

Trashing the Ghai Constitution: the positives

Professor Wadan Narsey

14 January 2013.

How can there be positives, you might ask? But first note, even diehard supporters of the Bainimarama Regime must be worried that the Bainimarama Regime is trashing the Draft Constitution, and is going to write its "own".

After all, the Regime itself appointed Professor Yash Ghai (Khaiyum's teacher at Hong Kong University) as Chairman, and the Commission was stacked with three known Regime supporters (Satendra Nandan, Taufu Vakatale and Penny Moore), none of whom have ever disagreed with the review process with its country-wide consultations, or the final product.

Penny Moore, to her great credit, has defended their Draft Constitution, while Vakatale has maintained a discrete silence. Nandan merely complained that Professor Yash Ghai, the Chairman of the Constitution Commission had released the "people's constitution" to the "people" without a collective decision by the Commission- an "illegal" act, roared the Military Regime.

The international community will note that the Draft Constitution abided by all the rigid requirements of the Regime's Decrees 57 and 58 of 2012: immunity for those supporting unlawful governments from 2000 to 2014 (which many opposed), a fair electoral system for Parliament where each person's vote was of equal value, and a clear enunciation of human rights.

Trashing this Ghai Draft Constitution may seem a negative to many, but it is ironically, taking Fiji forwards.

The dubious grounds for rejection

While one could easily find a few faults with the Ghai Draft, the arguments put forward by the Military President in rejecting the Ghai Draft, were totally without foundation and merely reveal the Regime's desperation in clutching at straws.

Nailatikau's most serious allegation was that "it is an anathema to democratic representation that the Ghai Draft allows for, at the very least, a 144 member body of unelected people [the People's Assembly] deciding on key issues pertaining to the people of Fiji".

This was blatantly false. Ghai's "People's Assembly" would not have any real legislative or governmental powers, which would all still reside with the democratically elected Parliament.

The only real "power" the People's Assembly might have had would be the election of the *largely symbolic* President. *This aspect could easily have been changed by the Constituent Assembly, should they see fit.*

All know that that the current President, the Prime Minister, the Attorney General, and their ever-changing military spokesmen *are all unelected people who have obtained their positions through a military coup and guns.*

All know that the Regime's Decree 57 had stated that the final decision on the Draft Constitution would be made by a "Constituent Assembly" *which would be completely appointed by Commodore Bainimarama, with nowhere the broad democratic element that the People's*

Assembly is being given in the Draft Constitution. and only after vetting by the Chief Justice's Tribunal.

Who could believe the President's allegation that the Regime's own Constitution Commission was over-influenced by foreign donors and local vested political groups?

The Regime which professes a belief in genuine people's democracy, felt desperate enough to pass a Decree stopping the Yash Ghai Commission from discussing their Draft Constitution with the people of Fiji, as had been set out originally in their Decrees, while their "legal team" will now do the job.

The Regime's contempt for the people of Fiji and genuine democracy could not be clearer.

The Regime's real worries

The real worries for the Military Regime would have been that: the Draft Constitution did not grant immunity for abuse of human rights; it granted immunity only to those who took an oath renouncing their support of illegal regimes (what a litmus test for the guilty!); the Regime would have to give way to a caretaker government six months before the 2014 elections; and there would be an end to the tenure of the current President.

The Bainimarama Regime was in a panic that the Draft Constitution states clearly that all members of the security forces (army, police and prisons) are explicitly required to not obey unlawful orders from their superiors. This requirement would have come into effect from the day that the President gave his "assent" to the Draft Constitution.

Another revealing positive is that mid-way through the Commission's work, the Regime promulgated yet another decree that stopped the Commission's exercise to establish *which of the Regime Decrees must be modified in order to be consistent with the new constitution.*

Such an exercise was absolutely necessary if there was to be full respect for the fundamental human right of access to the courts, and legal continuity in the fair administration of justice in Fiji, with total adherence to constitutionality and the law. The Draft Constitution even went so far as to outline which decrees needed to be changed, fully or partly (Schedule 7).

It would have worried the Regime that Schedule 6 for the Transition Arrangements states in Clause 24 (Judicial proceedings and other pending matters) that "(1) Any proceedings before any court, tribunal or commission that had arisen under any law and that had been terminated by order at any time before the General Effective Date, are revived and may be proceeded with under this Constitution".

This would have restored the basic rights to go to court with just grievances, of relevance to FNPF pensioners whose Burness/Shameem case already before the courts was purportedly terminated by a Decree and also international owners of investments at Natadola and Momi, challenging the appropriation of their assets by a Decree (and several other cases).

While this would have reassured the international investing community, how revealing that the Military President, with reference to the investments at Natadola and Momi, ridiculously alleged that "The Ghai Draft can lead to financial and economic catastrophe and ruin".

Judiciary not prepared to "do the dirty"?

There's another positive puzzle: the Regime's Decree 57 had insisted that after the Constituent Assembly approved the Draft Constitution, it would go to a 5 person Tribunal appointed by the Chief Justice, which would assess it in relation to the Decree requirements, and if necessary, refer it back to the Constituent Assembly for the required changes. Already fool-proof, you might have thought.

For the Regime to circumvent this whole process suggests that the Regime's legal advisers (including those lurking in the shadows) must have concluded that they would be on totally tenuous grounds, visible to all, if they made any changes to the Draft Constitution via the Chief Justice's Tribunal.

It would seem that Professors Ghai and Murray, and their group of legal advisers, were so thorough in ensuring that their final product was legally "water-tight", that the Regime's Chief Justice (and the 5 person Tribunal) were intimidated out of their "vetting" role, the full details of which would have been completely clear to the public.

Whatever the facts of the matter, it is indeed positive that the Regime found it necessary to short-circuit the process, and pass the Ghai Draft to Khaiyum and unknown advisers to the Solicitor General's office, to do their hatchet job, before it is sent for rubber-stamping to the "people's Constituent Assembly", yet to be appointed by Commodore Bainimarama.

Once more, passing the buck to the "President"

It is worth noting the beginning of Commodore Bainimarama's speech in rejecting the Ghai Draft:

"I firstly wish to thank and acknowledge the leadership and wisdom shown by His Excellency our President. Our vision to create a truly democratic nation under an elected parliamentary system will be etched in history, thanks to His Excellency our President. As requested by His Excellency, the Government's legal team will amend the Ghai Draft".

Khaiyum is now also repeating the mantra- please respect the "President's wishes" in ordering the revision of the Ghai Draft.

Fiji will remember previous activities conducted under the "mandate" and "powers" of a previous President, Ratu Iloilo, all proven to be without substance eventually:

- * the NCBBF and Charter exercise by John Samy and Archbishop Petero Mataca;
- * the President's Political Dialogue Forum by the "interlocutors" Robin Nair and Sitiveni Halapua;
- * the justification of the 2006 coup by Gates, Pathik and Byrne;
- * the 2009 purported abrogation of the 1997 Constitution by Iloilo himself.

The "President" yet again acquires autonomous authority, whenever it suits Bainimarama, and Khaiyum and advisers behind the scenes who do not want to be seen to get their hands dirty.

The sad difference between then and now, is that the current President is not senile like Iloilo, but fully aware of his faculties and the deep sorry hole into which he is digging Fiji.

The world also knows that Ratu Epeli Nailatikau, who once failed to be elected by the Great Council of Chiefs to the post of even Vice President of Fiji, is himself the embodiment of the "old undemocratic unelected chiefly elites" who the Regime allegedly wishes to eliminate, in their smokescreen Holy Grail of a new, meritocratic and democratic Fiji.

More positives

While many have been skeptical of the Military's objectives in doing the coup, the Regime has had enough supporters (a few well-intentioned), to be able to hang on to the reins of government for the last six years.

But the Regime's ruthless treatment and rejection of its own choice of internationally renowned and respected law professor (who six years ago seemed to be sympathetic to the "Bainimarama cause") will alienate even more supporters- individuals and business interests alike.

It is a positive sign that many of the former Bainimarama supporters from the unions and Catholic, Hindu and Muslim religions have become vociferous opponents of the Regime (fill in this list) or have silently disappeared from view (fill in this list), and note that both lists are getting longer.

Of course, some Regime supporters (individuals and business people), will continue regardless of any fraud that the Regime commits on the nation, but this list (fill it in for future reference) will also shrink if decent Fiji people ever get around to socially ostracizing them, as happens in morally and ethically strong societies around the world.

The international donor community (Australia, NZ, EU and US), who reluctantly accepted the Regime's "Roadmap" of democratic constitutional reform and free and fair elections by 2014, will have had their hopes dashed and their financial support for the Regime's constitution review thrown in their faces, but they will grit their teeth and continue, no doubt with a more steely appreciation of the untrustworthiness of the Bainimarama Regime.

Current supporters like India and China will know that their own reputations and their wider interests in the South Pacific are being hurt by their continued support of the Bainimarama/Khaiyum Regime, which future democratically elected governments will keep in mind (see my accompanying article on "China and India, the elephants in the Fiji room").

Over the next six months, meticulous comparisons between the Regime's Constitution and the Ghai Draft Constitution- what exactly is changed, added and left out - will reveal more facts to Fiji and the world, about the Regime's "real Roadmap". There will be no place to hide.

Take as positive that all the political parties in Fiji are now united in their opposition to the Regime, and will probably adopt a common strategy to the Constituent Assembly.

They will either (a) all participate and insist on supporting the un-amended Ghai Draft Constitution. OR (b) all boycott and watch with deep interest (and remember) who exactly are the "people's representatives" who will brazenly turn up to rubber-stamp the Military Regime's Constitution.

Either way, there is a definitely a new ball game in town.