

# **COVID-19 AND THE INSTITUTIONAL RESPONSE**

## **FIJI**

**Richard Naidu**

**5<sup>th</sup> Melbourne Forum on Constitution Building in Asia and the Pacific**

**24 September 2020**

# WHERE THIS PRESENTATION'S GOING

- Fiji – a quick refresher
- Covid-19 and the Government's legal response
- Police and the coronavirus
- Curfews and the courts
- Fiji Human Rights Commission response
- Reflections

# FIJI – A QUICK REFRESHER

- South Pacific state – pop. 900,000
- Multi-racial/cultural/religious – 51% indigenous Fijian, 38% Indo-Fijian, remainder mixed race/Chinese/other Pacific islanders – Christians, Hindus, Muslims [at least we think so – the Government refuses to give us ethnic data from the 2017 census]
- British colony from 1874 to 1970 (Independence)
- Indentured labourers came from India 1879-1916
- At Independence population was 51% Indo-Fijian – demography significantly changed since then

## FIJI – A QUICK REFRESHER – 2

**A HISTORY OF COUPS (AND COUP JURISPRUDENCE)**

- 1987 (x2) – Rabuka [“No Indian dominated government”]
- 2000 – Speight putsch [“No Indian PM”] then Bainimarama coup [No 3] resolved in court -> new elections, new govt
- 2006 Bainimarama coup [“govt is corrupt and racist, I am only here to remove it and reform, then I’ll step aside”] – Bainimarama becomes “interim PM”
- 2009 Bainimarama loses in court, abrogates Constitution [not sure if that was a coup - “Coups 4.5”?]
- Bainimarama’s “interim” government – eight years (2006-14)
- elections in 2014 (Bainimarama contests and wins with 60% of the vote)
- elections in 2018 (Bainimarama contests and wins with 50.02% of the vote)

FIJI – A QUICK REFRESHER - 3

# A HISTORY OF CONSTITUTIONS (4 IN 50 YEARS)

- 1970 Independence Constitution *[agreed]*
- 1992 Rabuka Constitution *[imposed]*
- 1997 Rabuka-Reddy Constitution *[agreed]*
- 2013 Bainimarama Constitution *[imposed]*

FIJI – A QUICK REFRESHER - 4

# FIJI'S CURRENT (“TRUE DEMOCRACY”) CONSTITUTION – (SOME OF ITS) ODD FEATURES

- all the basic human rights seem to be in there [it's just that the Government can legislate to override them almost at will]
- disproportionate executive control over judiciary and other key constitutional officer appointments
- legal “no go” areas [no challenge allowed to constitutionality of interim govt decrees or actions of coup-makers and their enforcers]
- more legal “no go” areas – no challenge (including judicial review of administrative action, constitutional petitions) allowed to any decisions made under interim government decrees up to 2014 (this extends even to decisions made now)

# FIJI AND COVID-19 – THE BEGINNING

- Government acted early and closed the borders
- limited community transmission, good contact tracing
- town and city lockdowns (14 days) where cases were found
- social gathering numbers controlled (10 ->2 -> 20 ->100)
- overnight curfews

**Overall – 32 cases, 28 recovered, 2 deaths**

[good management or good luck?]

**Early border closure undoubtedly the right decision – the economic consequences will come later**

# FIJI AND COVID-19 – SIX MONTHS ON

- borders remain closed
- limits of 100 on social gathering (patchily enforced)
- curfew continues (11pm-4am) – [PM admits this is ‘more security less corona’ - anyway his voters like it]
- Police enthusiastically enforce the curfew
- **Curfew arrests March-August 2020 – 2,469.**
  - [No of convictions not yet compiled but the overwhelming majority of arrests result in convictions]



# TO ANSWER [SOME OF] YOUR QUESTIONS [NOT VERY RESPECTFULLY]

- What other features of the constitutional system affected the state's response to the emergency?  
*["Never mind the constitutional system, we've got a virus to deal with here"]*
- What role did 'independent' institutions play during this period? Did they have a plan for carrying out their roles in these circumstances?  
*["Just do whatever the govt tells us to do"]*
- ❓ What role did courts play in responding to the emergency? Were courts inhibited/precluded from review by the facts of the emergency?  
*[Read on...]*



## A LITTLE FIJI COVID-19 TIMELINE

- 19 March PM's press conference – borders closed
- 23 March PM's next press conference - gathering limit 20, schools closed
- 27 March Parliament meets (amending Public Health Act – to increase the fines for non-compliance (from \$20 to \$10,000 or imprisonment for up to 5 years)
- 3 April First Public Health Act notices restricting movement issued (backdated to 20 March)
- 15 April Declaration of National Disaster [not since renewed]

## FIJI POLICE AND THE CORONAVIRUS - 1



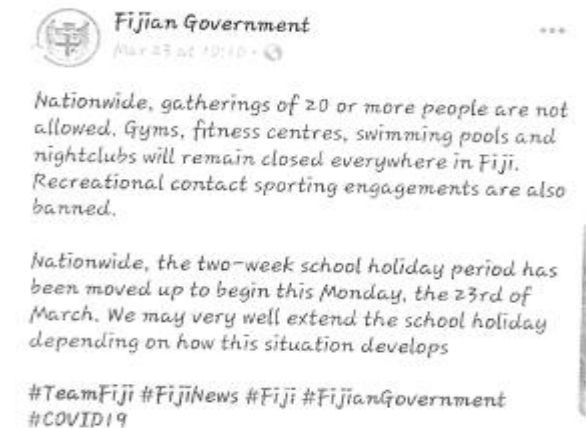
- **enthusiastic enforcement** – 2,469 arrests as of 31 August [including a Roman Catholic priest, several young people playing rugby, teenage couple and nine young men inside an internet shop]
- **“standard operating procedure”** detain for approx. 48 hours without police bail, take “curfew breakers” to Magistrates Court (by which time stunned detainees just plead guilty to get it over with) for quick and efficient dispatch with convictions and fines

## FIJI POLICE AND THE CORONAVIRUS – 2

# THE DISORDERLY MASS

- 22 March – Fr Dakai celebrates a family mass (more than 20 people turned up)
- 23 March – Fr Dakai arrested (detained for 48 hours) and charged for “disobeying a lawful order”
- Church lawyers seek particulars of the “lawful order”
- Police produce a screenshot of the PM’s 23 March press conference

[...case pending!]



## FIJI POLICE AND THE CORONAVIRUS – 3

# THE “FATTY’S NINE”

- 30 April 2020 – Nine students and staff decide to work through the night at the internet café below the (well-known) “Fatty’s Store”
- Police arrest them for breach of curfew – ‘you should all be at home’
- 48 hours in detention before Magistrates Court appearance
- They defer their plea and get legal advice
- Prosecution ultimately withdraws charges



Munro Leys solicitor (Bismarck Professor) standing control with the group of nine students who had their case dismissed at the Suva Magistrates Court. Picture SUPPLIED

### It's 'not a breach'

DPP agrees to withdrawal of charges, 9 walk free

By VISHAL KUMAR

Police have agreed to withdraw charges against nine students who were arrested on April 30 for breaching curfew. The students, who were arrested at an internet café below Fatty's Store, were released after the police agreed to withdraw the charges. The students, who were arrested at the internet café, were released after the police agreed to withdraw the charges. The students, who were arrested at the internet café, were released after the police agreed to withdraw the charges.

THE CURFEW AND THE COURTS - 1  
**THE NADI MAGISTRATE'S CASES**

*Nailuka*

- Accused pleads guilty to “disobeying lawful order as directed by the PM under the Public Health Act” (leaving a lockdown area by crossing a river) on 29 March
- Magistrate Siromi Turaga acquits – “the PM doesn’t have the power to issue orders under the Public Health Act – these are vested in the Permanent Secretary for Health”

(Note: the “backdated” orders weren’t issued until 4 April anyway)

THE CURFEW AND THE COURTS - 2  
**THE NADI MAGISTRATE'S CASES** [some swift justice]

*Lal and Chand*

15 April (morning)

- Accused plead guilty to “disobeying lawful orders of the PM” (breaching curfew) six days earlier
- Magistrate acquits – “the PM doesn’t have those powers” (as per *Nailuka*)
- Attorney-General reacts – “decision is deeply flawed” – the Magistrate (he says) “should have amended the charge, this is standard practice” [the Police did not ask the Magistrate to do so]

15 April (afternoon)

- Acting Chief Justice Kamal Kumar announces [the same day] that the Magistrate’s Court decision has been “revised” by a High Court judge [High Court has certain powers to revise Magistrate’s Court judgments but in limited circumstances, not necessarily clear here]



THE CURFEW AND THE COURTS - 3  
**THE NADI MAGISTRATE IS 'REVISED'**

- Magistrate Turaga's three-year contract (coincidentally, up for renewal) is not renewed. Acting CJ tells Fiji Sun newspaper "*His contract came up for renewal so it wasn't renewed, on the basis of the information we have*".
- Magistrate Turaga tells the *Fiji Sun: News* to me. I'd been told I was doing a good job and I was to be appointed a Master of the High Court.

(Magistrate Turaga is now in private practice)

THE CURFEW AND THE COURTS - 4  
**EILEEN'S CASE**

- Eileen and boyfriend are at the Suva seawall – they share a kiss
- Police turn up and accuse them of “unlawful social gathering” [others are at the seawall but apparently it was the kiss that offended the complainant]
- Eileen and boyfriend are detained at Central Suva Police Station (for 48 hours) before appearing in the Magistrates Court
- Eileen pleads guilty and is convicted and fined \$500 – three months to pay.

THE CURFEW AND THE COURTS - 5

# JUSTICE TEMO DOES SOME REVISING OF HIS OWN

- On 4 May High Court Justice Salesi Temo calls in:
  - a prosecutor
  - a Fiji Legal Aid Commission lawyer
  - 51 Magistrates Court curfew conviction files.
- On 14 May Justice Temo issues his own ruling revising the Magistrates' decisions:
  - penalties and fines imposed in these cases breach citizens' constitutional rights to be free of disproportionately severe treatment or punishment and do not apply the Sentencing and Penalties Act 2009
  - most cases sent back to Magistrates for reconsideration
  - Eileen's conviction overturned [Eileen's new lawyer loses his *pro bono* brief]

## THE CURFEW AND THE COURTS - 6 THE ACTING CJ STRIKES BACK

- Four days later (18 May), the Acting Chief Justice issues a “Declaration/Order”
- Justice Temo’s decision is a *nullity*, he says, because Justice Temo cannot revise a Magistrate’s Court order without a reference from the Acting Chief Justice
- [Acting CJ does not explain how he can *nullify* another High Court Judge’s order just because he thinks it was made without jurisdiction, as opposed to the ordinary process of appeal to the Fiji Court of Appeal]

[Eileen’s lawyer has a brief again? Off to the Court of Appeal, maybe they can work this out!]

# MEANWHILE, BACK AT THE FIJI HUMAN RIGHTS COMMISSION...



The (notoriously multisyllabic) Director of the Fiji Human Rights and Anti-Discrimination Commission writes an article in the *Fiji Sun* on 30 April:

- We all have a right to health
- There are limits to our other rights and freedoms
- The Fiji Constitution allows rights and freedoms to be limited even without a state of emergency
- Are our lockdowns reasonable limitations on human rights? Yes

[No comment on the fact that more than 1,000 people had been arrested by this time for curfew breaches]

REFLECTING ON ALL OF THIS ...  
**THERE'S A PATTERN HERE**

- A Constitution that takes human rights lightly, creates a heavy-handed executive
- A top-down crisis response – legislating by press conference
- Crisis restrictions on movement, gathering, etc become written law 14 days after they are announced (and “backdated”)
- Parliament meets – to increase punishment for breaching the Public Health Act
- Police/prosecution approach – detain 48 hours, prosecute, convict – nearly 2,500 arrests
- Magistrates Courts – no serious thinking about the effect on people’s future records of a recorded conviction for minor infraction
- High Court (at least some of it?) - apparent enthusiasm for supporting curfew punishments – outcomes swiftly consistent with the Police line; legal uncertainty about revision powers
- Fiji Human Rights Commission – ‘yes, our rights are limited’.

**So who’s thinking about our basic human rights?**

## **Acknowledgment**

My thanks to Elizabeth Volavola of Munro Leys, for assistance in research and compilation of materials