

**SUBMISSION TO THE SECTOR
STANDING COMMITTEE ON
JUSTICE, LAW AND ORDER
REGARDING THE PROMOTION OF
RECONCILIATION, TOLERANCE AND
UNITY BILL 2005**



CITIZENS' CONSTITUTIONAL FORUM LIMITED

June 2005

INTRODUCTION

It is well known that the Citizens' Constitutional Forum strongly opposes the Promotion of Reconciliation, Tolerance and Unity Bill 2005. The focus of our opposition is the proposal to grant amnesty to the perpetrators of the May 2000 coup, which is a travesty of justice that poisons every other provision of the Bill.

There are three main reasons why we oppose the amnesty proposal and the Bill:

First, the message that it sends to the people of Fiji is anti-democratic. It is a message from the Qarase Government to the people of Fiji that it was okay to violently overthrow the Chaudhry Government. This suggests it is sometimes okay to throw out a democratically-elected government. But in fact that can never be okay, and it is totally unacceptable and highly irresponsible for any government to suggest such a thing.

Secondly, the amnesty proposal would undermine the rule of law. It would undermine the hard work of our police, prosecutors and courts over the past four years in bringing the perpetrators of the coup to justice. It would damage the credibility of all those institutions and weaken their independence in the future. Besides being anti-democratic, the message of the amnesty proposal is also profoundly disrespectful of the rule of law. It suggests the law does not apply equally to everyone and that it is sometimes okay to break the law. This is totally unacceptable and, again, highly irresponsible.

Thirdly, the Bill will not promote national reconciliation. In fact, it has already become a cause of division and dissent. The secrecy in which it was drafted and the haste with which it is now being rushed through Parliament contradict the Government's claims that the Bill is an instrument of reconciliation. In addition, the Bill misrepresents traditional Fijian practices of restorative justice, and is completely one-sided. It has nothing to offer the victims of the coup. It does not provide them with any incentive to forgive. It does not require the perpetrators to express contrition or apologise. Compensation would be available to far too few, and would be far more limited than what might be awarded by a court under existing laws.

BILL SENDS ANTI-DEMOCRATIC MESSAGE

The message of the Bill is that the May 2000 coup was okay. But that message is false. The coup was not okay. Treason cannot be excused. A political motive can never justify violence. Terrorism is not acceptable. Murder is not acceptable. Rape, abduction, assault, burning and looting are not acceptable. In addition to all of the direct harm done by people who took part in the coup, or who contributed to the lawlessness that came with it, enormous indirect harm was done to the social fabric of our nation, to relations between our different ethnic groups, to the economy, to our collective future and to the futures of our children. Businesses closed, jobs disappeared, investment and trade collapsed and economic growth plummeted. Thousands of professionals and tradespeople have emigrated and the exodus continues to this day. In what sense, then,

can it be said that the coup was okay? **What is even more dangerous about this false message is that it suggests it is sometimes okay to throw out a democratically-elected government. In other words, it legitimises the coup culture.**

The proposed Reconciliation and Unity Commission would in fact have two functions that are diametrically opposed. The first is to advise the President on the granting of amnesties that would shield individuals who took part in the May 2000 coup from justice by removing the legal consequences of their actions. The second is to recommend measures to prevent future coups. If the Commission were serious about this second function it would have to repudiate the first. Its first recommendation would be that no amnesties be granted. If the Government were serious about preventing future coups, it would be doing everything in its power to ensure that all those who took part in the last coup are investigated, prosecuted and punished, without exception and to the full extent of the law.

That is what the Bill calls “retributive justice”. According to the Bill, it is characterised by “vengeance”, “retaliation” and “victimisation”. But this is complete nonsense. The real aims of the sentencing process in our criminal justice system are **retribution, deterrence, protection** and **rehabilitation**, and that is what the coup perpetrators need, as does the nation. Retribution means fair punishment. Deterrence means dissuading criminals from re-offending and dissuading others from following their example. Protection means protecting the community from crime. Rehabilitation means helping criminals to see the error of their ways and re-integrate into the community.

The Bill would not achieve any of these aims. In place of retribution, deterrence, protection and rehabilitation it offers **exoneration, encouragement, impunity** and **appeasement**. Criminals would go free. Their actions would be excused and, by implication, endorsed. The coup would be proved a success, five years after it occurred! The extreme ethno-nationalist fringe of politics would be comforted and indulged. Those who might consider staging another coup in the future would be encouraged to know that they are following in a proud tradition and the people who staged coups in the past were treated like freedom fighters.

History teaches us that appeasement of extremists does not work. Nazi Germany was an ethno-nationalist regime. The efforts of British and other European leaders to appease Hitler in the 1930s simply showed their weakness and allowed Hitler to annex Austria and Czechoslovakia virtually unopposed.

Fiji cannot afford to give in to its ethno-nationalist fringe.

There has been much talk of the “silent majority” in Fiji. The truth is that the vast majority of Fiji’s people wish to live in a peaceful democracy. They want to choose their leaders and have a government that listens to them and shows them that it is serving their interests. They want transparency and accountability. The message of this Bill is

anti-democratic and the CCF believes that, as people come to understand it better, more and more of them will oppose it.

Coups have set Fiji's development back by 20 years. No one wants the coup culture to continue. The way to stop it is to send the strongest possible message to the nation that violence is not an acceptable means of effecting political or constitutional change. That is precisely the opposite of the message of this Bill.

AMNESTIES WOULD UNDERMINE RULE OF LAW

The Fiji Police Force, the office of the Director of Public Prosecutions and the courts have been working tirelessly over the past four years to bring the perpetrators of the coup to justice. They have enjoyed considerable international assistance in this task and have achieved significant successes – although the task is still far from complete. The proposal to grant amnesties to people who took part in the coup now threatens to undo the work these three institutions have done. This is a slap in the face to those who have spent days, weeks, months and even years investigating these individuals, preparing and conducting prosecutions and presiding over court cases. It is also an insult to the foreign governments who contributed personnel and other resources to assist with this work. Amnesties would set criminals free and render all the work required to put them behind bars a flagrant waste of time and money.

In proposing this result, the Bill sends a message of disrespect to the police, prosecutors and courts. Not only is their work not valued – it is as if they have done the wrong thing! This message is likely to be devastating for their morale. In addition, their public standing is damaged by being overruled by Parliament. These institutions need to be seen to be independent if the criminal justice system is to maintain its credibility. This Bill would subject them to politics and, in doing so, denigrate the entire process. How can our institutions of justice maintain the appearance of impartiality when known criminals are shielded from justice?

More broadly, this presents a profound problem for the rule of law in this country. The rule of law is not firmly entrenched in Fiji at the present time. It was shaken by the May 2000 coup, and by the 1987 coups before that. **The rule of law rests on a system of shared values that need to be promoted and protected by all the institutions of government. This includes not only the police, prosecutors and courts, but also Parliament and every other public body as well.** It must also be promoted and protected by the business community and civil society at large.

The amnesty proposal in the Bill is antithetical and offensive to the rule of law. Besides weakening the ability of our justice institutions to perform their functions, it would place the coup perpetrators above the law. That is a frontal assault on two of the foundational principles of the rule of law, namely that the law must apply to everyone and that everyone is equal before the law. The Bill tells the people of Fiji that it is sometimes okay to break the law. A political motive can be an

excuse. That is false and it is irresponsible and dangerous for the Government to suggest it.

Once again, the CCF believes that the vast majority of people in Fiji aspire to a peaceful, democratic future. By undermining the rule of law, this Bill points in the opposite direction. It is an open invitation to the would-be coup perpetrators of the future. But it also has wider implications than that. It generates doubt and reduces predictability in the application of law in general. It suggests that this is not a stable society. It tells business people and investors that Fiji is not a safe place to bring their families or their money.

No one wants to see an increase in lawlessness. No one wants to see more of our young men turning to violent crime. They need better leadership and more opportunities, and they deserve them. **Once again, the way to put an end to the culture of coups is to send a message that violence is never an acceptable means of effecting political or constitutional change. The message the nation needs to hear is that it is never okay to break the law.**

BILL WILL NOT PROMOTE NATIONAL RECONCILIATION

In his second reading speech on the Bill, the Prime Minister suggested that “justice plus forgiveness and reconciliation equals peace”. But this Bill does not follow that formula. It offers no justice whatsoever. It confuses amnesties with forgiveness and insults victims’ intelligence and dignity by pretending that a Government-appointed Commission has the power to forgive on their behalf. How is this supposed to promote national reconciliation?

Much has been made by the Government of supposed parallels between its proposed Reconciliation and Unity Commission and the Truth and Reconciliation Commission in South Africa. But the fact of the matter is that the social, historical, political and legal context of South Africa in the early 1990s bears no comparison at all to the situation in which Fiji has found itself since the 2000 coup.

South Africa was emerging from decades of white minority rule, when the indigenous African majority was denied the vote. *By contrast, Fiji has been a democracy for most of the 35 years since it gained independence from the United Kingdom. Political parties and coalitions dominated by indigenous Fijians have consistently governed throughout that time.*

The apartheid era was characterised by gross inequality and widespread violence and civil unrest. Human rights abuses were committed both by the government and opposition groups. *With the conspicuous exception of the coups in 1987 and 2000, Fiji has enjoyed relative calm and peace in the post-independence era. The coups were led by disaffected indigenous Fijians.*

The interim Constitution adopted by the South African Government in 1993 called for Parliament to enact a law that would allow amnesties to be granted, and reparations provided, for crimes associated with political objectives that were committed under apartheid. *Fiji's current Constitution was purportedly abrogated during the May 2000 coup. It certainly did not make any provision for amnesties or reparations for crimes committed in connection with the coup.*

What is it then that Fiji has in common with South Africa? Certainly, both countries have problems associated with race relations. But beyond that superficial likeness, the nature and extent of their problems differ widely. Their circumstances could hardly be more different.

The fact that South Africa's 1993 Constitution specifically contemplated the granting of amnesties indicates that this had been agreed between the National Party, led by then State President De Klerk, and Mandela's African National Congress – being the two major political parties of the day. The *Promotion of National Reconciliation and Unity Act 1995*, which established the Truth and Reconciliation Commission, was passed by an overwhelming majority in the new South African Parliament. It was the ANC Government, representing victims of apartheid, that introduced the Act.

In Fiji, by contrast, the only political party that might have some claim to represent victims of the May 2000 coup, the Fiji Labour Party, has boycotted Parliamentary debate on the present Bill and its consideration by this Committee! The SDL and CAMV coalition cannot claim to represent victims of the 2000 coup. It was the coup that brought them to power. It must be remembered that the Fiji Labour Party would be in government today if it were not for the coup. In this sense, members of the current Government were the main beneficiaries of the coup. In fact, they are arguably the only people who benefited from it at all.

What does this mean for the comparison with South Africa? It means that there simply is no comparison.

Similarly, the establishment of South Africa's Truth and Reconciliation Commission was preceded by a series of major national conferences, where international experts on reconciliation shared experiences from around the world. In Fiji, there was not even any public consultation prior to the introduction of the Promotion of Reconciliation, Tolerance and Unity Bill 2005 into Parliament. This Committee originally gave members of the public just ten days to prepare written submissions. That is frankly insulting.

Much has also been made of the supposed consistency of the Bill with the traditional indigenous Fijian practices of *matanigasau* and *veisorosorovi*. However, this too is a misrepresentation. ***Matanigasau* may only be presented if the victim agrees that it is appropriate. One criticism of the traditional practice is that a victim's family or village elders may agree to receive *matanigasau* on his or her behalf. However, the family or elders must always consult with the victim first. Similarly, with**

***veisorosorovi*, both sides in the conflict must agree that it is appropriate. It is meaningless if only one side wants a resolution.**

In addition, both *matanigasau* and *veisorosorovi* require contrition on the part of wrongdoers, recognition of wrongs and the injuries inflicted on victims, offers of reparation or compensation and requests for forgiveness. None of those elements are present in the Bill, nor were they evident in the manner of its introduction into Parliament. Finally, it is increasingly common for traditional practices of restorative justice to take place alongside the court process. They are not alternatives. Again, this is not what the Bill proposes.

Where does this leave the Prime Minister's claim that the Bill is consistent with indigenous custom? The truth is that this is simply another attempt to manipulate popular opinion.

Turning to the CCF's views on reconciliation, there has been some suggestion that opponents of the Bill must necessarily oppose national reconciliation. However, the reverse is true. It is precisely because the CCF supports national reconciliation in Fiji that we must oppose the Bill. As we have said in the media, the CCF and our partners in the NGO Coalition on Human Rights believe there is a deep need for national reconciliation in this country, especially between the indigenous Fijian and Indo-Fijian communities, and especially since the May 2000 coup.

We believe that reconciliation is an open-ended process, which can be adapted creatively to the circumstances of the conflict that Fiji has experienced and the needs of our society. However, certain elements are essential to any reconciliation process:

- One of these is **consensual decision-making**. Reconciliation cannot be forced – it must be agreed by all parties to the conflict. Building this consensus requires dialogue.
- Another is **justice**. Reconciliation and justice are not alternatives – they complement one another. If the reconciliation process is unfair to any of the parties, it will provoke further conflict.
- A third essential element is **wrongdoer contrition**. Those who have done wrong must admit it, apologise to their victims and make amends. Reconciliation cannot succeed if the parties to the conflict do not agree that a wrong has been done, who has done it and to whom.
- A fourth element is **victim empowerment**. The experiences of victims of the conflict must be acknowledged. The reconciliation process must cater to victims' needs and seek to restore their dignity. In Fiji's case, this includes not only those who were held hostage in Parliament, but all those children, women and men right across the country who were terrorised and made to live in fear.

Unfortunately, this Bill fails to incorporate these essential elements. The CCF therefore believes that it cannot help to achieve national reconciliation in Fiji:

Consensual decision-making Decision-making on the Bill has been anything but consensual. Important parties were excluded from early consultations and representatives of the Indo-Fijian community have overwhelmingly rejected the Bill.

Justice The Bill seeks to shield coup leaders and their supporters from justice. It proposes that those already imprisoned should be pardoned and freed, and those still to be tried for their crimes should be given immunity from prosecution. The Bill proposes no punishment of any kind for these wrongdoers. What message will this send to our young people? It is an open invitation to anyone who might want to stage another coup in the future.

Wrongdoer contrition Those seeking pardons or immunity from prosecution will need to cooperate with the proposed Reconciliation and Unity Commission, but they will not be required to admit that what they did was wrong, apologise to their victims or make amends. In fact, the Bill makes excuses for the coups of 1987 and 2000, and refers to them as “political events”, as if they were not crimes at all.

Victim empowerment Contrary to comments made by the Attorney-General, the Bill will enable the proposed Reconciliation and Unity Commission to force victims to appear before it. Their wishes will not be relevant to decisions on the granting of pardons or immunity from prosecution to wrongdoers, however. The Commission will only be able to compensate victims of “gross” human rights violations, so those who simply lost earnings or business income will get nothing. Victims will lose the right to seek compensation through the courts if the wrongdoer is pardoned or granted immunity, and compensation from the Commission could be much less than a court might award – especially since the Minister of Finance has stated that the Government currently has no budget for it.

At the same time as urging the Government to withdraw this divisive and dangerous Bill, the CCF has suggested that the Council for National Reconciliation and Unity should be strengthened, given a wider membership, and tasked with developing new proposals for national reconciliation. We repeat that suggestion here.

National reconciliation will not be achieved through a single process. It cannot be legislated. It will require a variety of approaches catering to the wants and needs of different communities and individuals. It will undoubtedly require cooperation between

the different political parties and new partnerships between government, civil society and other actors working at all levels of society.

Creative new proposals need to be developed, and this should be done through a process of **consensual decision-making**, in which all parties to the conflict, including victims, can participate on their own terms. It should also be done with an appreciation of theories and practices of reconciliation that have been used in other parts of the world, and with due respect for human rights.

In this submission we have not discussed theories of restorative justice or the challenges of designing reconciliation processes for a multi-religious society. These are important issues that the CCF has simply not had time to explore here. We hope that other submissions will address them.

The proposals in the Bill for the establishment of a National Council on Promotion of Reconciliation, Tolerance and Unity also deserve a mention in this context. Some of these proposals are positive; however, the proposed Council would need to be more independent of the Government if it is to have real credibility. We suggest the chairperson be chosen by agreement between the Prime Minister and the Leader of the Opposition, and that the Council should not be subject to Government policy directions. The proposal to give the Council the power to summon witnesses to appear before it is draconian and unnecessary.

CCF'S LEGAL ADVICE ON BILL

The CCF has obtained legal advice that key provisions of the Bill are unconstitutional. We do not propose to enter into that advice in any detail here. It will be obvious to anyone who has read the Bill closely that the constitutional issues it raises revolve around its potential to undermine our institutions of justice and the rule of law itself. **If the Bill is passed in its present form, and others do not do so first, then the CCF will mount a legal challenge to have the Bill struck down by the courts.**