



Australia-New Zealand Scrutiny of Legislation Conference

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PARLIAMENTARY SCRUTINY, PARLIAMENTARY SOVEREIGNTY: WHERE ARE WE NOW AND WHERE ARE WE HEADED?

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Scrutiny of Legislation and Parliamentary
Sovereignty – The Fiji Experience

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1. Preliminary Note

At the outset let me say that in this conference, I am attending as part of Fiji's delegation but unlike my colleagues I am from the opposition side in parliament. I therefore have a different opinion of the situation in Fiji from my colleagues who are members of the Government and they will have the chance to rebut my views. I express my opinion however with the greatest respect to them and to the government of Fiji

2. Some Background Facts On Fiji Parliaments

There are some background information that you will all need to know in order to understand and appreciate how things are playing out in Fiji's current Parliament as concerns this topic of Parliamentary Scrutiny of Legislation and Parliamentary Sovereignty. It is therefore important to know these facts as a backdrop

Firstly we who are attending here as delegates from Fiji are members of Fiji's First ever Parliament to be convened under its new 2013 Constitution. This first parliament was established in October of 2014 after the first ever election under Fiji's 2013 Constitution. Before this, there was operating another parliament that was established under a different constitution, namely the 1997 Constitution, which was abrogated by the perpetrators of a coup in 2006.

That other Parliament under the 1997 Constitution had sat for a total of 3 separate terms; the first was immediately after Fiji's election in 1999 under the 1997 constitution. That first parliament was headed by Mr. Mahendra Chaudhry as Prime Minister. It only lasted up until May of 2000 when it was removed by a coup in that year that was conducted by a Mr. George Speight.

A High Court ruling one year later declared that the 1997 Constitution was still alive despite the act of its abrogation and another election was conducted under it in 2001. The second parliament under the 1997 Constitution was convened under this 2001 election and was headed by Mr. Laisenia Qarase as Prime Minister. This parliament ran its full five year term up until May of 2006 when general election was conducted again under the 1997 Constitution.

The third parliament convened under the 1997 Constitution was convened immediately after the General Election of June 2006 with Mr. Laisenia Qarase still as Prime Minister on a second term. This parliament ran until December of 2006 when it was removed under a coup conducted by Commodore Frank Bainimarama who is Fiji's current Prime Minister.

Mr. Bainimarama became Dictator from December 2006 and imposed his Constitution in 2013 and conducted an election under it in 2014 eight years after dismissing the last democratic Parliament in 2006. The first Parliament to be convened under the 2013 Constitution was done after the first election was held under it in September 2014. The Fiji delegation to this conference are members of this first parliament ever, convened under the 2013 under the Leadership of Fiji's current Prime Minister, the Honorable Mr. Frank Bainimarama.

Before the 1997 Constitution Fiji has had other Constitutions and parliament that were established and operated under them. The First of those was the 1970 Constitution that brought in Fiji's first ever post-colonial independent government under Prime Minister Ratu Sir Kamisese Mara. Several parliaments were convened under it following general elections, the parliaments continuing until the 1970 Constitution was abrogated during the 1987 coup that was conducted by one Colonel Sitiveni Rabuka.

Colonel Rabuka was dictator and he imposed the racially slanted 1990 Constitution and became Prime Minister under it until a commission was convened under Sir Paul Reeves and produced the 1997 Constitution. Rabuka lost his bid under the first election ever conducted under the 1997 constitution in 1999.

In this short summary we can all work out that since Fiji's independence in 1970, Fiji has had 4 separate Constitutions, or five if you count the Ghai Constitution that was produced after the professor Yash Ghai commission in 2013 but which was burned and thrown away by Mr. Bainimarama and his supporters in 2013. Bainimarama replaced that with the constitution that he approved and now known as the Fiji 2013 Constitution.

During the same period that is from 1970 to date Fiji has also had 4 different Parliaments sitting separately to uphold the 4 separate and different Constitutions. At the same time Fiji has had 4 separate coups that were nearly always immediately followed by the passing of a new constitution.

The first coup, conducted by Colonel Rabuka was said to have been conducted to bring to the forefront of power the indigenous population of Native Fijians. The 1990 Constitution underscored that but was moderated and diluted by the 1997 Constitution that aimed to bring about unity, including the formation of the so called government of National Unity established under it.

The 2013 Constitution aims to totally remove ethnicity and institutionalized customary institutions, that its authors claim is the source of dis-unity. This is to be achieved by the imposition of what is called equal citizenry that has so far been manifested by the passing of decrees and laws and decree to abolish Fiji's Great Council of Chiefs, remove Fijian as the name of ethnic natives, nationalize the administration and management of their native resource and remove manifestation of their culture including forbidding speaking native tongue in parliament. The aim really is to dissipate the indigenous ethnic group so that they become individuals answerable directly to the state and not the chiefs or chiefly institutions. The new Fiji is aiming to create a melting pot of individuals without ethnic groups or differing ethnic identities, values or culture. This new policy is called equal citizenry

3. Scrutiny of Legislation and Parliamentary Sovereignty in Fiji's New Parliament

3.1 Legislative Scrutiny – Law and Procedure

Legislative Scrutiny is defined as the mechanism or processes for determining a particular Judicial Instrument like a Bill or an Act is effective on accomplishing its purpose.

In Fiji, pre- Legislation Scrutiny is not guided by any Legislation but through policy and convention or tradition. When I was employed closely with the public services, that is some 20 years ago the passage of the law making process was as follows:-

- i. An issue is raised at ministerial level of a need for a law. This is discussed and specialist's experts both on the issue concerned and legal expert on that field may be consulted at that level
- ii. A cabinet paper is prepared and presented for approval.

- iii. Once approved the resolution is passed on to the Attorney General offices to refer to Parliamentary Counsels. Experts both legal and on the issue in question are consulted as a draft Bill is prepared for Parliament.
- iv. Draft Bill is presented to Parliament.

The first Scrutiny is made at Ministerial level. It is not uncommon that by the time cabinet approval is sought a draft bill is already in place if not the Parliamentary Counsels at the Attorney General's Office are responsible for that. The Parliamentary Counsels consult widely and in recent years, overseas expert are engaged. This was certainly the case for Fiji's new Companies Act where an Australian Company was involved and engaged.

At Parliamentary level the process is guided firstly by the Constitutional Provision on Bills and Fiji's Parliamentary Standing Orders. The Constitution (S71) only says that Parliament may make Standing Orders for the conduct of its proceeding. It also provides for a separate process on the making of any Constitutional amendment.

Fiji's Standing Orders on Bills process is prescribing under Chapter 7 and so far as scrutinizing Legislations are concerned the following are relevant:

- 1) SO 85(1) Says that on the second reading, a debate May take place on the principles of the merits of the Bills. This is the first chance by the members of Parliament to scrutinize a bill but limiting comments to the principles and Merits.
- 2) SO 85(4) says that after the Bill is read a second time & voted the Bill is referred by the Speaker to a Standing Committee.
- 3) SO 86- says that on the third reading parliament may debate but limited only to the technicalities of the provisions of the Bill
- 4) SO 51 provides for instances where Bills maybe fast tracked. This maybe moved by way of motion without motive depending on urgency and according to the Motion maybe debated for a limited time or may not be debated at all.

At the legislative stage therefore the first opportunity to scrutinize bills are firstly during the debate at the second reading but limited to the purpose and merit. The second opportunity comes at the committee stage where legal experts as well as experts on the issue may be summoned. The third opportunity comes during the third reading when debate is limited to the technicalities of the provisions. Parliamentary counsels, ideally, should be present at every stage and even during parliamentary sittings to monitor any need for corrections

3.2 Legislative Scrutiny- What Happens in Practice

Despite the opportunity that exists in provisions for Scrutinizing Bills, pre-legislation there are two opportunities and during legislation there are three, there is really very little that happens in practice.

Many times during debates and bills I and other Oppositions members would stand up in Parliament to remind Government that MP's are not expert on bills and that we should take every opportunity to allow experts to come in and scrutinize bills. Unfortunately I have heard it stated by the Government side that that have consulted widely, referring to the two opportunities before Legislature, and that is enough.

One of the critical problems that Fiji has in this area is the lack of properly trained Parliamentary Counsels. I know that Parliamentary Counsels should be fully trained in legal drafting but more importantly they should be sitting and be present inside the house during debates as well as during all sittings at the Standing Committee and not only when they are called upon.

The second major problem in Fiji is the attitude of the present Government. The Fiji First Government has set his views a firmly on the idea that whatever it wants that must be achieved even at the expense on being transparent and inclusive. It makes it appear to be abusing its mandates and it is not uncommon now that a lot of people are calling the Fiji Parliament as a "Parliamentary Dictatorship" because of that very reason.

The Government appears to be harboring the same feeling and attitude it did during its Dictatorship days when it was churning out decrease daily on an extra ordinary rate without consulting anyone. It clearly feels un easy every time it is criticized and it has amended the Standing Orders to reduce by half the Parliamentary sitting days in one year as well as to reduce debate times and circumscribe procedures for debating petitions.

This attitude by Government can be best illustrated by the fact that in the last two years more than sixty bills, representing thirty percent of the total has been fast tracked through S51.

In my previous experience as the member of the last two Parliament SO51 is only used as an exception and the only time I know when it was ever used was during Budget. The increase or decrease in budget affects such Acts as the Stamp Duties Act and other enactments in the amount to be levied that is to increase or decrease as a consequence of the budget. These amendments, coming into effect as a consequence of the budget are usually brought under Standing Order 51 without notice and with a request that debate should be limited as it should. Because the amendments are the result of the budgetary process.

But the present Government in Fiji is now abusing its mandates and Standing Order 51 by putting just about every Legislation through fast track under Standing Order 51. This has included some very important and onerous bills that demand, by their very nature, very close Scrutiny. One important example is the Companies Bill of 2015. The consequence has been felt already in that in less than a year amendment have been brought back to Parliament, the Companies amendment Bills of 2016 contained more than sixty amendment, consisting of simple grammar and typographical error.

4. Parliamentary Sovereignty

The concept of Parliamentary Sovereignty broadly means that Parliament has the right to make or un-make any law and no person is allowed to override or set aside the law of Parliament. In other words Acts of Parliament override the law of judges.

The experience in Fiji's Parliament demonstrates that the concept of Sovereignty, when in built checks and balances a properly used and adhered to on such things as reasonableness, equity, accountability, transparency, and inclusiveness, can be a good thing.

Certainly, in well democracies little or no problem will arise because those checks and balances and value are part of its traditions. But not in a half cut and sham democracy like Fiji and certainly not one where a current Prime Minister is a former dictator who has been and is open to abuse of the so called mandate acquired through election and exercised through the Sovereignty of Parliament

There are two problems that can be identified from Fiji's short experience. The First is the abuse of Government mandate on that concept of Sovereignty to entrench the position of Government as it purposely moves towards a police state

In Fiji this is apparent by the use of that mandate and the sovereignty of Parliament to push forward amendments to the laws of the Fiji independent Commission Against Corruption (FIRAC) to make that institution useful only as the watch dog of the regime to threat and quell dissent. This has been achieved by recent amendments giving extensive powers to persons of the institution to arrest without warrant, search and spy on people with immunity against prosecution. We in the opposition are calling it the establishment of a new Gestapo.

The second apparent area there has been abuse of mandate and the Sovereignty of Parliament has been in Fiji's Labor Laws. To quell dissent by the workers the Government, using its mandate and the Sovereignty of Parliament, has passed laws that has removed, restricted and diluted workers' rights. Of course ILO continues to complain but ILO as an agent of the UN is no more than a paper tiger.

The other areas where there has been apparent abuse of mandate and Parliamentary Sovereignty has been illustrated by the Parliament dismissing a member, Honorable Lalabalavu, last year for a period of 2 years for uttering words against the speaker outside parliament, and more recently for dismissing another member of the opposition, Honorable Draunidalo, for the remaining term of Parliament for calling the Honorable Minister for Education an idiot.

When honorable Lalabalavu was suspended last year, the opposition immediately complained to the Inter-Parliamentary Union (IPU). In January this year the IPU convened its Human Rights Committee to deliberate on the case. The committee called for and received submission from the Speaker of Parliament and the Opposition In February this year and handed down its ruling in March. It ruled that the suspension of Honorable Lalabalavu for the period of 2 years effective from May 2015 is disproportionate and in breach of his mandate to sit in Parliament and the rights of those who vote for him and it called for the immediate lifting of his suspension.

In May of this year an opposition member Honorable Tupou Draunidalo called out to the Minister of Education in Parliament, "you idiot". The Government abusing its mandate and the Sovereignty of Parliament moved a motion to suspend Honorable Draunidalo for the remaining term of Parliament for over two years. The Speaker of Parliament accepted the motion in that format dispute having had the benefit of the ruling of the IPU in the previous case of Honorable Lalabalavu.

5. Conclusion

The Fiji Parliament and democracy is very much work in progress. But even so, the current regime coming out of a dictatorship, is not at all keen on properly scrutinizing legislations, least of all hearing the voice of criticism and dissent to the extent that it is abusing its mandate and the Sovereignty of Parliament to push forward its dictatorial views as it creates for the people of Fiji a Parliamentary Dictatorship pushing Fiji closer and closer to becoming a full blown Police State.