

## 23. Mythic constitutionalism: Whither Fiji's course in June 2007?

**Joni Madraiwiwi**

Reflecting on the statement made by the commander of the Republic of Fiji Military Forces (RFMF), Commodore J. V. Bainimarama, upon seizing power and ousting the multiparty government of Prime Minister Laisenia Qarase on 5 December 2006, one is bemused by some of the commander's rhetoric. In his remarks he stated *inter alia*:

... The RFMF could have carried out unconstitutional and illegal activities, but had not done so and will not do so. It believes in the rule of law and shall adhere to the Constitution. It not only adheres to the rule of law and Constitution, but more importantly believes in adherence to the spirit of the law and the Constitution ...

There appear to have been three main reasons for the military intervention: Alleged widespread corruption and abuse of office reflected in the military's oft-repeated threat to 'clean-up' the government; the barely disguised hostility between the government and the military over the former's alleged involvement with and condonation of those associated with the storming of parliament and taking of hostages in May 2000; and the expanded role the military saw for itself following those events. The commander and his close coterie of advisers saw the military as the ultimate guarantor of the peace, a perception echoed constantly in public statements and private discussions.

With the military arrogating for itself the role of guardian and protector, the police force has become increasingly demoralized. The reform and rebuilding of morale implemented by Police Commissioner Andrew Hughes have dissipated gradually since his departure in November 2006. The military has blurred the boundaries between policing and security roles at the cost of police independence and autonomy. Paradoxically, the business community has been quick to embrace the expanded reach of the military. They welcomed the presence of checkpoints and the involvement of the military in policing as having a salutary effect on crime. Such tunnel vision is understandable but short-sighted. There has been a real undermining of the rule of law in the actions of the military. Neither has crime diminished, it has simply relocated elsewhere.

The breaches in human rights since the coup have been on a wide scale, culminating in the deaths of 41-year-old Nimilote Verebasaga and 19-year-old Sakiusa Rabaka. There have been two related objectives. The first was to intimidate and frighten opponents of the military. In this regard, skills acquired

in soldiering abroad have been deployed. The second objective was to consolidate further the role of the military, which readily attended to inappropriate calls for their intervention from many Indo-Fijians and other citizens frustrated or dissatisfied with the level of police investigations on their behalf. The helplessness of the ordinary citizen was heightened by the inexplicable stance assumed by the Fiji Human Rights Commission in (FHRC) in favour of the military. That has continued to the present day. It was the director of the FHRC who issued an elaborate justification for the military's actions of 5 December 2006, one that has emboldened and sustained the military in its peculiar understanding of what adherence to the constitution means.

As self-appointed guardians of the public interest, the military and the commander were able to enlist a disparate coalition to their cause. Between the 2001 election and the eve of the coup, the military played a generally useful, if somewhat vocal, part in the general debate on issues of national concern. There is little doubt that this helped to moderate the *Soqosoqo Duavata ni Lewenivanua* (SDL) government's inclination to pander to the nationalist and more extremist elements in its midst. When the commander finally mounted the coup, he had a ready constituency – beyond the command structure of his officers and foot soldiers. This consisted of the Fiji Labour Party and a large majority of the Indo-Fijian community, scarred by the events of May 2000 and by a sense of alienation from the SDL government and its policies. A majority of the minority communities also felt likewise – that is, marginalized and deprived of opportunities to benefit from government assistance. It also included the Roman Catholic Church hierarchy, a significant section of civil society, elements in the judiciary and in the professional classes as well as a portion of the private sector.

The interim government formed by the commander – after his appointment by the President as interim prime minister on 5 January 2007 – is revealing. While multi-ethnic in character, it has limited Fijian support. Those Fijian politicians who are in the interim cabinet were unsuccessful candidates in the election of May 2006. There is only one member of the SDL government represented, and he is there by default. The commander may well have had good reason for excluding the ousted SDL government, but it undermines his legitimacy. The interim government is unfortunately perceived by many in the Fijian heartland as the handmaiden of Mr Chaudhry. Many Fijians are convinced this was an Indo-Fijian coup. Still others think it was a Muslim coup because of the association with a few prominent Muslims. These perceptions, even if mistaken, pass for a reality from which conclusions are drawn. The actual explanation is less inflammatory: The interest of various individuals and groups happen to coincide with the military's. The coincidence was both opportunistic and principled, a few believing they were acting in the nation's interest.

The effect the commander has had in the short time he has held centre stage is profound. No other Fijian leader, Rabuka and Apolosi R. Nawai included, has so directly confronted the Fijian establishment and remained seemingly unscathed. He has, in turn, scorned the SDL government, the Methodist Church and the *Bose Levu Vakaturaga* (BLV) (Great Council of Chiefs). He has had verbal jousts with those of chiefly rank. In ousting the Qarase government and in the arbitrary dismissals and removals of government CEOs, statutory corporation CEOs and members of statutory and corporation boards, the commander has gutted the Fijian middle classes. These are the ranks from which Fijian leaders would be expected to emerge. For the future, he has ensured a sense of festering resentment that will be visited on the body politic in time to come. The suspension of the BLV, following its refusal to endorse the President's nominee for Vice-President on 11 April 2007, demonstrates further the commander's revolutionary status, in the cataclysmic sense of the term. The BLV itself is in many senses a symbol. In treating it in such a cavalier and contemptuous manner, the commander exposed the façade of its authority. This has compounded the erosion of traditional authority structures. That may not be such a bad thing, replete as it is with shibboleths and anachronisms which need to be cleared.

And what of this brave new world upon which the commander, the military and the interim government are embarked? One in which Fiji emerges as a tolerant, multicultural, multireligious society, where all its parts are comfortable with themselves and peacefully integrated with each other. It is a laudable goal. But can we be forced to embrace each other within months and years, when the process of change takes at least a generation? Asserting it is one thing, delivering that outcome quite another. Removing communal voting and ethnic categorization is merely the beginning of the facilitative measures to be taken. They will not in themselves assure the desired result.

Demographics and continuing emigration by other communities mean an ever-increasing indigenous proportion of the population. Irrespective of how the electoral boundaries are drawn, it is likely that a Fijian-dominated political party will form the next elected government. What will the commander and his fellow travellers do then? Many Fijians remain enamoured with the concept of the Indigenous Claims Tribunal and the Qoliqoli legislation. It resonates with what they believe indigenous rights comprise. As for the rationale of the Promotion of Reconciliation, Tolerance and Unity Bill: That has been made more topical in the light of the military's potentially treasonous conduct on 5 December 2006.

In its engagement with the Eminent Persons Group from the Forum and the European Commission, the interim government has stipulated a three year period as the timeline for the next election. This to be preceded by a census and an electoral redistribution on non-ethnic lines. Reading between the lines from

various statements attributed to the commander and the interim minister for finance, one senses that both would rather an even longer period. However, *realpolitik* obliges them to appear to accommodate the proposals of our neighbours and friends. The longer the period to election, the less the commander and Mr Chaudhry feel the SDL will return to the Treasury benches. We have already canvassed the reasons why this reasoning is flawed. In fact, the apologists for the coup among civil society support the calls in some quarters that there be less haste to election. They argue other initiatives must first be implemented to ensure a more equitable society in order to have a solid foundation for democracy. This presupposes that there is some requirement for social engineering of sorts to construct a democratic framework. The irony that these measures, which are best left to an elected government, are to be implemented by usurpers with a dubious mandate is lost on those apologists.

The centrepiece of the interim government's 'legislative' agenda is the Fiji Independent Commission Against Corruption (FICAC) Promulgation 2007. It was enacted by the President under section 85 of the constitution, which nominally vests executive power in him. The High Court will be ruling in due course on its constitutionality, following legal questions referred to the High Court in a recent case that FICAC was purporting to prosecute. Leaving aside that issue for present purposes, the capacity of the interim government to enact such legislation is a valid consideration. An executive whose mandate rests not in the popular will but on the force of arms has no authority to do so. The commander relied on the doctrine of necessity to sanction the actions taken by the military on 5 December 2006. It is trite law that the doctrine is of limited application and only authorizes *de facto* rulers to do that which is administratively necessary. It matters not that the commander restored executive authority to the President on 4 January 2007. The principle still applies because the interim government indirectly derives its authority from the coup. It and its legal advisers must be held to account for the legal fallacies they have so egregiously asserted since December 2006.

Despite these misgivings, the stated intention of the military, now championed by the interim government – to 'clean-up' the government, statutory bodies and corporations – has resonated widely. There is a profound sense of anger in the community, among all ethnic groups, at deep-seated corruption, cronyism, nepotism and abuse of office. However, apart from the work of FICAC, the arbitrary dismissals and removals that have been an integral part of this initiative have been misconceived. A majority of those targeted were not at fault. The mistake of a few was a close association with the previous government. For others, it was being singled out by the commander as potential sources of dissent. In six months of much publicity, and even more posturing, very few people have been proceeded against. This, from a military that has obdurately resisted any effort to investigate the deaths in custody of Counter Revolutionary Warfare

soldiers in November 2000, the full disclosure of the RFMF Regimental Funds, and the recent deaths of Verebasaga and Rabaka in military custody. The military cannot demand transparency and accountability from others, while resisting the application of a like standard for itself.

To its credit, the interim government has withdrawn the emergency regulations with effect from midnight 31 May 2007.<sup>1</sup> Although we are not privy to the military's intelligence reports, their sense of insecurity was obviously acute. Given their monopoly on ammunition and their ability to react rapidly to any situation, the continuation of the regulations appears to have been to reinforce their position vis-à-vis the general population rather than for the purpose of stability. Meanwhile, the interim government has recently proposed a high-level council and secretariat heralding a process of engagement with the wider community (as represented by key parties in civil society and the private sector). What is envisaged at the end of several months' consultations is a charter that reflects the broad principles upon which our future governance is to be based.<sup>2</sup>

The concept *per se* has some merit. However, the structure is cumbersome and there is a very real doubt that the voices of ordinary people will be heard. There are also continuing concerns about the legitimacy and mandate of those convening the gathering. Is this a genuine effort at drawing the people of Fiji together? Or is it merely an attempt by the interim government and its cohorts to cloak themselves in some mantle of popular acclaim? Moreover, the interim government has given little in return apart from the withdrawal of the emergency regulations. There appears to be divided opinion on this issue, although my sense is that the doubters appear more persuasive. The process is as critical as the outcome. However, one has not heard anything from either the commander or his senior ministers about engaging their opponents. If this were to become another talkfest, where the interim government preaches to the converted and is reinforced in its convictions, an opportunity for constructive dialogue and possible reconciliation would have gone begging.

Where the military and the interim government may have gone astray is in the scale of their objectives. In a relatively short space of time, whether it is two, three or five years is irrelevant, they wish to remake this country. It is a worthy ambition but unrealistic in the circumstances. Conducting a census and redrawing the electoral boundaries on non-ethnic terms are huge tasks in themselves, as are the reform of the public service, and the removal of corruption, to say nothing of the restoration of the economy. To envisage the beginnings of greater inter-ethnic integration several years hence seems to be an exercise in sublime optimism. Merely mouthing the rhetoric among the converted does not transform the concepts into reality. In asserting his vision of Fiji, the commander has also alienated Fijian religious leaders, who have great influence over their followers. They will be reinforced by upwardly mobile professionals and traditionalists

who are offended by the diminution of affirmative action policies. Together, they will either distance themselves from or circumscribe involvement with the interim government's policy of engagement.

As for inter-ethnic relations, this coup has seen little of the overt racism and tensions that followed the previous coups. The Fijian community has accepted the overthrow in sullen silence. Many Indo-Fijians see it as a measure of poetic justice for the indignities they suffered previously. Some of their leaders have expressed support for the military's actions. It is a reflection of how little we know each other. How will this play out in the future? There will probably be no inter-ethnic reprisals, but Fijians will more strongly endorse indigenously oriented policies in the government they elect. Political unity will not be the problem it has been, because of the preponderance of Fijian numbers.

The key to the interim government's survival rests on two factors: The performance of the economy and the holding of a general election. Should the former improve by the end of the 2007, the pressure on the interim government will ease slightly. However, this eventuality is debatable at this point. The public service unions appear to have muted their calls for industrial action over the five per cent wage and salary reductions and the lowering of the retirement age to fifty-five. The injection of funds into the sugar industry, assuming political targets are met, will be a real fillip to the economy. The electorate will be composed as long as it is satisfied the interim government is putting in place the necessary structures for an election to be held. It would even be prepared to allow it some leeway. However, the watchwords are commitment and movement. Even were the economy to worsen, the electorate would remain quiescent as long as it believed the interim government was genuine about delivering an election within a reasonable timeframe.

In hindsight, the military and the interim government's legal advisers, and by that reference is made to those in the shadows behind the interim Attorney-General, would have been better advised to have abrogated the constitution. The legal gymnastics they are obliged to perform, all the while chanting the constitution is intact like a mantra, would test a contortionist. The dilemma is that the legal apologists and their collaborators in the military wished to depart from the constitution without breaching it. We are still continuing on this 'Alice in Wonderland' journey. In the meantime, the courts are at once operating normally – as in trying criminal and civil cases – while coming under siege. The Chief Justice remains suspended on as yet unspecified charges. The appointment of the Tribunal to conduct the inquiry is still awaited. The acting Chief Justice was appointed in dubious circumstances by an improperly constituted Judicial Services Commission (JSC). The JSC for its part continues to make appointments despite the fact that its status may well be suspect. And appointees of the new regime are hearing challenges to the legal order post 5

December 2006. It is a very untidy state of affairs with little prospect of early resolution.

This retrospect ends where it began: With the military. The genus of the 2006 coup lies in the first one perpetrated almost two decades earlier. It is disingenuous for Sitiveni Rabuka to distinguish 'his' 1987 coup on the basis it was somehow intrinsically different. No coup against a democratically elected government can ever be justified, unless the government concerned is inflicting genocide or some other heinous crime against its own people. The present interim government may well acquire legitimacy in the courts through the doctrine of acquiescence, but it would have established a new legal order in the process. To continue to assert that the takeover of 5 December 2006 constituted an adherence to the constitution is not only absurd but also delusional. The only gratifying aspect of this travesty, in the absence of all the elaborate justifications, is the belated recognition by many Fijians that the only appropriate habitat for the military is the barracks. There being no external security threats as such, the military is now a law unto itself. Any meaningful attempt to prevent any further coups must deal with this issue. The sense of *puissance* conferred by the possession of arms is an intoxicating feeling we must cure. If not, we are destined to travel this weary path repeatedly in the future, periodic hostages to the messianic ambitions of one military officer after another. The ordinary people of our country, whose dreams are for the betterment of themselves and their families, deserve more.

## ENDNOTES

<sup>1</sup> The emergency regulations were reintroduced temporarily in September 2007.

<sup>2</sup> This initiative was overtaken by the formation of the National Council for Building a Better Fiji, which produced a *Draft People's Charter for Change Peace and Progress* in August 2008.