

THE
LAW
SOCIETY
CHARITY



PUTTING IDEALS
INTO ACTION



FIJI: THE RULE OF LAW LOST

Report by the Law Society Charity
January 2012

1 THE LAW SOCIETY CHARITY

- 1.1 The Law Society of England and Wales represents approximately 170,000 solicitors and 11,000 firms. It is the Approved Regulator of the Profession and is responsible for the oversight of the Solicitors Regulatory Authority to whom it has delegated its regulatory functions. In 1974 the Society set up the Law Society Charity, which operates independently of the Society but in conjunction with it. The Charity funds and provides expertise to organisations whose work is related to the law and the legal profession with a view to furthering law and justice. It has a particular interest in legal education and human rights. The Charity funds the operational human rights activities of the Law Society. Its Board is comprised of solicitors, fifty percent of whom (including the Chair) are members of the Law Society Council while the other fifty percent are drawn from a wide range of members of the profession.

2 FIJI

- 2.1 Fiji is a former colony of the United Kingdom, which became independent in 1970. The population comprises principally of indigenous Fijians and Indo-Fijians forming respectively approximately 60% and 40% of the population. There has been a history of ethnic divisions since independence. The country has been the subject of four military coups. The first coup took place in 1987 after the election of the first Indo-Fijian majority government. This failed in May 1987 but a second coup in September 1987 proved successful. The elected government was deposed; the Constitution, which had been in place since 1970 was revoked, and Fiji became a Republic. In 1990 a new Constitution was adopted which reserved majorities for indigenous Fijians in both Houses of Parliament.
- 2.2 Lieutenant Colonel Sitiveni Rabuka, the leader of the abortive coup in May 1987 and the successful one in September 1987, became Prime Minister in 1993. There followed in 1997 a review of the Constitution, which led to a situation which guaranteed indigenous Fijians dominance in most senior government and administrative positions.
- 2.3 In 1999, following elections under the amended 1997 Constitution, a coalition government was formed led by an Indo-Fijian dominated Labour Party. This government was dissolved following a coup attempt led by George Speight a Fijian nationalist. Speight had occupied Parliament on 19 May 2000 and held the Prime Minister, cabinet members and government members of Parliament hostage for 56 days. The President prorogued Parliament for six months on the 27 May 2000. Military intervention followed when Commodore Bainimarama appointed himself head of an interim military government and purported to abrogate the 1997 Constitution. The President treated the abrogation of the Constitution as meaning that his term had elapsed. The military government appointed a Prime Minister by decree and gave, also by decree, the Great Council of Chiefs power to appoint an interim President, which they did.
- 2.4 The status of the 1997 Constitution was litigated in *Republic of Fiji v. Prasad*. At first instance, the (then) Justice Gates of the High Court of Fiji found that the 1997 Constitution had not been abrogated. This decision was confirmed by the Court of Appeal, which found that the 1997 Constitution had not been abrogated and was still the supreme law of Fiji. Further elections followed and

democratic government was restored. Tensions continued between the government, and the military, led by Commodore Bainimarama.

- 2.5 On 5 December 2006 Commodore Bainimarama proclaimed himself President and dismissed the Prime Minister. A state of emergency was proclaimed and he appointed an interim Prime Minister. This was followed on 04 January 2007 by the installation of Ratu Josefa Iloilo as President by Commodore Bainimarama. The interim Prime Minister resigned and on the 18 January 2007 President Iloilo appointed Commodore Bainimarama his interim Prime Minister. The state of emergency remained in place until 31 May 2007; it was re-imposed in September 2007 and lifted again on 06 October 2007.
- 2.6 The Fiji Parliament has not sat since it was dissolved by President Iloilo following the December 2006 coup.
- 2.7 The legal status of the Government was challenged in the courts, unsuccessfully at first instance, but in April 2009 the Court of Appeal found the coup unlawful. At this point Commodore Bainimarama stepped down as Acting Prime Minister. This, however, was immediately followed by President Iloilo suspending the Constitution, assuming governance, revoking all judicial appointments and appointing Commodore Bainimarama as Prime minister.
- 2.8 On the 30 July 2009 Brigadier General Ratu Epeli Nailaikau became Acting President on the retirement of President Iloilo who was then 88 years old. President Nailaikau was sworn in as President later in the year.
- 2.9 Fiji has been governed by decree since April 2009.
- 2.10 The Public Emergency Regulations (PER) 2009 have been extended every 30 days by the Government since April 2009. These give the State control of:-
 - the movement of every person;
 - the release of press statements, publications and broadcasts of all media outlets;
 - every gathering of three (3) or more persons;
 - meeting and/or procession in public places

3 BACKGROUND TO THE REPORT

- 3.1 In 2010 the Commonwealth Law Association approached the Law Society Charity to support the attendance of Graham Leung, a former President of the Fiji Law Society, at the Commonwealth Law Conference to be held in Hyderabad in February 2011. The Charity agreed and Mr Leung was given a platform at the conference to deal with issues relating to the rule of law in Fiji. The Chair of the Charity was also invited to address the conference on the issue of the dismissal of the greater part of the Fijian judiciary and the removal from the Fijian Law Society of the registration of lawyers by the Military Government. The Fijian authorities had imported a number of judges from other jurisdictions, principally Sri Lanka, to replace those whom it had dismissed. These judges were employed on relatively short-term contracts. The issue as to whether their position could be examined under Home Bar Rules was raised. It is understood that the Commonwealth Law Association has set up a sub committee to examine this.

- 3.2 The Charity was aware that the Fijian Government had denied access to the UN Rapporteur to investigate matters in 2009 and further had declined to admit a high powered delegation from the International Bar Association also in 2009. This delegation produced a report entitled "*Dire Straits: a Report on the Rule of Law in Fiji*" which had to be based on interviews conducted externally. There seemed to be little prospect of any change of position by the Fijian Government to allow independent scrutiny.
- 3.3 The Charity decided to take advantage of a private visit to Fiji by its Chair in November 2011 to evaluate the position there by conducting interviews with lawyers and others within the country with a view to publishing a report. The focus of the report was to be on what action could be taken by external law societies and bar associations to support the Rule of Law in Fiji.
- 3.4 Prior to departure, the Law Society and the Charity were alerted by Law Asia, the International Bar Association and the American Bar Association to the fact that the Fiji government was denying the Fiji Law Society a permit to hold its annual convention.
- 3.5 En route to Fiji information was received that the Attorney General for Fiji intended to prosecute the proprietor and editor of the Fiji Times for contempt in relation to a suggestion of a lack of independence of the Fijian judiciary.

4 METHODOLOGY

- 4.1 Fiji was visited between 13 and 18 November 2011. The visit was confined to the main island Viti Levu owing to time constraints. Interviews were conducted with senior members of the British High Commission, former members of the judiciary and prosecuting authorities, representatives of NGOs and a wide range of lawyers including representatives of the Fiji Law Society, large commercial firms, medium firms, sole practitioners and employed lawyers. The process was complicated by the requirements of the PER for a permit for a meeting of any more than three persons and hence an interview could not take place with more than two individuals at a time. This, not unnaturally, created significant problems. Attempts were made to speak to as wide a cross section of the general population as possible on matters relating to the Rule of Law.
- 4.2 This report has benefited from the work of the International Bar Association and in particular its March 2009 Report "*Dire Straits: a Report on the Rule of Law in Fiji*". Materials provided by the Citizens Constitutional Forum have also been of considerable assistance.
- 4.3 Desk based research was also conducted and contact made with Fijian exiles and other interested parties.
- 4.4 The Charity sought advice from various sources on whether to approach Chief Justice Gates or Attorney General Sayed-Khaiyum for an interview in Fiji. The clear advice from all those approached was against this on the basis that the Government controlled media would present such meetings as an endorsement of the regime by the Law Society of England and Wales.
- 4.5 To protect those Fijians who assisted in the preparation of this report the sources of the information in it has not been attributed to individuals. Any inaccuracy in reporting is the responsibility of the Chair of the Charity, the author of the report.

5 RULE BY DECREE

- 5.1 The Decree system is governed by the Executive Authority of Fiji Decree 2009, which provides for the President to assent to new decrees.
- 5.2 What actually happens is that the Cabinet considers and approves decrees in secret which are then ratified by the President.
- 5.3 Practical difficulties are created by the frequent amendment of decrees and their backdating.
- 5.4 The system is neither transparent, certain, predictable, accountable nor democratic. It is not in accordance with the Rule of Law.
- 5.5 The Administration of Justice Decree 2009 removes the jurisdiction of the Courts to accept, hear and determine, or in any other way entertain, any challenges whatsoever (including any application for judicial review) by any person to the validity or legality of any Decrees made by the President as from 10 April 2009, and any Decrees as may be made by the President.
- 5.6 There is a Practice Direction posted as a notice on the walls of the Courts indicating that no proceedings challenging the constitutionality of the Government's acts can be issued. The Chief Registrar will issue a Certificate of Termination of Proceedings if any such cases slip through the net.
- 5.7 The population has no lawful method of challenging the actions of the Government.

6 THE POLITICAL BACKGROUND

- 6.1 Fiji has a small and fragile economy supported by tourism from Australia and New Zealand with some effort being made to engage with the Chinese. The other main activities are mining and sugar production.
- 6.2 The standard of living is declining but although there is visible poverty this is not so extreme, as seen in Africa, India and parts of Latin America.
- 6.3 There is no institutionalised opposition. Fiji is geographically isolated and has a relatively small population with few large towns and no major cities. The Government is able to control the people by a mixture of populist measures and intimidation. There is reluctance at all levels of society in Fiji to engage in any conversation relating to governance or legal issues at even the most basic level.
- 6.4 In order to grow, the economy needs investment and confidence. The link between the Rule of Law and economic confidence could provide an incentive for change.

7 THE ATTORNEY GENERAL

- 7.1 Aiyaz Sayed-Khaiyum is the Attorney General and has been since the assumption of power in 2009. He also served in the Administration between 2007 and 2009.

- 7.2 He also holds the portfolios of Minister of Justice, Anti-Corruption, Public Enterprise, Industry and Trade, Civil Aviation and Tourism and Communications. He receives a salary for each portfolio.
- 7.3 Commodore Bainimarama enjoys a similar arrangement for the multiple portfolios he holds.
- 7.4 The Attorney General is widely regarded as number two in the Regime and is seen as providing it's intellectual muscle.
- 7.5 In his various capacities he is responsible for lawyers and the Courts.

8 REGISTRATION OF LAWYERS

- 8.1 The Law Society of Fiji was responsible for the registration of lawyers until the implementation of the Legal Practitioners Decree 2009 which denuded the Law Society of this power and gave it to the Chief Registrar. The Law Society was reduced to the status of a voluntary organisation and the Government took over the issue of practising certificates.
- 8.2 The profession in Fiji is relatively small. The Law Society had issued 336 practising certificates in February 2009 and 331 in the previous year. In practical terms this meant that the Society could only support a very limited staff.
- 8.3 The first Chief Registrar to take office after the Decree was Major Ana Rokomakoti, a former Senior Legal Officer with the Fiji military. On 23 May 2009 she removed the files of the Fiji Law Society after threatening the staff with arrest if they resisted. This was despite the offer of an orderly handover by the Society. All lawyers had to reapply for their practising certificates by 15 June 2009 or lose their right to practice at the end of June. Hence all Fiji lawyers had to have the approval of a government official to practise. Her lack of independence was underlined when she was arbitrarily removed from office on the 25 June 2010.
- 8.4 Major Rokomakoti's successor is Mrs Irani Ganga Wakihta Aruchchi, appointed on an acting basis in June 2010 and on a full basis on the 10 May 2011. She is on a 3-year contract. Mrs. Aruchchi is Sri Lankan and was recruited as a Resident Magistrate taking office on the 8 January 2010 after the removal of three other magistrates. Like her predecessor, her tenure is entirely at the will of the Government.
- 8.5 The Fiji Law Society protested about the removal of its powers and the manner of the same with particular reference to the impact on the independence of the profession and the power of the regime to undermine it.
- 8.6 The profession reacted in different ways. Graham Leung took a stand on principle refusing to apply for a practising certificate on the basis that it would give recognition to an illegal Regime. He is now an exile being unable to work as a lawyer in Fiji. This option was not available to the majority of lawyers, even if they were active opponents of the Regime, and Leung was the only one who did not sign up. There were many who did so with the utmost reluctance believing it was the only option in their clients' interests, despite the unlawful usurpation of government. One firm, it was reported, had been able to represent a client targeted by the Regime who could not be helped by Graham

Leung owing to his lack of a certificate. The economic pressures not only affected the lawyers but also all their staff members who would face dismissal if practices closed.

- 8.7 Opinions offered during the course of the visit differed on how efficient the Law Society had been in relation to the registration process. The clear impression was that its administration had at least been adequate. It is accepted that from a clerical point of view the new process is at least as efficient. All lawyers interviewed who ranged between tacit supporters of the regime, through the apathetic, to outright opponents were conscious of the power held over them by the Government through its control of the registration process.
- 8.8 The Government did provide a substantial sop to the profession by slashing the practising certificate fees thus transferring the cost of administration to general taxation.

9 DISCIPLINARY PROCESSES FOR LAWYERS

- 9.1 In September 2009 former High Court Judge John Connor was appointed Commissioner of the Independent Legal Services Commission, the body now designated to hear complaints against lawyers. Under the Legal Practitioners Decree, charges are brought before the Commission by the Chief Registrar. The Chief Registrar can pursue charges of her own initiative even if withdrawn by a complainant.
- 9.2 The Law Society of Fiji had previously been responsible for dealing with complaints against lawyers and the cost thereof. It is apparent that its efficiency in this area was limited by the resources available to it.
- 9.3 The Chief Registrar is quoted as indicating that there were 348 outstanding complaints to be dealt with as at 1 September 2009. This seems a very high figure given the small size of the Fiji profession.
- 9.4 There seems little doubt that there was cause for public dissatisfaction with the previous scheme and that the Government one is far better resourced and thus quicker. In simple "client against lawyer" issues the system works well and Commissioner Connor is said to be effective and efficient.
- 9.5 Problems arise, however, with cases involving the Government directly or indirectly or where the lawyer concerned is an opponent of the Government or involved with a case or a client in which the Government perceives an interest.
- 9.6 Commissioner Connor is regarded as a supporter of the Regime and his acceptance of the post in any event calls into question his independence of it. The control of the prosecution system by the Chief Registrar makes it susceptible to government interference.
- 9.7 The power of the Commission under the Legal Practitioners' Decree to strike off or to impose a fine of up to \$500,000 is a powerful incentive to lawyers to avoid involvement with it.
- 9.8 The most high profile individual to appear so far is Dorsami Naidu who is President of the Fiji Law Society. He has been vocal against the Government and on 14 April 2009 was detained by the police for 24 hours under the Public Emergency Regulations for assembling peacefully outside the Lautoka High

Court building. The professional misconduct charges were brought by the Chief Registrar in February 2010.

- 9.9 Hemendra Nagin was the lawyer defending the then owner of the Fiji Times targeted by the Government and imprisoned. Nagin had been a leader of a petition against the forcible removal of the Chief Justice by the Regime in 2007. In October 2009 professional misconduct charges were brought against him which resulted in a fine of \$15,000. Fiji Law Society sources indicate that the charges were unsustainable and would not have been brought under an independent system.

10 THE FIJI LAW SOCIETY CONVENTION 2011

- 10.1 On 28 October 2011 LAWASIA issued a statement protesting against the refusal of the Fiji Government to allow the annual convention of the Law Society to take place. The statement was ignored.
- 10.2 This decision needs to be seen in the context of the campaign to undermine the Society and through it the independence of all elements of the legal profession in Fiji. The Society has been removed from Judicial Services Commission membership which deals with the appointment of judges.
- 10.3 Lawyers in Fiji have to complete 10 hours Continuing Legal Education (CPE) per year as a condition of practice. The traditional provider has been the Law Society. Sessions were provided at the convention.
- 10.4 The Society had been granted a permit to hold stand-alone CPE sessions over 2 days 5/6 November 2011. The Police Commissioner revoked the permit at short notice giving no grounds for the revocation.
- 10.5 In December the Attorney General hosts a conference at which 10 hours CPE are available. Attendance at this event would be limited if CPE could be provided by the Law Society but in its absence virtually the whole profession must attend to get their CPE to be able to practise.
- 10.6 The Attorney General is said to achieve a number of things by the use of the PER to ban the convention. A forum for informed persons aware of the unlawful position of the Regime and including opponents of it is avoided. The status and financial position of the Law Society is further undermined. The Government controlled media is able to present the substantial attendance of the profession at his conference as support for him and the Regime.

11 TARGETING OPPONENTS

- 11.1 There is clear evidence of abuse of power to target perceived opponents of the Regime including those who simply decline to acknowledge its legality or as part of their professional duties represent such persons.
- 11.2 Munro Leys is the largest firm in Fiji by a factor of 3. It is the largest South Pacific firm. It is held by its peers both inside and outside Fiji to be the leading commercial firm in the country. It is perceived by the Regime to be non-supportive.
- 11.3 The Firm had been the main provider of legal services to the Government of Fiji but now all that work has been taken away and given to those firms whom the Regime believes to be more pliant. Permits for continuing education events,

where Munro Leys partners are due to speak, are revoked. Examples raised during the visit were directors duties for the Central Bank and tax for the Institute of Accountants brought to attention for this report by those bodies. Munro Leys partners have been detained and treated violently by the Regime.

- 11.4 Imrana Jalal was a human rights lawyer serving as an adviser to the United Nations Development Program and Human Rights Adviser for the Secretariat of the Pacific Community.
- 11.5 She was charged with offences relating to operating a restaurant without a licence. These offences attract the maximum of a small fine and would normally be prosecuted by Suva City Council. In her case the charge of failing to obey an order was included which carries imprisonment. It was prosecuted by the Fiji Independent Commission Against Corruption (FICAC) despite the fact that the Decree empowering this did not come into force until 2 months after the charges were brought. She was ordered to surrender her passport despite the matters being administrative in nature. She was prevented from being able to function as an independent lawyer. She was eventually acquitted, but now lives in exile.
- 11.6 The use of overcharging to control opposition is not limited to action against the Lawyers. There has been an outbreak of graffiti offensive to the Regime. Instead of charging the alleged perpetrators with criminal damage or a like offence they have been charged with sedition.

12 PROSECUTORS

- 12.1 Josaia Naigulevu the long-standing and respected DPP of Fiji was dismissed along with the judges in April 2009. He was replaced by a young magistrate John Rabuku as Acting DPP in June of that year.
- 12.2 Rabuku was himself replaced by former military lawyer Aca Rayawa, who became Acting DPP in January 2010.
- 12.3 There followed a series of dismissals of prosecutors and by April 2010 there were only 5 in the office who had been appointed before 2006.
- 12.4 In October 2010 Rayawa was dismissed and he was replaced by Ayesha Jinasena a Sri Lankan who became DPP on a 2-year contract. The dismissal of 2 more senior lawyers followed in December.
- 12.5 The office of the DPP and that of FICAC became populated with the newly qualified and lawyers imported from Sri Lanka. The DPP was seen by her staff as largely an administrative figurehead and ineffectual in the control of casework.
- 12.6 The overall responsibility for the dismissal of the prosecutors lay with the Attorney General. Reasons were not given. Lawyers from all sectors of the profession indicated that the outcomes desired by the Regime and the police were not being achieved and that independent judgement was not seen as desirable.
- 12.7 It was suggested during the course of the visit that the possibility of the re-engagement of some of the prosecutors may arise and that if so they would apply the same standards of independent judgement as before, even at the risk

of further dismissal. It is clear that some of them are experiencing financial hardship. It would take a very strong individual to resist the economic and other pressures available.

- 12.8 Shortly after the visit on 24 November 2011, Ayesha Jinasena was sacked and ordered to leave the Country. The reported reason was a lack of confidence by the police.
- 12.9 The new DPP is Christopher Pryde, a New Zealander who was previously, Solicitor General in the Government.

13 THE JUDICIARY

- 13.1 There had been a significant erosion of the ranks of the judges, in particular at a senior level, prior to the revocation of all appointments in April 2009.
- 13.2 The Head of the judiciary is Chief Justice Gates. He had been appointed Acting Chief Justice after the last coup. In October 2007 he commenced hearing *Qarase v. Bainimarama*, which challenged the legality of the Regime's actions following the coup, as head of a panel of 3 judges in the High Court at first instance. Judgement was not handed down until over a year later when the Court found in favour of the Regime and Acting Chief Justice Gates in effect reversed himself in *Republic of Fiji v. Prasad*. It was the reversal of the *Qarase* decision by the Court of Appeal which brought on the dismissal of the judges.
- 13.3 The IBA Report of 2009 deals in detail with the finding that the then Justice Gates was found to have perjured himself by the Fiji Court of Appeal in connection with evidence given to it about a criminal trial over which he had presided in 2004.
- 13.4 The judges dismissed in April 2009 were given no reasons, no notice and no compensation for loss of office. It is apparent that their sin was to comply with their oath of office and to act independently rather than any misconduct. It is difficult to conceive of a more obvious attack on judicial independence.
- 13.5 Some judges suffered financially as a result whereas others have found more lucrative positions. It was clear from the interviews that the judges had a strong commitment to public service and had gained considerable job satisfaction from their work.
- 13.6 The loss of so many judges presented the Regime with practical problems in relation to continuing the operation of the courts. Chief Justice Gates, as he now is, has used his personal connections with Sri Lanka to recruit judges from there in large numbers on short term but renewable contracts. The quality is held to be variable. Maintaining independence from government in their position must be difficult.

14 The FIJI TIMES

- 14.1 There are major concerns as to the lack of freedom of expression. The present position of the Fiji Times serves to illustrate the point.
- 14.2 It is interesting to note that the Fiji Sun which supports the regime is the only Fiji newspaper made available on the national airline Air Pacific.

- 14.3 There is a government censor in each media outlet. In those circumstances how and why is the Attorney General seeking to proceed against the Proprietor and Editor of the Fiji Times for contempt for suggesting that the Fiji judiciary is not independent?
- 14.4 The answer would be comic if it were not tragic. The offending article appeared in the sports pages. It was an article which had previously appeared in a New Zealand newspaper and the offensive words were a direct quotation from the General Secretary of the Oceanic Football Confederation. A government censor had considered the relevant edition of the Times giving comfort to it but missed the piece as it was in the sports pages. The proceedings are ongoing.

15 CONCLUSIONS

- 15.1 That the Rule of Law no longer operates in Fiji.
- 15.2 That the material benefits enjoyed by members of the Regime, its supporters and those holding office under it will make it resistant to change.
- 15.3 That its relative isolation makes it less susceptible to outside influence and pressure than similar regimes.
- 15.4 That the power of the Military and the provision of patronage make internal opposition very difficult.
- 15.5 That there is no freedom of expression and detailed control of all media outlets.
- 15.6 That there is no peaceful and lawful way to challenge government decisions.
- 15.7 That there is no democracy.
- 15.8 That the independence of the judiciary cannot be relied on.
- 15.9 That the competence and independence of the prosecution service has been reduced to an unacceptable level.
- 15.10 That government controls and restrictions make it virtually impossible for an independent legal profession to function appropriately.

16 RECOMMENDATIONS

It is recommended that:-

- 16.1 The Law Society of England and Wales and the Bar Council reaffirm their recognition of the Law Society of Fiji as the representative organisation of the Fijian Legal Profession and urges this position upon the International Associations on which they are represented.
- 16.2 The Law Society of England and Wales seeks British Government funding to provide capacity building to the Fiji Law Society in relation to the registration and discipline of lawyers such assistance to be offered on a government-to-government basis.

- 16.3 The Law Society of England and Wales and the Bar intervene on behalf of individual lawyers whose human rights are impinged in Fiji and urge other national associations to do likewise.
- 16.4 All national and international law society and bar associations urge their member firms to resist efforts to discriminate against individual firms in Fiji in transactions in which the member firms are involved.
- 16.5 The Commonwealth Lawyers Association pursues the investigation as to whether those accepting office with the Regime can have their conduct reviewed under home bar rules and urges its membership organisations to do likewise and further considers how the issue may be addressed in Sri Lanka.
- 16.6 The Bar Council in England and Wales and the Inns review the membership and qualifications of those holding office under the Regime and consider whether they continue to be justified and that other national organisations do likewise.
- 16.7 That Rule of Law issues in Fiji be monitored on a continuing basis with regular reviews of developments by the Commonwealth Lawyers Association and the International Bar Association.
- 16.8 All national law societies and bars lobby their governments to press for measures to be taken by the Fiji Government to ensure a return to the Rule of Law.

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