

HE Ratu Epeli Nailatikau *LVO, OBE, CSM, MSD, OStJ, jssc, psc*
President
Republic of Fiji
Government House
Suva

Your Excellency

re: Proposed constitutional process and
Fiji's return to democratic rule

1. We, the legitimate representatives of an overwhelming majority of the people of Fiji, write to you to express our anxiety at the manner in which the proposed constitutional process and the return to democratic rule via general elections is being driven by the current administration.
2. First and foremost, Sir, it is imperative to ensure the credibility and legitimacy of any roadmap that is adopted to return our nation to constitutional rule. The roadmap proposed by the interim Prime Minister does not meet this important requirement. Further, we are concerned that it has been unilaterally imposed on the people of Fiji without any consultation with the legitimate representatives of the people.
3. In our view, the legitimate way forward for the country is to abide by the decision of the Fiji Court of Appeal judgment of 9 April 2009. As advised in the judgment, a caretaker cabinet should be appointed with the specific mandate to oversee the process of holding general elections and restoring constitutional rule within a realistic time frame.

The Constitution Making Process

4. Firstly, members of the Constitutional Commission were appointed by the regime without any consultation with key stakeholders. There are serious reservations about the independence of certain members of the Commission who are perceived by the people to be too close to the current administration.

5. Secondly, the **restrictive environment** in which the constitutional process is taking place, will not encourage free and open discussions on the subject. Draconian decrees that suspend and violate human rights especially the right to freedom of expression, assembly and association, remain in force as instruments of fear and intimidation. The local media is still operating under constraints that undermine its freedom to disseminate news fairly and in a balanced manner without fear of repercussions from the regime.
6. There are credible reports of a certain media organization being threatened by the interim Attorney General following its interviews of two prominent leaders of political parties.
7. A State sponsored civic education programme on constitution making has begun but key stakeholders, such as, political parties, trade unions and other important civil society organisations have been excluded from participating and/or playing an active role in this exercise.
8. It is also a matter of grave concern that military officers and civil servants are assigned to head the civic education programme.
9. Moreover, threats by the RFMF warning people not to “mess with the Army” make a mockery of the initial assurances by the interim Prime Minister that people will be free to openly state their views on the proposed constitution.
10. The requirement that political parties and trade unions seek separate permits for each consultation/discussion meeting has now been relaxed but political leaders and party activists are still being closely monitored and harassed by the security forces.
11. We re-iterate, no meaningful dialogue or consultations can take place in such a restrictive climate. In short the process is not inclusive or participatory and it lacks credibility and legitimacy.
12. Thirdly, the composition of the Constituent Assembly which according to the interim Prime Minister’s statement of March 9 will finally decide the constitution, has not been fully disclosed. There is widespread concern that it may be stacked to ensure a particular outcome. The Prime Minister has full control over appointments to the Assembly. This, in itself, undermines its independence and integrity.

13. We note with some concern a recent government announcement that chair persons of provincial councils will, from this year, be appointed by the Minister and not elected by members of the respective councils as had been the case in the past. There is little doubt, judging from past practice in such matters, that provincial councils will be invited to be members of the constituent assembly.
14. Furthermore, why are appointments to the Constituent Assembly put back to December 2012, just days before it is to begin its deliberations? Why has there not been any consultation on the subject?

The role of the Military

15. There is one significant omission from the interim Prime Minister's list of essentials that must be written into any new constitution. We refer to the role of the military in any future governance of Fiji. We note the reluctance of the regime to permit free and full discussions on the role of the military.
16. Whether the constitution is re-written or not, the role of the military has to be thoroughly considered and finalized once and for all. The Army has been responsible for trashing our constitution thrice. Fiji has to ensure this does not happen again otherwise the nation could be treading the same path again and again in the future.

The Electoral System

17. The interim Prime Minister says the subject of an electoral system is non-negotiable. The regime's position here is for proportional representation based on one man, one vote, one value. We disagree. This is a crucial issue in ensuring racial harmony and political stability in the future and must be put to open discussions so that a fully representative system which respects the rights of the minority communities can be found.
18. The significance of reserved seats for different ethnic communities that make up the nation cannot be brushed aside in a multiethnic and multicultural country like ours, more so, in light of our political history.

The Electoral Process

19. There is much that is questionable about the manner in which the electoral process is being implemented. The Attorney General's office has taken charge of the voter registration process when it should be the responsibility of the Office of the Supervisor of Elections. In the interest of credibility, it is vital that the entire electoral process, including that of voter registration, be completely detached from the current administration.
20. The provisions of the Electoral Act and Regulations were arbitrarily amended by a Decree to assign this responsibility to the Attorney General's office. The chair of the Constitutional Commission has also been critical of the interim regime assuming charge of the electoral process, saying that it undermines the integrity of the process as it is likely that some members of the current administration may be competing in the forthcoming elections.
21. The following appointments are essential to oversee the entire electoral process, independent of the regime and political parties:
 - Electoral Commission
 - Boundaries Commission
 - Supervisor of Elections

In the absence of a Constitutional Offices Commission (1997 Constitution), these appointments should be made by the President on the advice of a caretaker administration(see Para 24) after due consultations with key stakeholders.

22. The promulgation of Decrees 57 and 58 undermine the independence, integrity and credibility of the process. The provisions therein relating to the grant of immunity from prosecution to the perpetrators of the 2006,2000 and 1987 coups and the absolute powers of appointment of the Constituent Assembly conferred on the interim Prime Minister, make a mockery of the entire constitutional process.

23. It is significant that the Chair and members of the Constitutional Commission have said that as much and we quote below from the media release issued by the Commission on 19 July 2012:

“Nonetheless there are a number of aspects of the Decrees about which we are concerned.

First, although the Constituent Assembly Decree lists some of the groups that will be represented in the CA (such as political parties, trade unions, women, the military, and civil society etc.), it gives the Prime Minister full control over the size and composition of the Constituent Assembly. There is no indication of how many members will be drawn from each sector or what other sectors might be included. There is also no provision giving the groups that are represented a say in who should represent them in the Assembly. The Prime Minister will also appoint the Speaker of the Assembly.

These arrangements effectively mean that the essential principles of democracy are ignored and the independence of the Assembly is negated. In the light of the fact that members of the present government may wish to compete in the forthcoming elections, it is particularly important that they should not control the process that will, among other things, set out the rules for the elections. This will undermine the credibility of those elections.

Secondly, the Decrees require a broad immunity provision for the 2006 and earlier coups to be entrenched in the new constitution. Among other things, the new constitution is to grant the same, broad immunity for actions up to the first meeting of a new Parliament to members of the government, administration and security forces as was granted by decree in 2010. This type of prospective immunity is most unusual, perhaps unique, and, we believe, undesirable. The only exception is that the new constitution is not required to give immunity for common crimes (such as murder and assault) committed after the date of issue of these Decrees.

The Commission recognizes that immunity has been given in the past and that the immunity required in the new constitution is similar to those immunities and it also understands that the issue of immunity must be considered in the process of transitioning to democracy. However, we are concerned that the people of Fiji have not been consulted in any way on this important matter.

We believe that a better approach would be for the question of immunity to be part of the constitution-making process. If immunity was part of the process, it could be discussed through submissions to the Commission and debate in the Constituent Assembly. Then a solution could be reached that citizens believe would promote the transition to democracy and contribute to a sustained democracy as envisaged in the Preamble to the Decrees.

Thirdly, although the temporary suspension of the requirement of permits for meetings is an important step forward, we are concerned that the current atmosphere in Fiji is not conducive to an open process in which Fijians can debate their future properly. Controls over the media and the wide reaching powers of the security forces in this regard are particularly worrying, as is the fact that generally people have no redress for actions taken against them by the state because the right of access to the courts has been removed.

An important part of the process for the constitution making should be the bringing together of all the people of Fiji to discuss freely, and agree on, the future of their country. It should be an occasion for national reconciliation, acknowledging the violation of human rights and other abuses of power, and to commit the nation to a vision of Fiji based on democracy and respect for human rights, and a determination to overcome the divisions of the past. This task requires the full participation of the people in the process, and the freedom of their representatives in the Constituent Assembly to negotiate a settlement that enjoys wide support in the nation.”

These comments must not be taken lightly. Indeed, they make a highly cogent case for not proceeding with the constitution making exercise as fashioned by Decrees 57 and 58 to which Your Excellency, most regrettably, gave his assent. The Commission clearly recognizes that the process is being controlled by the interim administration to protect their own interest. In the event we urge Your Excellency to consider the alternative which we outline hereunder:

The legitimate Way Forward

24. In our view, the only legitimate course of action that should be followed to return to the rule of law and constitutional rule, is to revert to the Fiji Court of Appeal judgment of 9 April 2009 (*Qarasevs Bainimarama-Civil Appeal No ABU 0077 of 2008s*).

25. The Appeals Court had found that the dismissal of the SDL government and the dissolution of Parliament were unlawful and in breach of the Fiji Constitution; and that the 1997 Constitution was still in force and had not been abrogated. It further held that the appointments of the Army Commander, as Prime Minister, and that of his ministers were not validly made.

26. In acknowledgement of the realities of the situation, however, namely, that a *de facto* government had been in office for the past two years, (in paragraph 156 of the judgment) their Lordships held that:

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

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

27. Your Excellency, we hold that the course of action advised in the judgment should be followed. A caretaker administration should be appointed with the specific mandate to oversee the process of holding general elections and restoring constitutional rule, within a realistic timeframe. This should be no longer than 12 months as we deem it is possible to hold credible elections within that period.

28. We, respectfully, propose that Your Excellency give serious consideration to act on the advice rendered in the Fiji Court of Appeal decision to appoint a caretaker Prime Minister – a distinguished person, independent of the political parties and the regime and one in whom our people can repose confidence - to advise dissolution of Parliament and direct the issuance of writs for an election under Section 60 of the Fiji Constitution.

29. The caretaker administration should then assume full responsibility for the constitutional and electoral process.

30. A President's Political Dialogue Forum (PPDF) can be established following the appointment of the caretaker administration. The mission of the PPDF would be to assist the caretaker government in obtaining consensus on the roadmap for the restoration of constitutional government via free, fair and credible general elections.
31. Our feedback from the people is that there is overwhelming support for the 1997 Constitution to be retained. Any changes to it can be discussed and agreed to in the PPDF. The constitutional Commission can be tasked to write a draft national charter using the 1997 Constitution as the base (reference) document. There is no need to rewrite the entire constitution as the 1997 Constitution was promulgated after wide consultations with the people.
32. Your Excellency, Fiji no longer has the luxury of time on its side. Conditions have deteriorated considerably in the past five years and our people are being held to ransom while those in authority abuse the power that they have usurped.
33. The President's mandate to the interim administration given in January 2007, remains unfulfilled. There has been constant rhetoric from the regime that it will spend the first three years (2009 to 2012) on "reforms" such as rebuilding the economy and fixing up the infrastructure. To date, there is little to show for it. The economy continues to be in recession and much of our infrastructure has deteriorated considerably, both in the urban and rural areas.
34. State finances are more precarious now than they were in 2006; the national debt crisis has deepened with State borrowings having risen sharply in the past three years. We are now borrowing new money to repay old debts.
35. Poverty levels have escalated with at least 40% of the population living in absolute poverty according to credible sources - indicative of the hardship facing our people. Business confidence is so low that private investment levels sank to a worrying 2% of the GDP last year.

36. FNPF's decision to cut pension rates down to 8.7% from the current rates ranging from 25% to 15%, will cause severe hardship to many of the nation's elderly. It is a worry even for future pensioners considering that some 60% of Fiji's workers receive wages that are below the poverty line. In a country where there is no social security net, the majority of Fiji's senior citizens will no longer be able to retire in dignity and on a livable pension.
37. Key sectors of the economy are deeply troubled. The sugar industry is in a highly critical state with sugar production virtually halved, down from 330,000 tonnes in 2006 to 165,000 tonnes in 2011. The Fiji Sugar Corporation is insolvent, surviving on borrowed funds and government grants.
38. The Corporation registered a loss of \$37m for the 2011 financial year, its total borrowings stand at \$218m and it faced debt repayment commitments of \$113m for the year ending 31 May 2012 which it was unable to meet, according to the 2011 report of the independent auditors of FSC.
39. Air Pacific is similarly placed with heavy financial losses -\$92million sustained in the 2010 financial year, reduced to a \$3.6m 'book' loss last year. But the actual loss is believed to be much higher. Recent announcement of a \$11m profit last financial year is viewed with a great deal of scepticism by financial experts in the absence of published audited accounts of the airline.
40. Other troubled public entities are: FNPF, PAFCO, Hardwood Corporation, Telecom Fiji, Post Fiji and Tropik Woods.
41. Official corruption is rife and there is no accountability or transparency in government's dealings. Government accounts and the Auditor General's reports have not been published for public scrutiny since 2008. It is significant that Transparency International gave Fiji zero out of 100 points in a survey about budget transparency in 2010, saying it is "*virtually impossible for Fiji citizens to hold its government accountable for its management of the public's money*".

42. The Asian Development Bank in its latest economic survey, *Outlook 2012* released in April has warned that unless the debt to GDP ratio is reduced significantly, there would be little scope for further fiscal expansion and the provision of public services would be adversely affected. It also warned that Fiji's medium term macro-economic outlook was "weak and foreshadows greater poverty challenges".
43. Your Excellency, urgent action is needed to stabilize State finances, revitalize the economy, restore investor confidence, and deal with the worsening social issues of poverty, unemployment, housing, health care and rising crime levels.
44. The current administration has been unable to demonstrate that it has either the competence or the acumen to deal with these issues. The past five years have illustrated this quite graphically. It has failed on various counts with dire consequences for our people and the future of Fiji as a viable State.
45. The following developments also cause a great deal of anxiety about Fiji's future:
- massive outmigration of skilled people who do not see a future here
 - influx of foreign nationals with questionable intent. There are reports linking them with drugs, prostitution and gambling rackets etc
 - high rate of unemployment among youths
 - the dismantling of democratic entities and traditional indigenous Fijian institutions
 - serious violations of human rights – as cited in independent reports (Amnesty International, UN Human Rights Council, US State Department Report on Human Rights, ILO Report on Trade Union rights – ILO Case No. 2723)

- promulgation of draconian decrees which curtail or completely deprive the workers of their rights to organize and bargain collectively – a gross violation of ILO Conventions 87 and 98 which have been ratified by Fiji
 - interference with the independence and integrity of the judiciary
 - disrespect for the rule of law as clearly demonstrated by the promulgation of various draconian decrees that debase human rights and compromise the rule of law, including interference with due judicial processes
46. The entire nation is held to ransom by a small group of individuals who have usurped lawful authority for their own benefit. These same individuals continue to use the Military and the Police to remain in power.
47. Failure to come up with a credible roadmap to restore democratic rule in the past six years has resulted in our isolation from the international community. We have been suspended from the Commonwealth and the Pacific Islands Forum, while hundreds of millions of dollars of much needed development aid has been withheld by the European Union.
48. This is the stark reality about our Fiji today. Ordinary people are getting restive as they find it difficult to meet even the basic needs of their families- to put food on the table and to provide for other essentials. The rising rate of malnutrition among our children, increasing incidence of diseases such as TB, substance abuse and suicides are all indicative of the worsening poverty situation in our country.
49. Your Excellency, we call on you as the Head of State with executive authority to take action now to halt this rapid decline of our nation. This can be done through steps we have proposed in this petition. We entreat you, respectfully, to act with due urgency in the interests of Fiji and her people.