' *(my underlining for emphasis)**

*Just as independence and impartiality are fundamental traits of a judicial officer no organisation, not even the courts, could function without confidentiality, probity, loyalty and most importantly, trust. These are not just high sounding words or pious sentiments, they are essential to the proper functioning of any organisation, no working relationship could survive for long or function effectively without them. To borrow an example from the disciplined forces what is the worth of a regiment or platoon without 'esprit de corps'?*

**147.** The Judiciary must be independent of the other arms of State. Judges and other judicial officers must be appointed on merit and by the Judicial Services Commission. Decisions of the Judicial Services Commission should be amenable to parliamentary debate if necessary.

#### **Prescribed time limits for judgments**

**148.** Judges and other judicial officers must have prescribed time limits for delivering judgments after hearing matters and if the prescribed limits are not adhered to then judges and other judicial officers should be required to show cause as to why they should not be subject to an inquiry into the same by the Judicial Services Commission.

### **Code of Conduct for judicial officers**

**149.** Judicial officers must also have a Code of Conduct. In the past certain judges have questioned why they should be bound by such a code. The answer is simple – those that dispense justice and make pronouncements on the law must first be, like the wife of Caesar, beyond reproach themselves. In doing so we must ensure that judicial officers do not by their conduct, outside of Court, bring the judiciary into disrepute and the Bangalore Code of Judicial Conduct 2002 must be strictly enforced on judicial officers.

### **Role of the Judiciary to be clearly enunciated in the new Constitution**

**150.** The role of the judiciary must be to pronounce on laws as passed by the Legislature and it must at all times be independent. Gates J in *Prasad* (supra) said the following of the role of the judiciary in times of constitutional crisis:

*Gleaned from the recorded cases and from what had happened in Fiji in the early days of the Military takeover the following observations can be made on the role of the judiciary in such crises:*

- 1. 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.*
- 2. Extra-constitutional occurrences or subversions if not intended to be temporary will not displace the Constitution for some period of time. Judges should continue to uphold the Constitution meanwhile. Even in cases where the doctrine of necessity applies, time will need to pass before validity ab initio can be granted to acts committed under the doctrine.*
- 3. Unless there has been a “Glorious Revolution” to remove an undoubted tyrant, or to end a regime whose record “was one of turmoil” **Mokotso (supra) at 167** followed by “clear acceptance, jubilation, and acclaim” for the revolution, the judges should await the filing of cases and production of evidence and arguments for consideration of validity under all other heads of claim see **Pakistan Petitions Case (supra)** generally.*

4. It is not the oath taken or the regime under which an appointment is made that colour a judge's role on legitimacy. A judge is expected to act at all times impartially, fairly, with integrity, and to uphold all the laws of the land, independently of the regime existing at the time of his or her appointment. A judge may be called upon to curb the excesses of a revolutionary regime acting arbitrarily or outside the law.

5. Judges should remember the importance of the constitutional separation of powers and not intrude into political matters. To do so compromises the independence of the judiciary. In particular the President can be advised to seek his own counsel and constitutional adviser. Such persons would have been made available to the President readily and urgently through the auspices of several of the overseas missions of Commonwealth countries represented in Fiji.

It would be inappropriate, as happened here in Fiji, for 3 judges of the High Court, to provide written opinions to His Excellency and oral advice on political paths out of the impasse. It is unwise also to tender advice on the grant of immunity to the rebels for such immunity is bound to feature in future criminal prosecutions or civil litigation [see **Lennox Phillip and Others v. DPP and Another [1992] 1 AC 545; A-G of Trinidad and Tobago & Another v. Lennox Phillip and Others [1995] 1 AC 396**]. Even more unwise and dangerous a judicial precedent was the tendering of advice on the proroguing of Parliament, the appointment of an Acting Prime Minister and the dismissal of the Government. These were not appropriate judicial functions.

6. Similarly judges should not compromise their neutrality by taking an active part in advising an usurping regime. Nor should they assist in drafting decrees for the usurper. Such may attract the criticism that they were aiding and abetting the abrogation of the Constitution, indeed were acting with indecent haste to see the Constitution gone, such assistance being in obvious conflict with their judicial oaths of office. The cynical will say they hoped for something in the new regime. Such views undermine the public's confidence in the judiciary.

7. It is well known the same judges assisted in the drafting of the **Administration of Justice Decree 2000 (Interim Military Government Decree No. 5 of 2000)**. That Decree

*was subsequently repealed by the Judicature Decree 2000 [ICG Decree No. 22].*

**151.** Have the judges post 5<sup>th</sup> December 2006 been practising what Gates J had outlined, and as stated above, by the judiciary? Clearly, the answer is **not** in the affirmative.

**152.** The clearest evidence of the Judiciary being asked to play an extra judicial role can be gleaned from Section 21 of Decree 58 of 2012, which provides for the Chief Justice to basically vet the immunity provisions in the draft Constitution. It reads:

*21. - (1) No later than seven days after the adoption of the draft Constitution by the Assembly, the Assembly shall present the draft Constitution to the President.*

*(2) Upon receipt of the draft Constitution from the Assembly, the President shall forward the draft Constitution to the Chief Justice, who shall, within seven days upon receipt of the draft Constitution, appoint a five member Tribunal, which shall consider whether the draft Constitution complies with the principles and values contained in paragraphs (d) and (e) of section 3 and subsections (2) and (3) of section 8 of this Decree.*

*(3) The Tribunal shall comprise of the Chief Justice or his nominee as the Chair of the Tribunal, and four other members, at least two of whom shall be international experts.*

*(4) The Tribunal shall, within fourteen days of its establishment, review the draft Constitution and submit a report with recommendations to the President, on whether the draft Constitution complies with the principles and values in paragraphs (d) and (e) of section 3 and subsections (2) and (3) of section 8 of this Decree.*

*(5) In reviewing the draft Constitution, the Tribunal shall regulate its own procedures, and the members of the Tribunal shall receive such remuneration and allowances as the Chief Justice may determine.*

*(6) If the report of the Tribunal concludes that the draft Constitution does not comply with the principles and values in paragraphs (d) and (e) of section 3 or subsections (2) and (3) of section 8 of this Decree, the President shall refer the draft Constitution, together with the report of the Tribunal, to the Assembly for necessary amendments to the draft Constitution in accordance with the report of the Tribunal, to ensure compliance with the principles and values in paragraphs (d) and (e) of section 3 and subsections (2) and (3) of section 8 of this Decree.*

*(7) Upon receipt of the draft Constitution and the report of the Tribunal under subsection (6), the Assembly shall, within seven days,*

*make the necessary amendments to the draft Constitution in accordance with the report of the Tribunal and shall present the draft Constitution to the President for assent.*

*(8) If the report of the Tribunal concludes that the draft Constitution complies with the principles and values in paragraphs (d) and (e) of section 3 and subsections (2) and (3) of section 8 of this Decree, or upon receipt of the draft Constitution from the Assembly under subsection (7) as the case may be, the President shall provide his assent to the draft Constitution within seven days of receipt of the report of the Tribunal under subsection (4) or within seven days of receipt of the draft Constitution from the Assembly under subsection (7) as the case may be, and a public ceremony shall take place at which the President shall display the new Constitution to the persons present and to the nation by means of television and other media.*

**153.** One must ask: is it the role of the judiciary and especially the Chief Justice to preside over matters such as reviewing the relevant parts of the Constitution, especially as it relates to the immunity provisions? Would such conduct not easily be characterised as the judiciary actively working with the Executive to further the interests of a regime that has been declared unlawful by a Court of Law?

**154.** At present our courts are shackled by decrees and they for some strange reason the Court seem to acquiesce to these decrees most of which have an explicit caveat on its challenge.

**155.** I further invite the Commission to look at Section 5 (4) of Decree 9 of 2009 (Administration of Justice Decree 2009).

**156.** The most abhorrent, in my view, is Section 5 of Decree 2 of 2009 (Executive Authority Decree 2009), which reads:

*No question as to the validity of this Decree or any other Decree shall be entertained by any Court of Law in Fiji.*

**157.** Gates J in *Prasad (supra)* said this of the right to bring actions to court:

*The courts, if they have any role at all to play, must always be involved in the business of upholding justice and the rule of law. On being told the courts had no powers to intervene in a matter Salmon LJ in *Nagle v. Feilden* [1966] 2 QB 633 at 654 said this:*

*"This is a familiar argument on behalf of anyone seeking to exercise arbitrary powers free from any control by the courts. It was eg. recently advanced in this court on behalf of the Crown in *In re Grosvenor Hotel (London) (No.2)* when the question of Crown privilege was under consideration. I must confess that I do not find this argument attractive. One of the principal functions of our courts is, whenever possible, to protect the individual from injustice and oppression. It is important, perhaps today more than ever, that we should not abdicate that function."*

**158.**Further Gates J in *Koroi v Commissioner of Inland Revenue* [2001] FJHC 138; HBC0179.2001 (24 August 2001) who said:

*"I have already commented on the lack of authority for the making of Decrees and Proclamations. Laws are to be made only in accordance with the Constitution. Laws made otherwise or "amended not by the legislative will but by an executive decree" would have to be scrutinised for compliance with the Constitution see *State v Audie Pickering* (unreported) Suva High Court Misc. Action No. HAM0007 of 2001S 30 July 2001. In that case Shameem J. said (at p 13):*

*"All laws passed before the passing of the Constitution must measure up to the requirements of the Constitution."*

*Additionally, the decrees will have to be considered by Parliament to see whether they are void or merely voidable.*

*The task of analysing all of the Decrees and Proclamations since 1987 is a substantial task. Dr. Ogoweve puts it (at p 293):*

*"One should strive to formulate a rule or rules that would allow the courts to cherry-pick between necessary and undesirable outcomes."*

**159.**Further on in the same judgment, Gates J wrote:

*A court can sever from, or strike out, a Decree whenever there is conflict with the Constitution, or where the lack of legality is unsupported by any obvious and necessary efficacy.*

**160.**So why is our judiciary so subservient to an unelected regime, which passes laws not out of necessity but seeks to effectively rule as an elected government would and where an elected government would

pass laws subject to public and parliamentary debate and review by the Senate before presidential assent so as to give it legitimacy.

161.In *Prasad (supra)* Gates J said that there was no necessity to abrogate the Constitution. I would, in hindsight and with greatest respect to him, disagree. A government held hostage is a situation which affects the operation of machinery of State. Actions taken to overcome such a situation can be seen as an act of necessity.

162.However, the political situation leading to the usurpation of the people's mandate in 2006 by the military led by Mr Bainimarama could hardly be classed as a situation where the doctrine of necessity where a usurper commits treason and then appeared to successfully argue the doctrine of necessity in the High Court and which decision was subsequently overturned by the Court of Appeal.<sup>3</sup>

163.Why has there been such variance in the decisions of the High Court on the abrogation of the Constitution in 2001 and 2008 and where the current Chief Justice was the main player in both challenges of 2001 and 2008?

164.Further, why do current bench of judicial officers generally hold the view that the decrees are not challengeable as they are the will of the Legislature when clearly there is no legislature?

165.The United Nations Declaration on Human Rights is very clear on issues of justice and courts.

*Article 7 reads: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. Article 8 reads: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 10 reads: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*

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<sup>3</sup> *Qarase v Bainimarama* [2009] FJCA 67; [2009] 3 LRC 614 (9 April 2009), where the Court of Appeal clearly declared that the extra constitutional acts of 5<sup>th</sup> December 2006 and thereafter were unlawful under the Constitution.

166.The declarations are binding on member states and include Fiji.

167. In light of these clearly enunciated and uncontested legal principles on the role of courts in times of extra constitutional change, and the behaviour of the current unelected government acting as if it had the electoral mandate, our judiciary must act independently and entertain challenges to decrees, including, in this instance, decrees 57 and 58. To not do so would be to invite further adverse inferences.

### **MY VIEWS ON THE PEOPLES CHARTER: THE MILITARY'S PANACEA FOR ALL OF FIJI'S PROBLEMS**

168.The interim administration appears to lay the foundation for the new constitution through its document called the Peoples Charter. This document has no popular support or mandate. No discussions of any real substance were had on this proposed charter by the political parties, NGOs, the Churches, the GCC and the ordinary person.

169.The Peoples Charter (Charter) was launched in September 2007 and “adopted” on 15<sup>th</sup> December 2008 by an unelected dictatorial military regime and states its case on pages 3 and 4 of the same Charter. It speaks of equal representation, fair electoral system, abolishment of communal roll and strengthening of the Constitution amongst other things. It does, quite ironically, speak of ending the coup culture. The Constitution that the Charter spoke of strengthening was abrogated on 10<sup>th</sup> April 2009. The Charter is a document that was prepared and foisted on the citizens of this country to give the military dictatorship some contrived sense of legitimacy.

170.The Charter must not be given any significant weight, because as said earlier, it has no mandate of the people. The Constitution Commission can consider it like any other proposal. It cannot dictate the work or the direction of the Constitution Commission and it cannot be an imposition on the people.

171.The statements of accountability and transparency in the Charter clearly have not been given any thought or consideration by the interim regime. It is a case of preach but not practice.

172.It talks about free and truthful media, yet has gagged the same media with draconian legislation suffocating it of all freedom. It is my firm belief that the media must be free to report without fear and or favour.

It must also ensure that its reporting is responsible and a media ombudsman may need to be considered to address complaints with the media. Further, the Public Order Act and the Defamation Act would need to be strengthened to address public grievances with the media.

173.The interim government has refused to publish ministerial salaries since the abrogation of the Constitution on 10<sup>th</sup> April 2009. It has not published the annual reports of the auditor general for a number of years. It has borrowed heavily without conducting appropriate due diligence and being mindful of statutory responsibilities on fiscal policy.

174.In an effort to rein in state spending and create greater accountability measures, tax and expenditure limitations must be constitutionally prescribed to put the power of government back into the hands of taxpayers. An effective tax and expenditure limitation (TEL) is a constitutional limit on expenditures/revenues to a ratio of population growth plus inflation growth and will allow taxpayers, *vide* their representatives, to approve or reject expenditure proposed by the Legislature. One important element is the reinforcement of democratic principles, embodied in the ability of citizens to check the power and size of their government. Most importantly, enactment of a TEL would force the Government to live within its means and not grow exponentially beyond its intake of revenue.

175.The interim regime speaks of civil service appointments on merit yet the interim prime minister's brother in law, Francis Kean, who was charged with murder and subsequently convicted of manslaughter, was made a permanent secretary when public service rules clearly prohibit persons with adverse criminal records from being appointed to the civil service. Why the exception here?

176.Further, the interim prime minister's brother, Ratu Meli Bainimarama was reappointed to the civil service after reaching retirement age and appointed High Commissioner to Malaysia at a time when thousands of civil servants were being sent home having reached 55 years.

177.The rights of indigenous landowners have been stripped arbitrarily by decree and the Fijian chiefly system – the bulwark of Fijian society has been made virtually non-existent by decree.

178. If the interim regime cannot uphold its own values, how can its commitment to the current constitution process or any other issue of national importance be taken seriously?

179. The method of voting and our electoral system must be decided by the people and not foisted upon them by an egocentric regime using the bogey of race. It is a fact that race is a part of our lives but racism is not and should not be. To this end, appropriate anti-discrimination legislation laws can address the issues of and related to racism.

180. People must have a sense of belonging. They must have security and one way of doing so is to ensure that their concerns and interests are adequately protected – if it means by way of reserve seats then it should be so.

181. Our prison numbers are not reducing but in fact increasing for reasons best left to be answered by the interim regime.

182. Clearly, the Charter is a self-serving document prepared by the likes of John Samy who were paid exorbitant sums of money to prepare it to legitimise the military take over.

183. The whole charter process was a farce with hand-picked persons by the regime to legitimise its deposing of an elected government and paint a picture of utopia in Fiji – one that could only be achieved by the Peoples Charter.

184. As said earlier, the Charter had no popular mandate and cannot, by any account, be held to be the views of the people and therefore is of negligible value in the constitutional process. The acts of Mr Bainimarama on 5<sup>th</sup> December 2006 and thereafter have had no universal acceptance. There has not been a glorious revolution. As such, the current regime has no popular or legal mandate to exist. Its rejection has been widespread from the church, the chiefs, the vanua, the workers and the farmers. It is for this reason that the regime has decreed an immunity clause as a pre requisite to constitutional discussions and has decreed the same for the Constituent Assembly.

### **THE ISSUE OF IMMUNITY**

185. It is apparent that the interim regime and in particular its Prime Minister and Attorney General are driving the issue of immunity.

186.It goes without saying that the immunity provisions in Decree 57 and 58 are clearly designed to serve the interest of the usurper of democracy and the voice of the people.

187.Should such an act of usurpation, the criminal charge for which is treason, be subject to immunity? I am clearly of the view that there should be no immunity for Mr Bainimarama and Mr Aiyaz Khaiyum must be tried for aiding and abetting treason. In addition to this Nazhat Shameem must also be investigated and charged for her role in drafting decrees and accepting lucrative consultancies from the interim administration. It is time that the people of this country stood up to bullies and their public and intellectual advisers.

188.Gates J, as he was then, in *Prasad (supra)* said:

*It is obvious that an usurpation of the power of Parliament that is the Parliament consisting of the President, the Senate and the House of Representatives by subverting or abrogating the Constitution does not amount to an amendment within the supreme law. A challenge made in this way is an unlawful act. What laws therefore can come to the rescue of those who would otherwise be guilty of treason by such usurpation? When one considers the amount of incursion and damage caused to the lives of the ordinary people of Fiji as a result of the attempted civilian coup of the George Speight group and the extra-Constitutional disengagement now affecting Fiji nationally and internationally it is not difficult to see why such acts should be visited with the most serious charge in the Penal Code, namely treason.*

189.It was Gates J, again, in *Koroi (supra)*, who said:

*The Constitution's very indestructibility is part of its strength. It is not possible for any man to tear up the Constitution. He has no authority to do so. 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. During a period of dire emergency it may endure suspension, if such a suspension will ultimately see the Constitution supported, and ensure its re-emergence. Such a situation occurred in Fiji following the events of 19 May 2000. **Republic of Fiji v. Prasad [2001] 2 LRC 743** (the Court of Appeal).*

*Even in the case of a Glorious Revolution, the provisions in the Constitution for Constitutional amendment must eventually be followed. The doctrine of necessity may come to the aid of such a revolution in its earliest days. But the Constitution never goes away, and can never be dismissed or abrogated in a Decree or Proclamation.*

*In this respect, it has the quality of the Holy Books. The books themselves may be torn up, but the precepts and the teachings are indestructible, memorised by their adherents. The man lying tortured on the rack may be forced to say whatever his torturers may wish him to say, but his inner thoughts remain unchanged. The fundamental law represented in a Constitutional document may only be changed in accordance with that Constitution. The Constitution provides for its own mutation. 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 see **Dr. Tunde I. Ogowewe** in [2000] B.I.I.C.L: "The Creation and Amendment of Constitutional Norms," Chapter 13 Why the Judicial Annulment of the Constitution of 1999 is imperative for the survival of Nigeria's Democracy. 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. That way leads to the guillotine. Such tyranny lacks universal morality and the courts will not assist usurpers simply because they are numerous, powerful, or even popular.*

**190.**The current constitution process must not even vaguely consider the issue of immunity.

**191.**The proper forum for such discussion is by the courts and or Parliament, if and when the person who executed the coup, that is the military commander and current interim prime minister, is charged and presented to Court. He can labour his defence/s in Court just like any ordinary person who is charged for any offence and presented in Court. Mr Bainimarama as a citizen must be subject to the rule of law as it applies to all citizens.

**192.**The American President, Theodore Roosevelt said:

*“No man is above the law and no man is below it; nor do we ask any man's permission when we ask him to obey it. Obedience to the law is demanded as a right; not asked as a favour.”*

**193.** Mr Bainimarama did not have any reason to intervene in the civilian and or parliamentary processes on 5<sup>th</sup> December 2006. There was no issue of necessity. Parliament was functioning well and there were no issues of security.

**194.** The issues of security were created by Mr Bainimarama by his overt threats to depose a democratically elected government – a threat he carried out on 5<sup>th</sup> December 2006. He created a situation and then tried to invoke the doctrine of necessity to justify his actions. Such action was a complete reversal of intervention by doctrine of necessity, where a situation has to exist to justify intervention. There was no such situation prevailing at the time. The security of the country was well under control under the command of Police Commissioner Andrew Hughes. Mr Bainimarama must thus be subjected to the rule of law like any other citizen of this country.

**195.** Dwight Eisenhower, the 34<sup>th</sup> President of the United States once wrote:

*“The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law.”*

**196.** James Callaghan<sup>4</sup>, the former Prime Minister of Britain, said this of the rule of law:

*The rule of law should be upheld by all political parties. They should neither advise others to break the law, nor encourage others to do so even when they strongly disagree with the legislation put forward by the government of the day.*

**197.** Similarly, Mr Bainimarama must take responsibility for his actions. On the facts Mr Bainimarama has usurped the authority of Parliament and Government and the offence of which is treason. The Penal Code defines treason as:

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<sup>4</sup> Callaghan is the only person to have served in all four of the Great Offices of State: Prime Minister, Chancellor of the Exchequer (1964-67), Home Secretary (1967-70), and Foreign Secretary (1974-76).

*50. Any person who compasses, imagines, invents, devises or intends any act, matter or theory, the compassing, imagining, inventing, devising or intending whereof is treason by the law of England for the time being in force, and expresses, utters or declares such compassing, imagining, inventing, devising or intending by publishing any printing or writing or by any overt acts or does any act which if done in England, would be deemed to be treason according to the law of England for the time being in force, is guilty of the offence termed treason and shall be sentenced to death.*

**198.** The conviction for a charge of treason carries a penalty of death and the last such case of treason was after 2000 where George Speight was sentence to death and which was subsequently commuted to life imprisonment by the President Ratu Josefa Iloilo.

**199.** Mr Bainimarama must not act like a coward but stand up and submit himself to the same rule of law that he professes to uphold and let the process take its course.

**200.** Caroline Kennedy, the daughter of John F Kennedy and a lawyer by training said:

*“The bedrock of our democracy is the rule of law and that means we have to have an independent judiciary, judges who can make decisions independent of the political winds that are blowing.”*

**201.** In this regard, it is my fervent hope that the Chief Justice will refuse to participate in the finalization of the new Constitution as has been proposed under Decree 58 of 2012.

**202.** The immunity provisions in Decrees 57 and 58, if adopted and incorporated in the new constitution will not end but proliferate the cycle of coups as there will always be a new constitution and immunity for such usurpers.

**203.** Further, the immunity provisions in Decrees 57 and 58 are clearly designed to frustrate the work of the Constitution Commission and the Constituent Assembly and to coerce these bodies to provide irrevocable immunity. The drafters of these decrees clearly appear to ignore the fact that it will be the people who will decide what sort of

the constitution they will want and not Mr Bainimarama or Mr Khaiyum.

**204.** The seekers of the immunity also conveniently forget the fact that whilst they seek immunity for themselves, they have scant regard for the thousands who have suffered though their illegal acts. Who is to compensate them and their families?

**205.** It is my submission that persons who have been adversely affected by the acts of 5<sup>th</sup> December 2006 must have a right to seek judicial recourse and any decrees prohibiting such challenges must be appropriately amended to allow an affected citizen the right to seek recourse in the Courts.

**206.** I will finish this section with a quote from Abraham Lincoln, who said:

*"Those who deny freedom to others deserve it not for themselves, and, under a just God, cannot long retain it."*<sup>5</sup>

## **CONCLUDING COMMENTS**

**207.** The Constitutional Commission must operate independent of the interim regime and Section 7 (4) of Decree 57. It must do so for the purpose of maintaining its independence and integrity. It must accurately report in its findings the views of the people.

**208.** Constitution making or reviewing is an onerous task. Generally, constitutions should be reviewed and amended by Parliament and not be a post-coup exercise with the usual immunity provisions for the perpetrators of this treasonous act.

**209.** In Fiji, the military, directly and or indirectly, seems to have developed the habit of usurping the mandate of the people as repositied with Parliament, and seem to find it convenient and acceptable to rid the existing constitution and making new ones.

**210.** Often, the people, the politicians, NGOs and foreign countries are quick to embrace such a process as a matter of convenience instead of being strident in their opposition of usurpers of the people's mandate.

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<sup>5</sup> Abraham Lincoln, letter to H.L. Pierce, April 6, 1859. From the series *Great Ideas of Western Man*.

211.Nonetheless, the Constitution Commission is to be encouraged in its work and I trust that they will arrive at a document which will embody the views of the people.

212.I shall conclude these submissions by a quote by Hamad bin Isa Al Khalifa:

*Democracy is not just constitutional and legislative rules; it is a culture and practice and adhering by the law and respecting international human rights principles.*

I wish you well in your important duty.

*Rajendra P Chaudhry*

**RAJENDRA P CHAUDHRY**

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***<sup>i</sup>Should seats in Parliament be reserved on the basis of gender?***

*I am sorry. I've tried my best. But I still remain unconvinced of the merits of the case for reserving parliamentary seats for women. It is not as though I am against the proposal; just that I remain ambivalent.*

*And unfortunately, such is the self-righteousness of those demanding reservation that they do not regard it as necessary to try and persuade anybody that they are right. Rather, they take the line that anybody opposed to reservation is also opposed to women and therefore, beneath contempt.*

*As far as I can understand it, the case rests on several propositions. The first is that Indian women are a disadvantaged grouping and therefore deserving of some special consideration. I have no real problem with this proposition. But it is from the next step onwards that I begin to get more than a little bewildered.*

*The second key proposition is that the way to advance the cause of women is to ensure that lots more women occupy positions of political influence.*

*At first, this doesn't sound unreasonable but the more I think about it, the weaker this formulation seems to me.*

*It makes the assumption that women in positions of power will help other women. But will they? Do men in power actually help other men? What reason is there for believing that any powerful women will put herself out for her sisters?*

*Let us take the case of the single-most powerful prime minister India has ever had: Indira Gandhi. From 1966 to 1977, Mrs Gandhi spent 11 years in power during her*

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*first term. And from 1980 till her assassination she was the leader of the party in power; a party that called itself the Congress (I) after her.*

*This achievement cannot be minimised. Mrs Gandhi took office 13 years before Mrs Thatcher and assumed a political importance that few women have achieved in the West even today. A woman has never been elected president of the United States or of France.*

*You could argue that Indira made it to the top in 1966 because she was Pandit Nehru's daughter. But the 1971 and 1980 victories were entirely her own.*

*And yet, did Indian women benefit substantially during her reign? Were they significantly better off in 1984 than they were in 1966 as a consequence of anything she did? Did she even regard it as part of her responsibility to be especially concerned about women?*

*If the argument is that all women benefit when some occupy positions of influence, then why didn't it happen in Tamil Nadu when Jayalalitha was chief minister? In Orissa when Nandini Satpathy ruled? And so on.*

*You can't respond that this was because they were untrue to the cause of women. If every Indian woman in politics is untrue to this cause, then what reason is there for believing that those who will get an assisted entry into Parliament will be any different?*

*And perhaps this is how it should be. The basis of parliamentary democracy is that a representative represents all his or her constituents. Men aren't elected to help men. And women aren't elected to help women. Both are elected to help everybody.*

*Take the argument that the way to help all women is to place women in positions of influence and substitute 'women' with 'Muslims' or 'banias' or 'harijans' and you will see how dangerous it is.*

*When Muslims vote as Muslims, we worry that they are not voting as Indians, Why, we ask, can't they vote for a Hindu? Do they believe that all national politics should boil down to a single-point agenda: vote for our own kind? When 'banias' appeal to other banias only on the grounds of caste, we say that it is a symptom of an immature democracy.*

*And yet, in this case, we believe that the best way to ensure that women's interests are protected is to change the law to exclude men from being elected!*

*Does that make much sense?*

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*Nor is it necessarily correct to say that women believe that they will only progress if other women represent them. Take the example of the West. Few would deny that American women are as politically aware as American men. And yet the proportion of women in the Senate is not significantly different from the number of women in the Lok Sabha.*

*If you claim that the low proportion of female Indian MPs is a symbol of the backwardness of Indian women, then what about America? Why don't those educated, politically aware women elect more female senators?*

*Could it be because they don't believe that the only way ahead is to vote on the basis of gender?*

*Take an Indian example. Kerala is one of India's most literate states. Female literacy is staggeringly high and society is matriarchal. Yet, the proportion of women in state politics is not much higher than in say, Gujarat or Rajasthan.*

*Perhaps educated women voters don't necessarily want to be represented only by women. Perhaps they can see beyond gender even if those pressing for reservation are not willing to do so.*

*And finally, there is the whole business of the double standards on reservation.*

*Until the demand for reserving seats for women caught on, most educated middle class women would say that they were against reservation. They believed that the scheduled caste/tribe reservation should be phased out. And when V P Singh introduced the Mandal proposals, they were outraged.*

*Today, many of the same women are supporting reservation of parliamentary seats for women. And they are dredging out the same arguments they rejected during the Mandal debate.*

*They claim that the proportion of women in Parliament is significantly lower than the percentage of women in the population - and so, we should change the rules of the electoral system to ensure a near parity.*

*But the percentage of Muslims in Parliament is also lower than the proportion of Muslims in the general population. So is the proportion of Dalit Christians. And so on.*

*Are we going to keep changing the electoral system until we achieve demographic parity through reservation? If you accept the case for reservation for women then you*

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*are logically bound to accept the proposition. Consistency demands that you extend the principle to all groups, not just to women.*

*But, I suspect, few of us are prepared to agree to that. Muslims have asked for reservation for years on exactly the same grounds: they are disadvantaged; political parties don't nominate enough of them; the more Muslims there are in power; the better off the general Muslim population will be, etc.*

*Each time, their demand has been denied. We have explained that we are not anti-Muslim; just anti-reservation. We said the same to the Mandalites. And we repeated it to Dalit Christians. When politicians did not listen to us, we damned them as venal and opportunistic.*

*But now many educated women have turned those arguments on their heads. They have completely abandoned the principles that they professed only a couple of years ago.*

*Why is this? Is it because they smell a chance to grab some power for themselves; a chance to get into Parliament?*

*I hope not. I hope there is a<sup>i</sup> convincing rebuttal to the arguments I have raised. And, I hope that some supporters of the proposal will finally take the trouble to convince those of us who remain ambivalent.<sup>i</sup>*