



# An Analysis: 2013 Fiji Government Constitution

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## TOWARDS SUSTAINABLE CONSTITUTIONAL DEMOCRACY

### Acronyms

President	Pres
Prime Minister	PM
Ministers	Mins
Members of Parliament	MPs
Speaker and Deputy Speaker	Spkrs
Leader of the Opposition	LO
Chief Justice	CJ
President of the Court of Appeal	PCA
Other judges	Judges

### Commissions and Tribunals

Accountability and Transparency Commission	ATC
Constitutional Offices Commission	COC
Electoral Commission	EC
Fiji Independent Commission against Corruption	FICAC
Human Rights and Anti-Discrimination Commission	HRADC
Independent Legal Services Commission	ILSC
Judicial Services Commission	JSC
Legal Aid Commission	LAC
Mercy Commission	MC
Public Service Disciplinary Tribunal	PSDT

### Independent Offices

Auditor General	AudG
Commissioner of Fiji Corrections Service	CFCS
Commander of Republic of Fiji Military Forces	CRFMF
Commissioner of Police	CP
Director of Public Prosecutions	DPP
Governor of the Reserve Bank of Fiji	GRBF
Permanent Secretaries	PSs
Secretary-General to Parliament	SGP
Solicitor General	SG
Supervisor of Elections	SE



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## TOWARDS SUSTAINABLE CONSTITUTIONAL DEMOCRACY

### **Versions of Fiji Constitutions**

The 1990 Fiji Constitution

The 1997 Fiji Constitution

The Constitution Commission Draft Constitution 2012

The Government Draft Constitution March 2013

1990 or 1990 Constitution

1997 or 1997 Constitution

2012 or 2012 Draft

GDC or March 2013 Draft



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### Part 1. Executive Summary

This document aims to provide an objective analysis of the Fiji Government Constitution that was presented on the 22<sup>nd</sup> of August, 2013 and assented on the 6<sup>th</sup> of September, 2013 (with amendments and revisions).

The analysis covers the process leading to the assenting of the Fiji Government Constitution, providing interpretation of the document section by section and highlighting areas of possible weaknesses and strengths measured against the international standards and other comparative constitutions of democratic states. At the same time it is important to include Fiji's own experiences in constitution-making and ask some critical questions that have plagued our own experiences in democratisation.

#### Constitution-Making Process

The Fiji constitution-making process began in March 2012 with the declaration of the 'non-negotiable' principles and a deadline for elections by September 2014 as part of the critical path for returning Fiji to sustainable democracy. Since the Constitution Commission consulted the people and completed its draft Constitution, the process has had three periods. First, the government objected to the Constitution Commission draft and removed its commitment to the Constituent Assembly. Second, in March 2013 the government produced its own draft. Third, on 22 August, 2013 it released a revised version as the Fiji Government Constitution, and that was assented to on 6 September, 2013 (with some further revisions).

#### 'Free and Fair' Elections

Under the Fiji Government Constitution (and related decrees) electoral rights are granted, *but* can be (and are) limited by decree. This analysis explores the basis of "free and fair" elections for Fiji under this Constitution and as claimed by the government.

#### Fiji Government Constitution vs the 'Non-Negotiable' Principles

On the issue of addressing the non-negotiables the Fiji government Constitution promises to achieve these goals: an expansive range of rights; open-list Proportional Representation (PR) replacing communal voting; a secular state; 'independent' commissions and offices to check abuses; an impartial judiciary to uphold the constitution; and a transition to democratic government. However, a closer look reveals that these aspirations are subject to significant limitations and are contrary to the values of the non-negotiables.





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### **Amending the Constitution: Section 161**

It is impossible to amend anything relating to immunity, transitional provisions or the amendment process itself. It is difficult to amend any other parts as it would require super-majorities in both Parliament and a referendum— with processes that are inconsistent with most modern democratic constitutions.

However, section 161 allows the current Cabinet to amend the Fiji Government Constitution for a brief period until the 31<sup>st</sup> December, 2013.

To assist to conform to its own principles, it should consider amendments, especially to: (i) remove the Claw-back Clause that undermines the entire Bill of Rights; (ii) involve Parliament in appointing judges and 'independent' commissions and offices; and (iii) allow flexibility in the amendment procedure.

## **Part 2. The Constitution-Making Process**

### **Overview of Constitution-Making Process**

Significant changes to the previously provided constitution-making process were announced by the Prime Minister when releasing the Draft Constitution on 31 March, 2013. The government deviated from the decreed Constituent Assembly [Decree 12/2013] and instead the people were asked to become the constituent assembly by contributing their comments on the Government Draft Constitution (GDC) by no later than 5 April, 2013 with the government to then finalise the Constitution within a further seven days. This was subsequently extended to 30 April, 2013.

While the Government's request for written submissions on the March 2013 Draft was defined as public participation and of testing public support, the official period for submissions was far too short to enable real participation.

Of greater concern, the Government has not made available the 1,093 written submissions received by the Attorney-General's office. It is therefore impossible to understand what motivated any of the changes from the March 2013 Draft to the Fiji Government Constitution, or indeed whether these changes were reflective of the wishes and concerns of the people of Fiji. Moreover, when the Government released the Fiji Government Constitution on 22 August, 2013 it was widely understood that this was the final version. But when the President assented to it on 6 September, 2013 the assent was to a version to which revisions had been made.

Compare all of this to the 2012 Constitutional Commission, which had every one of its over 7,100 submissions posted on its website and available for consultation in person. It also published a report explaining its decisions in developing the 2012 Draft Constitution, and relating those decisions to the views it received in public meetings and submissions. A



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legitimate test of public support, considering international standards, would involve at the least a far longer period of public debate and possibly a Constituent Assembly and/or referendum.

All of the factors outlined indicate that the process for making the Fiji government Constitution will no longer provide for 'full, inclusive and fair participation of all Fijians,' one of the government's own 'non-negotiable' principles [Fiji Constitutional Process Decree 2012]. As a result, there are serious risks that any constitution emerging from this process will be neither 'owned' nor seen as legitimate by the people of Fiji.

### Drafting

The Fiji Government Constitution draws much of its provisions from 1990 and 1997, but also borrows extensively from the 2012 Draft. Given the markedly different drafting styles of these documents – 1990 and 1997 with their formal legal language contrasting the conversational tone of the 2012 Draft – the result is an odd and inconsistent amalgam.

A constitution is a country's basic law; therefore it is important that it is as clear as possible from a legal point of view. It is often difficult to know the intention of particular provisions of the Fiji Government Constitution, especially since the promised explanatory report about the Fiji Government Constitution has not been provided yet. Fortunately, the avenue to remedy at least some of the structural and drafting problems identified in this analysis is provided by way of the section 161 transitional amendment provision discussed in Part 4.

### Omission of Women

While the right to equality and freedom is provided for in the Bill of Rights (26), the Fiji Government Constitution is otherwise silent on women, particularly in respect to their participation in public life. Of particular note, the Fiji Government Constitution does not implement any special measures to increase the number of women elected in parliament or holding office in other public bodies. By contrast, the 2012 Draft required that party lists include women in electable positions [80.3] and that the composition of public bodies "reflect the regional, cultural and gender diversity of Fiji" [83]. Further, the 2012 Draft provided that the State could adopt special measures to protect or advance people who were disadvantaged. This can be juxtaposed against a provision in the Fiji Government Constitution expressly permitting legislation that 'excludes persons from holding public offices', which could be used to exclude women (26.9.f).

### 'Free and fair' elections

For an election to be both *free* and *fair*, it must have: (i) a coherent constitutional and legislative framework; (ii) independent and impartial election administrators, supported by a free media and peaceful order; and (iii) agreement of all political parties to participate in competitive elections. When read with the constitutionally protected decrees that severely restrict the media and political parties, the notion of 'free and fair' elections will not be easy to achieve.



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### Framework

The Fiji Government Constitution affirms that elections will take place by 30 September 2014. It also sets out the basic structure for elections including: rights to register, vote and stand for election, voter and candidate eligibility, form of the voting system (open list PR), a commission to administer the elections, rights protecting the media, and penalties for corrupt or violent electoral practices. As the chapter-by-chapter analysis shows, each positive provision is undermined by another negative (and unnecessary) provision:

- Electoral rights are granted, *and* can be (and are) limited by a simple decree;
- Citizens have a right to vote and stand for election. Trade union leaders are restricted from being candidates;
- An electoral commission will administer the election. It is controlled by the sitting Prime Minister, who holds office until that post is filled following the election;
- Media can report on the election. The media decree and the limitations of freedoms can be applied by law to control media behaviour; and
- Political parties must be transparent and peaceful. Limitations can be drawn to define these definitions of transparency and how they are to keep the peace.

Fortunately, the Fiji Government Constitution can be changed under section 161 to bring the electoral provisions into line with international standards. The government can also, at any time before the sitting of the first parliament under the Fiji Government Constitution, amend or revoke all decrees that prevent a 'free and fair' election.

### Supervision

The Fiji Government Constitution creates two important institutions for elections: the Electoral Commission and the Supervisor of Elections. The chapter-by-chapter analysis explores the independence of these institutions and highlights the significance of the Prime Minister's control over appointments, removals and remunerations. The more immediate concern, however, is the transitional arrangements for elections in the Fiji Government Constitution. Until the Prime Minister (through the COC) appoints members the electoral bodies, the permanent secretary for elections will perform their functions. This affects the ability to administer General Elections 'freely and fairly.'

### Consent

For elections to be legitimate, most (preferably all) political parties must consent to participate. Citizens in each party must make that decision themselves. A constitution can provide rules to protect parties from outside interference and



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enable them to campaign to be elected. The freer they are to operate in a fair playing field (within reasonable limits to prohibit corrupt or violent conduct), the more likely they are to participate.

The Fiji Government Constitution and Political Parties Decree set out positive rights to form parties and vote, as well as demands for accountable and transparent party finances. Additionally, the Fiji Government Constitution and Political Parties Decree place demands on parties, including that:

- trade union leaders must quit their positions before standing as candidates;
- parties must gather 5,000 signatures across the country to register,
- candidates can be barred for *any* election offence, which can easily be abused to target particular individuals, and
- laws may limit the rights and freedoms relating to labour relations, association, movement and expression for the 'orderly conduct of elections'.

### Part 3. Chapter-by-Chapter Analysis

#### Preamble

While a preamble to a constitution is usually not enforceable by the courts, it can still play an important role. First, it often states key sources of legitimacy of the constitution by highlighting important aspects of the country's constitutional history and the people's role in making the Fiji Government Constitution. Second, a preamble describes how a country constitutes and defines itself and its vision for the future. In doing so, a preamble is usually intended to inspire, and so highlight key goals of the constitution, and principles and values that underlie it.

Because a preamble is generally unenforceable, key goals and principles stated in it do not take effect directly on their own, but rather indirectly, through in the later substantive provisions of the constitution. Courts and government bodies can also use a preamble to interpret the constitution or develop policy. In that way a preamble can have significant influence beyond being just a source of inspiration.

As with our previous constitutional documents including the 2012 Draft had preambles that in various ways aimed to inspire citizens and public office holders by:(i) highlighting key aspects of Fiji's constitutional history, and how the constitution in question was made; (ii) defining the people of Fiji; and (iii) highlighting key goals of the constitution, given effect elsewhere in the constitutions.

#### The Fiji Government Constitution



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The Preamble to Fiji Government Constitution does not deal with Fiji's constitutional history. This contrasts with the 1997 Constitution which acknowledged the 'abrogation' of the 1970 Constitution and the making of the 1990 Constitution, and then committed Fijians to 'living in harmony and unity ... and strengthening our institutions of government'.

The Preamble to the Fiji Government Constitution does purport to address how the Constitution was made. It opens and closes with phrases similar to those used in many other constitutions in the past 250 years: 'WE, THE PEOPLE OF FIJI ... HEREBY ESTABLISH THIS CONSTITUTION FOR THE REPUBLIC OF FIJI'. Such phrases are usually employed where there has been significant effort to involve the people, either through their representatives (a national parliament, a constituent assembly, a national conference) or directly (through consultation by a constitutional commission or through a referendum). Neither of these two methods of participation was used to make the Fiji Government Constitution.

### Defining the People of Fiji

The Preamble includes a new part, added since the 2013 Draft, recognising four main communities of Fiji, namely iTaukei, Rotuman, descendants of indentured labourers from both India and the Pacific Islands, and descendants of immigrants and settlers. It also recognises not only the ownership by iTaukei and Rotuman communities of their lands, but also the culture, customs, traditions and language of each community. This inclusive new part of the Preamble is a welcome addition, emphasising not only the goals of unity and equality of citizenry (which were included in the original version of the Preamble, in the March 2013 Draft) but also related goals of valuing the contributions of all and reducing ethnic divisions. These are consistent with the 'non-negotiable' for the Fiji Government Constitution that the Government set out at the onset.

### Goals of the Constitution

The Preamble in the Fiji Government Constitution includes, in addition to the goals of unity and equality, several other admirable goals:

- the Constitution as supreme law, and the framework for the conduct of Government;
- recognition and protection of human rights; and
- commitment to: (i) justice, national sovereignty and security, (ii) social and economic well-being; and (iii) safeguarding the environment.

Because of the inherent importance of many of the 'non-negotiable' and other principles stated by the Government in 2012, it would have been expected to have a much more complete statement of them in the Preamble. Important among the 'non-negotiables' that receive no mention are 'true democracy', 'removal of systemic corruption', 'an independent judiciary', 'elimination of discrimination', 'good and transparent governance', and social justice'.



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### Giving Effect to Goals

Stating the goals in the Preamble, should complement the rest of the document's content that seeks to make these goals a reality. In fact, little has been done to give effect to many of these goals and principles through substantive provisions in the Fiji Government Constitution. The main exception involves iTaukei and Rotuman land (as discussed in the section on Human Rights, below).

### Chapter 1 - The State

The structure of Chapter 1 of the Fiji Government Constitution reflects the equivalent chapter in the 1997 constitution, while many of the provisions draw heavily on sections of the 2012 Draft.

#### **Secular State**

The provision on Fiji as a 'Secular State' (4) is clearly intended to meet the requirements of the 'non-negotiable' principles. Read with the Freedom of Religion in the Bill of Rights (22), they effectively establish a secular State.

#### **Founding Values**

The founding values of the State of Fiji are admirable (1). Most are drawn from the 2012 Draft [1]. However, part of the reason for the statement of such values in the 2012 Draft is that guidance on how they were given effect by substantive provisions elsewhere in the draft. But there are some values in the Fiji Government Constitution which are not reflected in substantive provisions. In particular:

- independence of the judiciary, as discussed in relation to Chapter 5 below;
- 'civic involvement', provision in relation to civic life and the involvement of civil society in engagement with the state contained in the 2012 Draft [7, 53-7] has been omitted; and
- 'a prudent, efficient and sustainable relationship with nature' receives little attention, for even in relation to provision on 'Environmental Rights' (37), the more detailed and progressive provisions of the 2012 draft on 'The Natural Environment', 'Principles of Land Use and Environmental Protection', 'Natural Resources' [2012 Draft, 10, 12, 14] have been omitted.

There is little point in bare statements of values without including rights and responsibilities for achieving them.



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### ***Languages of Fiji***

There is little in Chapter 1, or anywhere else in the Fiji Government Constitution, concerning languages of Fiji. Two notable inclusions are provision for translations of the Constitution to be made available in the iTaukei and Hindi languages (3) and for iTaukei and Hindi languages to be taught as compulsory subjects in all primary schools (31). Various provisions on languages have been included in past Fiji constitutions. In a multi-ethnic state such as Fiji, there are symbolic and practical reasons for giving recognition to the key languages of the various communities, and ensuring that government is required to respect the interests of different communities in maintaining and making use of their languages. The 2012 provision to allow English, Fijian and Hindi in Parliament is not included.

### ***Prohibiting Coups, Immunities and Abrogation***

The provision against future coups (2), taken from the 2012 Draft [2], and: prohibits abrogation or suspension of Fiji Government Constitution; stipulates that the Constitution may only be amended in accordance with Chapter 11; and provides that establishing a government other than in compliance with Fiji Government Constitution is unlawful and prohibits the granting of immunities to anyone attempting to do so. There are inconsistencies here, particularly in respect of the provision against future immunities. If such immunities should not be granted in such cases, it is difficult to see why comprehensive immunities of precisely this kind are granted in Chapter 10 in respect of past coups.

Attempting to 'coup-proof' the Fiji Government Constitution in this manner is likely to have little practical effect, especially when the Fiji Government Constitution contains provisions likely to provide incentives for coups (major obstacles to amending the Constitution, concentration of power in the executive and undermining the independence of the judiciary), and at the same time removes disincentives by indicating that the deterrence of criminal penalties for coup-makers can always be removed by inclusion of immunity provisions.

Finally, the inclusion of a provision on amendment procedures in a chapter dealing with the State is odd and unnecessarily repetitious given that s 159(1) already provides that Fiji Government Constitution can only be amended in accordance with Chapter 11.

### **Chapter 2 - Bill of Rights**

A bill of rights serves to recognize and protect citizens' individual rights and liberties. It typically achieves this by providing that laws and actions that do not respect constitutional rights are invalid. However, such rights are not absolute, and may need to be limited in certain circumstances. For example, an environmental law may well limit some freedom of movement to keep people out of sensitive natural areas. Limitations on constitutional rights are not necessarily bad and it is common for a bill of rights to allow for some limitations of some constitutional rights and freedoms.



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Constitutions usually provide a mechanism for determining whether a particular limitation is permissible. The approach widely used in modern constitutions (and considered international best practice) is the proportionality test, under which courts are empowered to assess whether the purpose of a limitation under law is 'reasonable and justifiable in an open and democratic society' [1997]. The 2012 Draft's proportionality test was even stricter, requiring that limitations set out in a law be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

Under such constitutions, if an individual claims that his or her constitutional rights have been abrogated by a law, it is for the courts to determine whether the purpose of that law falls within any permissible purposes set out in the constitution, and whether the limitation is reasonable and justifiable.

### ***Overview of the Bill of Rights***

The Bill of Rights in the Fiji Government Constitution contains substantially the same rights as in 1997 and the 2012 Draft, as well as a number of new socio-economic rights [as in the March 2013 Draft]. Several 'protections' and rights that were not in the March 2013 Draft have been reintroduced, including a provision to protect customary land (28), a provision protecting existing rights and interests in land, such as the rights of tenants (29), and a provision recognising the right of landowners and customary fishing right beneficiaries to an equitable share of royalties to mineral exploitation (30) [as in the 1997 and 2012 Draft]. At times, the Fiji Government Constitution improves on formulations in earlier constitutions [including the 2012 Draft]—for example the rights are extended to bind all public office holders (6).

While its list of rights is comprehensive, the protection of rights under the Fiji Government Constitution is weak. This is because Fiji Government Constitution gives Parliament an almost unqualified right to limit the rights and freedoms which it confers. Compared to the March 2013 draft, which itself allowed for the severe limitation of rights comparative to the 1997 and 2012 Draft, the Government Constitution is substantially more limiting, leaving all rights open to the arbitrary or at best 'necessary' restrictions condition. The result is that Chapter 2 is in reality less of a Bill of Rights and more, a list of political aspirations.

### ***The 'Claw-Back Clause' and the Limitation of Rights***

The Fiji Government Constitution adopts a number of at times overlapping and confusing approaches for dealing with permissible limitations. Of greatest concern, ***any*** right contained in the Bill of Rights may be limited by the 'Claw-Back clause' if the limitation is: (i) necessary; and (ii) prescribed by, or by actions taken under the authority of, a law (6.5.c). The highest threshold test that an ordinary Act of Parliament limiting any constitutional right must satisfy is that it be no more than is 'necessary'. In some circumstances, even weaker tests for determining permissible limitations apply (as discussed below).





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On its face, the introduction of a necessity test gives the appearance of placing some sort of minimal check on the government's authority to limit certain rights, as the government must justify to a court why any law limiting those rights was 'necessary'. However, this is an incredibly low threshold, particularly compared to the requirement that any limitation be 'reasonable and justifiable in a free and democratic society'; the approach widely used in modern constitutions.

Without a more stringent limitation clause, there is potential for great abuse of rights, as the government is given the right to do most of what it might want to do, without the courts being able to say whether this was reasonable or democratic. Even to the limited extent that the courts can provide a check (such as in respect of the 'necessity' of limitations), the issue of structural independence of the judiciary under the Fiji Government Constitution (see the discussion of Chapter 5 below) tests the extent to which this would occur in practice.

### **Example 1: Mining licences and iTaukei land rights**

Parliament makes a law allowing for the grant of 99 year mining licences over iTaukei land without requiring consultation with customary owners. Such a law would limit the constitutional protection of iTaukei land, set out in section 28 of the Fiji Government Constitution. If the law was challenged before a court, the State could argue that the granting of mining licences was *necessary* for the economic wellbeing of Fiji. This would likely pass the necessity test set out in section 6.5.c, in which case ***the law would be valid***.

At times, the claw-back clause undermines the whole purpose and architecture of the Bill of Rights. For example, the Bill of Rights contains a number of provisions that set out the nature of a right, and list specific purposes for which that particular right may be limited or may be authorised to be limited by a law [as in 1997 and the March 2013 Draft]. Provisions of this nature fall within two subsets. One subset—e.g. 17 (freedom of expression, publication and media); s. 18 (freedom of assembly); and s. 21 (freedom of movement)—requires that limitations also be only 'to the extent necessary' (in addition to being: (i) prescribed by a law; and (ii) for one of the specific purposes listed).

The other subset [e.g. s. 19 (freedom of association); s. 20 (employment relations); s. 23 (political rights); s. 26 (right to equality and freedom from discrimination); and s. 27 (freedom from compulsory acquisition)] do not apply a necessity test. Accordingly, the only test for determining the permissibility of a limitation under law is that its purpose fall within the allowable situations listed in respect of the particular right [as was the case under the March 2013 Draft]. In many instances, these allowable situations are expressed incredibly broadly. Even to the extent that the purpose of a law does not fall within the specific purposes listed for a particular right, provided the limitation is necessary, it would nonetheless be permissible under the claw back clause.



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Finally, the Bill of Rights contains provisions which set out the nature of a right, without any corresponding purposes for which a limitation under law is permissible. Of these provisions, there are also two sub-sets. One subset [e.g. 24 (privacy); 25 (access to information); and 37 (environment)] requires that such limitations be only 'to the extent necessary'. This has the same practical impact as the application of the general permissible limitations provision. The other subset [e.g. s.16 (executive and administrative justice)] may be limited by any law. This means that any future government can use an ordinary Act of Parliament to limit the right to executive and administrative justice as far as they wish without needing to justify the limitation. Obviously, this is a weaker test than the claw-back clause allowing Parliament to remove completely the constitutional protection afforded those rights, and thereby nullifying those rights entirely.

### ***Specific Limitation of Rights Issues***

Commendably, the provision on the right to life (8), no longer lists express circumstances in which the taking of life is permitted [as was the case in the March 2013 Draft]. However, given the claw-back clause, Parliament nonetheless has the power to pass a law permitting the taking of life in certain circumstances, if such a limitation was determined to be necessary.

Labour rights in particular are severely restricted in the Fiji Government Constitution, while the right of every worker to strike [which was included in 1997, 2012 and the March 2013 Draft] has been omitted. Parliament also has unfettered power to limit the right to freedom of association to regulate:

- the registration of trade unions and similar bodies,
- collective bargaining processes, and
- essential services and industries (19).

Such broad limitations on labour rights are rare in other democratic constitutions, and have the potential to hamper the activities of trade unions and employer groups. They also continue restrictions set out in existing decrees which have been strongly criticized by the International Labour Organisation.

The Bill of Rights allows extra grounds for limitations in the case of elections. To ensure the 'orderly conduct of elections,' the Fiji Government Constitution permits limitations on freedom of expression and freedom of assembly [as in the 1997 and March 2013 Draft], as well as on labour relations and the freedoms of association and movement [as in the March 2013 Draft]. This almost unrestricted authority to limit specific rights allows a future government to restrict, for example, the right for political parties to hold party meetings. It is difficult to see how this is consistent with a commitment elsewhere in the Fiji Government Constitution to 'free and fair elections' (52 and 75.2) or to the creation of a 'true democracy'.



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Section 26.9.f allows Parliament to pass a law that 'excludes persons from holding public offices', without such a law being discriminatory. This would give Parliament the power to legislate in a manner that prohibits any individual or group from being employed in the public service.

Unlike earlier constitutions [and to some extent the 2012 Draft] there is also little recognition that sometimes the protection of culture and community might justify limits on individual rights (like rules about participating in village clean-ups, or laws restricting movement in some areas to protect culture).

### ***Limitations During a State of Emergency***

In a state of emergency (discussed further in relation to Chapter 9, below), all rights (other than a few prescribed ones) may be limited to the extent 'strictly required by the emergency' (44). This places some checks on the government's authority to limit rights, but this is not as strong as a requirement that the limitation be reasonable and justifiable in a democratic society.

It is, however, a higher threshold than the necessity test otherwise applicable to determining permissible limitations on the majority of rights contained in the Bill of Rights. This has the practical effect of affording greater protection to those rights during a state of emergency than during 'normal' times.

### ***Rights relating to land***

The March 2013 Draft was silent on land and indigenous rights and provided no constitutional protection of iTaukei rights to land. The Fiji Government Constitution gives the impression of addressing iTaukei concerns about this lack of protection by including a provision recognising that ownership of iTaukei land remains with customary owners (28). It further provides that iTaukei land cannot be permanently alienated other than to the State in accordance with constitutional provisions governing compulsory acquisition (27). This means that customary owners of iTaukei land are actually afforded no greater constitutional protection than any other person in Fiji who owns land. This is supported by a provision which allows law concerning communal ownership of iTaukei land, access to marine resources and entitlement to chiefly title to limit the right to equality and non-discrimination (26.9.e).

Fiji Government Constitution does not entrench the suite of legislation (including the *iTaukei Lands Act*, *iTaukei Land Trust Act*, *Rotuman Lands Act*, *Banaban Lands Act* and *Agricultural Landlord and Tenant Act*) which forms the basis upon which the majority of land in Fiji is owned, accessed and developed. Such legislation was entrenched in each of the 1970, 1990 and 1997 Constitutions and in the 2012 Draft. This omission means that all these laws may be amended by a simple majority in Parliament.



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## TOWARDS SUSTAINABLE CONSTITUTIONAL DEMOCRACY

There is no requirement that the State and proponents consult with affected land owners and communities in respect of proposed land developments [as there was in the 2012 Draft]. Of far greater concern, the protection afforded iTaukei land can also be limited, or completely removed, by an Act of Parliament that accords with the Limitation of Rights clause. Accordingly, the Bill of Rights offers no real protection to iTaukei landholders.

Commendably, the Fiji Government Constitution includes a provision [in largely identical terms to 1997 and the 2012 Draft] which recognizes the right of owners of land or customary fishing rights to an 'equitable share' of royalties and/or other payments from mineral exploitation in respect of their land or seabed.

This provision permits Parliament to enact legislation to provide a 'framework' for determining what constitutes an equitable share, taking into account several factors (which, again, largely mirror those set out in 1997 and 2012). Again, under the claw-back clause, it is possible that the government could nonetheless limit this right by law if 'necessary'.

The Fiji Government Constitution also includes new provisions protecting land leases and land tenancies (29). Commendably, these provisions require that landowners receive fair and equitable return for their leased land, and that the terms and conditions of leases be fair, just and reasonable. Such rights should nonetheless be read with reference to the drafting problems set out in Table 1.

The Fiji Government Constitution also prohibits any law which diminishes or adversely affects rights and interests in land leases (29.2) and provides lessees with a right not to have their lease terminated other than in accordance with its terms (29.3). These provisions have several seemingly unintended consequences.

First, s 29.2 and 29.3 are not expressed as being "subject to this Constitution". Accordingly, any land acquired in accordance with the compulsory acquisition provision (27) would seemingly be acquired subject to any land lease or land tenancy. Second, s 29.3 has the effect of denying landlords recourse to common law and statutory rights that would typically govern leases and other such contracts.

There are several other potential problems in relation to these provisions (for example, the manner in which they cut across legislation regulating land use and access, such as planning laws and environmental protection laws). However, an analysis of these issues is largely redundant as the potential problems outlined above can be remedied, and indeed the rights themselves can be abrogated, by legislation introduced in accordance with the claw-back clause.

### ***Application and interpretation***

The Bill of Rights applies to all branches of government [1997 and 2012] as well as public officials (6). The rights also have horizontal application (i.e. against individuals). The provisions about how courts are to interpret the Bill are similar to those of the 1997 Constitution and 2012 draft, but no longer *must* consider relevant international law (as required in



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## TOWARDS SUSTAINABLE CONSTITUTIONAL DEMOCRACY

2012). The Fiji Government Constitution also does not include either a right for courts to consider laws in 'open and democratic societies', or recognition of customary law when undertaking constitutional interpretation [as in 2012].

For most social and economic rights, there is an obligation on the State to 'take reasonable measures within its available resources to achieve the progressive realisation of the right'. The State must do things to fulfil these rights. But there is no clear statement [as in 2012] that people have these rights. Courts will have to determine whether the State has proved it does not have resources. However, it remains unclear what remedies are available to courts to compel the State to redress any unjustifiable failures.

It is possible that courts could turn to creative interpretation in order to protect constitutional rights. The Fiji Government Constitution provides that courts 'must promote the values that underlie a democratic society based on human dignity, equality and freedom' when interpreting the Bill of Rights (7). From this, a court could imply that any limitation must be no more than is reasonable and justifiable in a free and democratic society. Yet as the International Senior Lawyers Project noted in its analysis of the March Draft, 'if the GDC [March 2013 Draft] intended to protect rights properly, restricting the circumstances in which they may be limited, it would do so directly and not leave it to the ingenuity of lawyers and judges to protect Fijians from the infringement of their rights'.

### ***Enforcement***

The Fiji Government Constitution adopts a highly restrictive approach to enforcement of rights [as in the March 2013 Draft and the 1997 Constitution], by providing that only individuals whose rights are directly contravened have the right to bring proceedings (44). This is at odds with the approach taken in most modern democratic constitutions (such as the Kenyan Constitution), and indeed the approach proposed in 2012, which allowed anyone, including people acting in the public interest, to institute proceedings in court alleging that a law infringed the Constitution.

The enforcement provisions allow the Attorney-General, on behalf of the State, to intervene in proceedings before the High Court (44.7). Intervention is a procedure which allows a non-party to join proceedings without the permission of the original parties to those proceedings. The rationale for intervention is that a judgment in a particular case may affect the rights of a non-party (in this instance, the State), who should therefore have the right to be heard. An intervener does not have the power to stop or otherwise suspend those proceedings. It is common practice for an attorney general to have the right to intervene in constitutional proceedings (see, for example sub-rule 61.4 of the Rules of the Supreme Court of Canada).

The courts have a key role in upholding the Bill of Rights, with judges required to exercise their independence and objectivity in adjudicating claims about the validity of the actions of other branches of government. There are some issues discussed below, about the structural protection for the independence of the judiciary in the Fiji Government



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## TOWARDS SUSTAINABLE CONSTITUTIONAL DEMOCRACY

Constitution. Only with an independent and impartial judiciary can there be a strong check against violations of the Bill of Rights by a government.

### ***Human Rights and Anti-Discrimination Commission***

The Commission is a continuation of the body created by decree [11/2009] (45). Under the Fiji Government Constitution (173.2), all provisions of the decree remain in force until amended by Parliament. This means that it is the decree and not the constitution that will govern the Commission until such time as Parliament legislates to the contrary. Therefore, while the Fiji Government Constitution now makes provision for the composition and appointment of the Commission (which was a notable omission from the March 2013 Draft), the composition and appointment mechanisms set out in the decree effectively override the Fiji Government Constitution (refer to Appendix B). Otherwise, the Commission has a similar role and authority as in the 2012 Draft, except that it is restricted to making recommendations only to government (the Prime Minister) and not to all public bodies (42.2).

Under the transitional provisions (172.5) any undetermined complaint lodged with the Commission as at the commencement of the Fiji Government Constitution will continue to be dealt with by the Commission. However, any complaint made to the Commission after 21 August, 2013 must pertain to matters occurring after 21 August, 2013. This will arbitrarily deny many individuals from lodging complaints in respect of matters arising before that date.

### ***Omissions***

What is left out of the Bill of Rights is perhaps just as important as what is put in. Of particular note, it makes no provision for: (i) the rights of women; (ii) cultural or linguistic rights (other than the requirements that iTaukei and Hindi languages will be taught as compulsory subjects in all primary schools (31.3)); or (iii) iTaukei customary rights.

## **Chapter 3 - Parliament**

If the Fiji Government Constitution is the spirit of 'We, the People,' then Parliament is its body. All its members are chosen by registered voters to represent them by writing laws that public officials and ordinary citizens must follow. Members of Parliament (MPs) are ultimately accountable to the people through elections and the Fiji Government Constitution through the courts. In a parliamentary executive system, as applies in Fiji, the members of the executive government (the Prime Minister and Ministers) are drawn from the members of the Parliament. One of the major roles of Parliament is to keep the executive accountable. But because the political party (or parties) from which the executive is drawn usually control the Parliament, there can be practical difficulties facing a Parliament to maintain accountability, and as a result it is important to ensure that there is balance between the powers of the Parliament and the executive.



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## TOWARDS SUSTAINABLE CONSTITUTIONAL DEMOCRACY

### **Parliament**

The legislature consists of a 50-member Parliament elected from a single, national constituency by a system of open list proportional representation (if the Fijian population grows or shrinks, the members are adjusted in proportion). Parliament has a 4 year term unless dissolved after at least 3.5 years by the President on the advice of the Prime Minister (58).

Parliament must sit within 14 days of the election being decided (67). If no party wins outright - as is usually the case with PR system elections - it could often be an almost impossible request to form a coalition government in 2 weeks. There is a further pressure that MPs must elect a Prime Minister within 48 hours of the first sitting. If not, there must be new elections. Taken together, if no party wins 50% of seats, there will be enormous pressure to form a coalition and agree on a Prime Minister in a very short period of time or face grave consequences.

There is no 'upper house' (or second chamber) like the Senate [1997], which can help to keep a check on an executive-dominated 'lower house'. Nor is there anything like the National People's Assembly [2012] intended to bring together the members of Parliament and representatives of civil society and other interests, with a view to ensuring that there were real opportunities for public debate on major national issues. It is difficult to see how Parliament will be an effective body since, if 16 MPs become Ministers (as there are now), only 34 are left to run all its committees and other business. The Fiji Government Constitution recognizes this in part by adding 5 more MPs than the March 2013 Draft. However, it still falls far short of the 60 MPs in 2012 and 71 MPs in 1997. In fact, as there is no limit on the number of Cabinet ministers that the Prime Minister can appoint, he or she could even appoint a majority of members as ministers.

Also missing in the Fiji Government Constitution are two other important aspects of the provisions modern constitutions normally make to facilitate Parliament in keeping the executive arm of government accountable. First, the Leader of the Opposition has a drastically reduced role compared to earlier constitutions (discussed below). Second, the role of MPs in supervising other government bodies through parliamentary committees (composed of MPs from all political parties) is diminished. The Fiji Government Constitution does not make special provision for them and in particular has chosen not to entrench a Public Accounts Committee, chaired by an opposition MP, to oversee government spending [a feature of both 1997 and 2012].

While Parliament may establish committees 'with the functions of scrutinising and examining Bills and subordinate legislation' (as well as other functions as prescribed), there are several difficulties with giving real effect to the intention of this provision in terms of facilitating accountability of the executive:

- First, if there is a large Cabinet, it will be difficult to have an effective committee system since there will not be enough MPs to do the work.
- Second, the Constitution provides that almost any constitutional office or commission can make 'such rules and



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regulations as it deems fit for regulating and facilitating the performance of its functions'. These provisions could result in numerous rules and regulations being made by diverse bodies, and yet there is no requirement for those bodies to provide the rules and regulations that they make to the Parliament or the relevant parliamentary committee for scrutiny. By comparison, the 1997 Constitution required that regulations made by the Public Service Commission be laid before the legislature within 2 sittings days, and the regulations could then be disallowed (147).

- Third, the Secretary-General of Parliament, responsible for managing the legislature, is now appointed by the Prime Minister (through the COC) (79), with the result that Parliament will not even be in full control of the person responsible for organising its administration.

Under the Fiji Government Constitution the Speaker can exclude the public from Parliament in exceptional circumstances on 'reasonable and justifiable' grounds, while under the 2012 Draft such an exclusion also had to be justifiable in an open and democratic society based on human dignity, equality and freedom. On a positive note, any regulations made under the authority of the Fiji Government Constitution or a law must provide for public participation, as far as is practicable (50).

The Fiji Government Constitution now allows members of Parliament, including the Prime Minister and Speakers, to determine their own salaries, which cannot be reduced 'except as part of an overall austerity reduction'(80). But there is no upward limit on salaries. In other words, MPs can vote themselves a pay rise as high as they like, but cannot take a voluntary pay cut. Earlier constitutions avoided this danger by creating an independent commission to set the salaries of MPs [2012, 161; 1997, 83].

### ***The Leader of the Opposition***

In parliamentary executive systems, and especially those derived from the Westminster tradition (as with Fiji) the position of Leader of the Opposition is a critically important position. He or she has a vital role in ensuring that parliament keeps the executive accountable. Beyond that, the opposition leader is the alternative prime minister, and as such is accorded considerable respect and given important roles in key institutions other than parliament. This is especially important in Fiji with its history of communal politics.

Under the Fiji Government Constitution, the Leader of the Opposition has a reduced role compared to earlier constitutions. MPs from parties opposed to the Prime Minister vote to elect this office—but if they cannot agree, there is no deadlock breaking mechanism and the office simply remains vacant (78)! Her or his most important constitutional roles are, first, in the COC, directly as a member and indirectly by appointing another member, and second, in making a nomination for election of the President by the Parliament (84). However, the COC is dominated by the Prime Minister and Attorney-General. This is also worrying since the COC now appoints the Electoral Commission, so that all of its





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members will be accountable to the Prime Minister, while in the March 2012 Draft at least one member was appointed directly by the Leader of the Opposition.

In the 1997 Constitution, the office of the Leader of Opposition held a central role in appointments to the Senate, many of the independent commissions and offices, the Chief Justice and other judges [64, 132, 133]. The 2012 Draft also gave extensive powers to the Leader of the Opposition to: (i) control an early dissolution of Parliament; (ii) make appointments, especially the Chief Justice and COC; and (iii) control the military through the National Security Council [88, 129, 151, 175]. By taking all these powers away from the Leader of the Opposition, the Fiji Government Constitution undermines the role of opposition parties in Parliament to balance the majority party, reduces the ability of Parliament to keep the executive accountable, and, most important, further strengthens the office of the Prime Minister at the expense of 'true democracy'.

### ***Elections***

Members of Parliament are elected by secret ballot in 'free and fair' elections administered by the Electoral Commission (52). There is a 'single national electoral roll' for voters to elect candidates based on an open list proportional representation system where 'each voter has one vote, with each vote being of equal value' (53). Parties are awarded seats according to the sum of the votes cast for their candidates (53). However, all political parties and independent candidates must get at least 5% of all votes to get a seat. All Fijian citizens 18 or over may register to vote except for those: (i) serving a prison sentence of 12 months or longer; (ii) of unsound mind; or (iii) disqualified for an election offence [same as 1997]. All those nominated by a registered party or registered as independents may stand for elections if they meet the following conditions (56):

- Fiji citizen [same as 2012], but also not a dual national;
- registered voter;
- ordinarily resident in Fiji [same as 2012], but also must have lived here for past two years,
- not an undisclosed bankrupt;
- not a member of Electoral Commission for last four years [same as 2012];
- not subject of imprisonment when nominated [same as 2012];
- not convicted of an offence with a maximum penalty of over 12 months imprisonment in last 8 years;
- not guilty of an offence against election law, registration of parties or voters.
- any public official is deemed to have vacated their office when nominated (57). Strangely, this includes all elected or paid trade union members, but not the Prime Minister, other Ministers or the Leader of the Opposition.



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### ***The Constitution's new electoral system is problematic.***

First, it negates the 'non-negotiable principle of 'one person, *one vote*, one value'. The reason is that political parties and independent candidates must meet a threshold of 5% of votes cast to qualify for a seat. In a 50-seat Parliament, each seat should correspond to 2% of votes. But if two small parties and an independent candidate each received 4% of the total votes, they would not get any seats. In such a situation the votes of more than 1 in every 10 voters would be wasted.

Second, the Fiji Government Constitution's election system must be read together with the Political Parties Decree 2013. Restrictions in that Decree make it likely that just a few large parties will be registered, while provisions in the Constitution mean that all parties are likely to be tightly controlled by their leaders. Under the Decree, parties must meet strict criteria to register including a requirement to gather 5,000 signatures. Only large parties can meet this burden. In terms of control of MPs, they can lose their seats if they: (i) resign from their party; (ii) vote against their party (or abstain); and (iii) are expelled from their party (63). Such provisions may have their place in an open list proportional representation system as they ensure that MPs represent the party that voters chose. It may be difficult for an MP to dissent against an unpopular decision made by her or his party.

Third, there are dangerous political consequences associated with the extreme limits on the Bill of Rights in Chapter 2 of the Fiji Government Constitution (discussed above). For example, if a political party controlled over half the seats in Parliament, it could amend the election law to allow (or demand!) that political parties explicitly campaign as ethnic parties. Since this law could be passed as an exception to the Bill of Rights under section 6.5.c, there is no constitutional check against the return of communal politics.

Fourth, an open list, single constituency system of proportional representation is likely to lead to two unintended consequences: voting on ethnic lines and very few women being elected. When voters can choose who to vote for on open party lists, especially given Fiji's history, they are likely to vote along the usual ethnic lines. Nothing in the Fiji Government Constitution restricts ethnic voting. In relation to representation of women, it is often argued that experience of open list proportional representation in other country is that increased proportions of women are elected. But there is no guarantee in the regard, and particularly where there are strong cultural and other factors restricting women's participation in public life, as in Fiji, there is little reason to expect that an open list system will assist. With no constitutional requirement to include women candidates, and given Fiji's context, political parties have been, are and likely will in future be dominated by men. Women candidates will not do well under this system. However, there is nothing in the Constitution prohibiting an amendment to the Political Parties Decree 2013 to require parties to make special provisions for women in their lists.



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Lastly, the Fiji Government Constitution requires a by-election if an independent (or, in special cases, a party-affiliated) MP vacates their seat (64). In a single, national constituency, this would require holding a nation-wide election to fill just one seat.

### ***Electoral Commission and Supervisor***

The Electoral Commission is responsible for registering voters and conducting 'free and fair elections'. Unlike the 2012 Draft, there is no provision for an interim body of non-political and international members to supervise the first election. Rather, the current Prime Minister (through the COC) dominates the appointments of both the Electoral Commission and Supervisor of Elections (75). Until these appointments are made, the permanent secretary for elections (again appointed by the current Prime Minister) will perform these functions (170). Elections administered under this Constitution will challenge the principles of a 'free and fair' election.

This conclusion is supported by the fact that—of all the constitutional commissions—only the Electoral Commission is neither declared to be 'independent' nor guaranteed to be free from 'direction and control' of other bodies.

### **Chapter 4 - The Executive**

Fiji's constitutions have provided for parliamentary executive bodies, meaning that Ministers must be members of the Parliament and are answerable to the Parliament, in that they must answer questions in the Parliament in relation their ministerial responsibilities, and can be removed from office by a vote of no confidence by the Parliament.

The main role of the executive arm of government is to manage the business of government on a day to day basis. It usually develops proposals for laws, and frames the proposals for raising and expenditure of revenue (in the budget), but always subject to approval by the Parliament. The executive also directs the work of the state services.

The Prime Minister and other Ministers have powers granted by the Fiji Government Constitution and laws passed by Parliament. If they act outside those powers, there are checks to stop them: courts can give them directions, as can independent commissions and offices; Parliament can pass a motion of 'no confidence'; and, ultimately, voters can choose not to elect them again. A constitution must strike a delicate balance by granting the executive enough power to act effectively but not so much as to abuse the trust given them by the people.

### ***President***

The President is the Head of State and vested with the 'executive authority of the state' as in 1997 (81). There is no Vice-President, so if the President is absent or incapable, the Chief Justice acts in her or his place (88).



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The President has only ceremonial authority as Commander-in-Chief of the Republic of Fiji Military Forces and a duty to annually present the Government's speech on its programmes and policies to Parliament (not the Prime Minister) (81). The President is elected from Parliament from two candidates, one each appointed by the Prime Minister and Leader of the Opposition (84). In 1997 the Great Council of Chiefs appointed the President after consulting the Prime Minister, and in 2012 the President was elected by the National People's Assembly. The President may serve two 3-year terms, in contrast to two 5-year terms in 1997 and one 4-year term in 2012. The President can only be removed for inability or misbehaviour by a tribunal appointed by the Chief Justice at the Prime Minister's request. Parliament must act on advice of this tribunal (89).

The President has a range of other functions under the Fiji Government Constitution, and it appears that the intention is that the Presidency be only a ceremonial office, without discretionary powers or reserve powers (a significant change from 1970, 1990 and 1997). The significant provision here is section 82, which provides that 'the President acts only on the advice of Cabinet or a Minister or of some other body or authority prescribed by this Constitution for a particular purpose as the body or authority on whose advice the President acts in that case'. The section is copied from 1997, but does not include a second clause that states: 'This Constitution prescribes the circumstances in which the President may act in his or her own judgment.' [96.2]. In the case of FICAC appointments, for example, the Constitution does not provide for who appoints its members. The Decree (11.2007) says the President 'may appoint' members, but does not name a body giving advice. It is unclear whether the President may act on her or his own discretion or whether this would violate their constitutional powers.

### ***Prime Minister and Cabinet***

The Prime Minister is elected by Parliament as under the 2012 Draft and similar to the 1997 Constitution (93) and directly appoints and dismisses Ministers (92). The Prime Minister has enormous powers under the Fiji Government Constitution. Particular powers are explained throughout this analysis (see especially Appendix B), but it is worthwhile summarizing some examples of the Prime Minister's powers, which together are perhaps unprecedented in modern constitutions:

- appoints all 'independent' offices through the COC (except the Solicitor-General);
- appoints two 'independent' commissions through the COC: HRADC and PSC;
- appoints as many Ministers as desired (including the Attorney-General);
- sets remuneration for the Chief Justice and President of the Court of Appeal (on advice of an commission established by her or him), the EC, HRADC and PSC and many 'independent' offices;
- initiates the process for removal of the Chief Justice and President of the Court of Appeal (by establishing a tribunal), and most 'independent' offices and the EC, HRADC and PSC (by establishing a tribunal through the COC).

All Ministers in Cabinet must be from Parliament (except the Attorney-General). There is no limit on the number that can be appointed [14 maximum in 2012] and no requirement for a multi-party Cabinet [as in 1997] (95). Ministerial



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appointments are normally the most powerful measure available to gain and maintain support of members in a Parliament. There is nothing to prevent the appointment of more than half the members of Parliament as Ministers, perhaps destabilising the opposition in the process (though restrictions on MPs voting against political party directions might be a partial obstacle to such measures).

As in earlier constitutions, Cabinet is individually and collectively responsible to Parliament and must have its confidence (90-91). In most countries, executive powers are given to Cabinet as a whole and not just the Prime Minister (and never the Attorney-General). The greatest check on a Prime Minister and Cabinet is Parliament. In the Fiji Government Constitution, if a Prime Minister survives a 'no confidence' motion, there cannot be another such vote for at least six months (94).

Such a provision may make sense in a political culture of many small, fragmented parties. In Fiji, however, with a few large parties whose leaderships will have significant powers to control dissent, that provision is likely to make it extremely hard to remove an unpopular (and very powerful) Prime Minister. The Government's own 'non-negotiable principle of 'one person, one vote, one value' will have little meaning if any Prime Minister is shielded in this way for 4 years from MPs (expressing the will of the people) unhappy with his or her actions. In an extreme case, a Prime Minister could barely survive a 'no confidence' motion, but might still not have enough support in Parliament to pass any new laws—leaving the legislature frozen for 6 months.

### **Attorney-General**

The Attorney-General is 'the chief legal advisor of Government' and a Minister in Cabinet (96) [as in the 1997 Constitution]. The Prime Minister appoints the Attorney-General, who must ordinarily be a MP who: (i) has practised law in Fiji [as in 1997] for at least 15 years; (ii) has not been found guilty of any disciplinary proceeding for legal practitioners in Fiji or abroad; and (iii) supports the Prime Minister. If no MPs qualify, the Prime Minister may appoint someone from outside Parliament who becomes a Minister and may sit but not vote in Parliament.

The Attorney-General has remarkable and wide-ranging powers, far wider than under other Commonwealth constitutions (see Appendix B). In addition to the traditional role as the government's 'chief legal advisor,' the Attorney-General:

- chairs the Mercy Commission and is consulted by the JSC on the appointment of the other 4 members of that Commission;
- influences all judicial appointments by being consulted: (i) by the Prime Minister on appointment of the Chief Justice and President of the Court of Appeal; and (ii) by the JSC for appointments of all other judges;
- is directly involved in the appointment of almost every 'independent' commissions and offices directly as a COC member and indirectly by being consulted by the Chief Justice and JSC;
- involved indirectly in determining remuneration for members of every single 'independent' commission and office;



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- initiates the process for removal of holders of most ‘independent’ offices and the EC, HRADC and PSC (by participation in COC decision establishing a tribunal) and indirectly involved in processes for removal of others through the JSC; and
- is required to be provided with regular reports by offices and institutions otherwise supposed to be independent bodies that under most constitutions would be required to make such reports only to Parliament.

These give the Attorney-General extensive control over the judiciary and ‘independent’ bodies—functions usually performed by committees of elected MPs. The 1997 Constitution limited the office’s role to ‘chief legal advisor,’ while 2012 removed the office entirely.

### Chapter 5 - Judiciary

The judiciary determines disputes over criminal, civil and constitutional matters. In the process, it applies, interprets and develops the law. It also plays important roles in relation to the accountability of the Parliament and the Executive. In applying and interpreting the Fiji Government Constitution, judges act as guardians of that supreme law and the rule of law.

Modern constitutions protect the critical role of judges as independent guardians of the law by separating them from undue interference by the legislature and especially the executive. The courts will then be more free to decide cases impartially, on their merits and not on political grounds. Independent legal institutions are also crucial to ensure the court system is independent and impartial in upholding the Fiji Government Constitution and the rule of law.

#### ***Composition and Role of the Courts***

The Fiji Government Constitution structures the judicial system in the same way as the 2012 Draft and 1997 Constitution. The Chief Justice heads the Supreme Court and is a member of the High Court. The Court of Appeal is headed by a judge appointed as its President. The High Court hears most serious criminal, civil and constitutional cases. It also supervises the Magistrates Court, which handles less serious criminal and civil cases, and can determine constitutional issues that arise in such cases, subject to appeal to the High Court. Usually a case can be appealed from the High Court to the Court of Appeal and then to the Supreme Court, which has the final say in interpreting the Fiji Government Constitution.

#### ***Independence of the Judiciary***

The Fiji Government Constitution fails the ‘non-negotiable’ principle of an ‘independent judiciary’. The Prime Minister and the Attorney-General have significant control over the judicial branch, including all the independent legal offices and the vitally important Judicial Services Commission. There is a risk of abuse of power to appoint, remove and alter the salaries of judges (a situation little changed from the March 2013 Draft).



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## TOWARDS SUSTAINABLE CONSTITUTIONAL DEMOCRACY

Most modern constitutions provide for non-political appointment processes for all judicial offices. While the Chief Justice is often a political appointment, there is often some form of independent or bi-partisan selection and appointment process in law or in practice. The independence of the Chief Justice is crucial since it often exercises significant powers, especially in interpreting the Fiji Government Constitution and appointing other judges.

Under the Fiji Government Constitution, however, the two highest judicial offices (Chief Justice and President of the Court of Appeal) are appointed by the Prime Minister after consultation with the Attorney-General (106). These two offices likewise determine their levels of remuneration (113) and the Prime Minister initiates the removal process by a tribunal. Security of tenure is still less for any non-citizen judge (which is common practice in Fiji), including Chief Justice or President, as they serve for maximum three year terms.

The position with independence of other judges and magistrates (and senior court officials such as registrar and masters, as well as judicial department employees) is little different. They are appointed by the Judicial Services Commission (JSC), which is controlled by the Chief Justice and Attorney-General, and they have no real security of tenure.

The Chief Justice will be acting President in cases of absence or incapacity of the President (88). This provision could politicise the office of Chief Justice by creating perceptions of links to executive authority. For example, even though the presidency under the Fiji Government Constitution is primarily ceremonial, Fiji's history has shown that a President may be drawn into political controversies. Similarly, the requirement for presidential assent to laws passed by Parliament (48) could lead to the Chief Justice, acting as President, to either assent to an unpopular or controversial law, or assent to and then interest or apply a law. The Fiji Government Constitution was not accompanied by the promised explanatory report, so it is impossible to say why it did not instead provide for some other office-holder, such as the Speaker, to be designated as acting President.

### ***Judicial Services Commission (JSC)***

The Judicial Services Commission, after consultation with the Attorney-General, appoints and disciplines all judges and magistrates other than the Chief Justice and the President of the Court of Appeal (108). Modern constitutions usually provide strong protections for the independence of bodies such as a JSC. They not only guarantee a JSC freedom from direction and control (as the Fiji Government Constitution does) but also offer protections through provision on their composition and mode of appointment of members that keep them separate from government. For example, membership is required to reflect specific interests separate from government, usually including the professional body for lawyers, and often the leader of the opposition, and a majority of JSC members are usually not appointed by government, but rather nominated by bodies associated with the interests they represent, so that the process for their appointment is independent of government.



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The Fiji Government Constitution is an improvement over the March 2013 Draft, which allowed the Attorney-General to directly appoint two members.

All five JSC members are executive appointees. The Chief Justice, who is chairperson, the President of the Court of Appeal, and the Permanent Secretary responsible for justice are all appointed by the Prime Minister after consulting the Attorney-General. The Chief Justice then appoints the other two members, one of whom must be a lawyer, again after consulting the Attorney-General. The Chief Justice determines the remuneration, removal and suspension of these two members after consulting with the Attorney-General.

While one appointee must be a lawyer, there is no provision for lawyers as an organized body to influence the JSC. This is a most strange omission. Because judicial appointees are normally senior legal practitioners, lawyers should have a say in appointments through their representative as an independent legal profession. This leads to another problem that there is no independent law society since its abolition by Decree 16 of 2009. Without a body to represent lawyers independently of government control, no lawyer appointed to the JSC can be seen as an independent voice in judicial appointments, discipline, removals or remuneration.

It is also unusual for a JSC to have control over all non-judicial officers working for the courts. Such officers would normally be treated in the same way as any other public servant. Given the executive's control over the JSC, it raises further concerns about that control. Another concern is that the JSC, like many legal institutions established under Chapter 5 Part B (discussed below), is required to 'provide regular updates and advice to the Attorney-General on any matter relating to its functions and responsibilities' (104).

### ***Accountability Through the Judiciary***

Judges have an important role in keeping government accountable by interpreting and enforcing the Fiji Government Constitution. They must determine whether actions of government institutions (including actions of Parliament in making laws) have been in accordance with the limits on power contained in the Fiji Government Constitution in at least three main ways:

- constitutional interpretation;
- enforcement of human rights and scrutiny of laws regulating or limiting human rights (see Chapter 2); and
- scrutiny of laws limiting human rights that are made for the purposes of a state of emergency (see Chapters 2 and 9).

The judiciary has authority to deal with constitutional interpretation issues arising in the course of other cases. In addition, it is common for an increasing range of governmental bodies to be authorised to go direct to the courts with





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question on constitutional interpretation or application. Such actions are often an effective 'short cut' through complex court procedures, enabling quick resolution of constitutional controversies. Such arrangements expand the scope of the possibilities for holding governments to account in terms of how they honour the constitution.

The Fiji Government Constitution allows only the Cabinet to seek such opinions, and only from the Supreme Court (91). This is a much narrower provision compared with many modern constitutions. The 1997 Constitution empowered the President, who was appointed by the Great Council of Chiefs (and so not a Government appointee) and had discretionary powers, to seek such opinions (123). Possibilities under the 2012 Draft would have been much wider still, as it allowed any person to 'institute court proceedings alleging that any law, act or omission' was contrary to the constitution (120).

Concerning military courts, the 2012 Draft Constitution sought to ensure that they would be subject to scrutiny by the normal courts of appeal [126]. In this way an important aspect of military powers would be subject to judicial scrutiny. It is regrettable that this provision has been omitted from the Fiji Government Constitution.

### ***Independent Judicial and Legal Institutions***

This part of Chapter 5 provides for 'independent' institutions to support and monitor the judiciary and the Fiji Government Constitution itself:

- the Independent Legal Services Commission (114);
- the Fiji Independent Commission Against Corruption (FICAC) (115);
- the Solicitor-General (116);
- the Director of Public Prosecutions (DPP) (117);
- the Legal Aid Commission (118);
- the Mercy Commission (119);
- the Public Service Disciplinary Tribunal (120); and
- the Accountability and Transparency Commission (121).

It is not clear why some of these institutions are provided for in the chapter on the judiciary. FICAC and the Accountability and Transparency Commission, in particular, are not usually regarded as judicial or legal institutions, but rather as accountability bodies better included in Chapter 8.

All save the section on the Accountability and Transparency Commission (which does not exist yet) provide that an institution created by an existing law, promulgation or decree 'continues in existence'. This formulation was used in the 1997 Constitution. It is unclear why it is being used, when the Fiji Government Constitution includes provision in the 'Transitional' arrangements in Chapter 12 that appears to ensure existing institutions continue to operate. Section 171 states that any institution established by the Fiji Government Constitution is 'the legal successor of the corresponding office or institution existing immediately before the commencement of this Constitution'. One possible interpretation of



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the provisions in Chapter 5 on continued existence of institutions under specific laws may be that there would be little scope to change the named laws. While there are other possible interpretations, if that interpretation prevailed the implication could be that the arrangements under those laws cannot be changed without amendment of the Fiji Government Constitution. As it will be almost impossible to make amendments, that interpretation could result in great inflexibility.

To reduce uncertainty, and the possibility of inflexibility, it would be wise to remove all these provisions on continued existence under named laws, and instead rely on section 171. The provisions in Chapter 5 may have been included as part of a broader scheme to ensure that decrees not only continue in force but are superior to the Fiji Government Constitution (see the analysis of 'Decrees as Super Laws' in the discussion of Chapter 12 of the Fiji Government Constitution, below). But if these sections referring to the decrees also prevent those decrees from ever being altered, that would presumably be an unintended consequence that the Government would wish to avoid.

In most cases, the sections on each institution set out details of both the composition and the manner of appointment of the institution with two exceptions: FICAC has no appointment method for the commissioners (Promulgation 11/2007 provides that the President appoints Commissioner and Deputy Commissioner); Legal Aid Commission has no provision for either membership or appointment method (Decree 19/2009: Solicitor General as chair; Chief Registrar of the Courts; three legal practitioners with at least 10 years' practice appointed by Minister, and two lay members appointed by Minister).

Lack of consistency here raises questions about what is intended. For example, does this mean that Parliament can amend the composition of these two 'independent' bodies at will? This is especially dangerous for FICAC since it has extensive powers to investigate and prosecute corruption offences.

There were uncertainties and inconsistencies in provisions about independence of many constitutional institutions in the March 2013 Draft. Some such problems have been remedied by including standard provisions in each of the sections governing 'independent' commissions and offices. While most institutions now have a standard guarantee of freedom from direction and control, there are aspects of the arrangements that cause concern, especially the extent of executive control (see Appendix B). An additional worry is the requirement that several of the offices and institutions must 'provide regular updates and advice to the Attorney-General' – the Independent Legal Services Commission, FICAC, Legal Aid Commission, and the Mercy Commission. Again, there is no explanatory report that justifies why the lines of direction, control and accountability lead to the Attorney-General and not Parliament (as is provided in relation to the Accountability and Transparency Commission, the Public Service Disciplinary Tribunal, and the Auditor-General). It would be preferable for these institutions to provide their reports to the Parliament, as is provided in relation to the Accountability and Transparency Commission, the Public Service Disciplinary Tribunal, and the Auditor-General.

Most unusually, the Fiji Government Constitution includes provision for the Independent Legal Services Commission with extensive powers over the legal profession (Decree 16/2009). The Commissioner is appointed by the JSC after consulting



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the Attorney-General. An independent legal profession that regulates its own affairs is usually seen as an important part of ensuring an independent judiciary and is a vital aspect of safeguarding the rule of law. A democratising constitution would have been expected to move away from executive control of the legal profession.

### Chapter 6 – State Service

This Chapter provides for the Fiji Public Service, and in particular the establishment and roles of the Public Service Commission. In addition it provides for the three Disciplined Services – Police, Corrections and Military. It is not uncommon for the Public Service and Disciplined Services to be grouped together in one part of a constitution. They share the characteristic of being directed by and answerable to the civilian government. In fact, without them, the political arms of government could do little– they are the arms and legs of government.

It is strange, however, to see included in the same chapter provision for a Constitutional Offices Commission and aspects of the independence of constitutional offices. A central purpose of including provisions on such matters in modern constitutions is to ensure that accountability institutions and other bodies whose political neutrality is important are free from the direction and control which is a central feature of the state services.

#### **Public Service**

It is normal for government to have power to direct and control the work of the Public Service. Sometimes such powers extend to making appointments at senior levels such as permanent secretary, though that has not previously been the case in Fiji (for example under the 1997 Constitution (147)). However, to reduce the dangers of politicisation and corruption of the bureaucracy, it is common for modern constitutions to limit government power over appointments, discipline and similar aspects of management of at least less senior public servants. To achieve this, the key institution such as a public service commission is often protected from government control by appointments to the commission being insulated from political control, and by being guaranteed freedom from direction and control. That was the position under the 1997 Constitution [142-5, and 170] and the 2012 Draft [144-51 and 168].

Appointments to the PSC are no longer to be made by the Prime Minister, but rather by the Constitutional Offices Commission, an institution not provided for in the March draft. But that new body is not insulated from government control. It is chaired by the Prime Minister, who appoints two other members, and also includes the Attorney-General. While it is a positive step to see that the Opposition Leader is a member, and also appoints one other member, the numbers give the government of the day control, four members to two.

Under the Fiji Government Constitution, the PSC no longer controls appointments to offices in the Public Service, as it did under the 1997 Constitution (147) and as was provided in the 2012 Draft (166 and 168). First, the Prime Minister has the



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key role in the appointment and removal of all permanent secretaries, as their appointments and removals are by PSC 'with the agreement of the Prime Minister' (126).

These arrangements are likely to lead to a high degree of politicisation of the public service, because permanent secretaries will now be appointed and removed politically (with agreement of the Prime Minister). Such pressures are likely to be felt in relation to appointments in each ministry, especially as agreement of the responsible minister will be necessary for appointment, removal and discipline.

Under section 127 of the Fiji Government Constitution released on 22<sup>nd</sup> August, 2013 they could have been reassigned and their remuneration determined on the same basis, and the permanent secretary of each ministry would have had authority 'to appoint, remove and institute disciplinary action against all staff of the ministry, with the agreement of the Minister responsible for the ministry' (127). But the Fiji Government Constitution was revised on 6 September, 2013 to delete sections 127.2-8. The earlier provision for appointment etc. of staff by each permanent secretary was a recipe for compartmentalisation of ministries calculated to undermine the Fiji Public Service as a unified national institution, and would have further increased its politicisation. The removal of these provisions plus others in section 127 is very strange since it now appears that most things relating to these important civil service positions may be regulated by any law of Parliament (or Decree up until the elections), instead of the Constitution itself. Also deleted was section 128 on the appointment of ambassadors, which leaves it unclear who has the constitutional power to appoint these officials.

### ***Disciplined Forces – The Republic of Fiji Military Forces (RFMF)***

It is common for constitutions to be quite explicit about the role of the military being limited to defence and to assisting the civilian authority in narrowly defined circumstances such as humanitarian disasters. They also usually make explicit that the military is under direction and control of the civilian government.

Both the 1997 Constitution and the 2012 Draft sought to limit the role of the military when compared to the 1990 Constitution. The 2012 Draft also sought to make accountability by the RFMF to the elected civilian government clear, through a National Security Council intended to 'exercise civilian oversight of the security services' (175). Such approaches, consistent with modern constitutions, are particularly important in a situation where there have been several military coups, and where one of the central goals of the Constitution is the restoration of democracy following a coup.

The Fiji Government Constitution includes an unusually expansive statement of the role of the RFMF, similar to the position under the 1990 Constitution. It is given 'overall responsibility ... to ensure at all times the security, defence and well-being of Fiji and all Fijians' (131]). Of concern here is the fact that in its 2012 submission to the Constitution Commission, the RFMF stated that it was the 'last bastion for law and order in Fiji' and would continue to be 'the guidance of the governance of this country, ensuring that peace, prosperity and good governance is practiced and



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adhered to'. Such statements indicate that the RFMF sees itself as supervising the civilian government, rather than responsible to it. While the President is the symbolic 'Commander-in Chief,' it would appear that the Fiji Government Constitution envisages civilian control being exercised mainly through the 'Minister responsible for the Republic of Military Forces' (131).

By contrast, the National Security Council proposed in the 2012 Draft was stated to be 'a consultative forum in which members of Parliament, and Ministers who are directly accountable to Parliament, engage the Commanders of the security services in discussion of matters of national security, and *through which they exercise civilian oversight of the security services*' (emphasis added) [2012, 175]. Composition of that Council involved the commanding officers of the three services, as well as the Prime Minister, three Ministers (defence, foreign affairs, and police/public safety), leader of the opposition, and the chair of any relevant parliamentary committee. This arrangement emphasised both the notions of the services as servants of the elected government, and civilian control.

### ***Constitutional Offices Commission (COC)***

Modern constitutions have increasingly sought to establish 'politically neutral zones' by creating 'independent' institutions to carry out sensitive activities insulated from political interference. Since the 1960s, protections for independence of constitutional offices with sensitive duties have gradually become much stronger in many constitutions, and extended to more institutions and offices. Typically, the most significant protections include ensuring appointment and removal processes are free from too much influence by a single office, like that of the Prime Minister.

The Fiji Government Constitution establishes a Constitutional Offices Commission dominated by the executive (132). The Prime Minister is chair and controls three of the appointments with only two positions (the Leader of the Opposition and his or her nominee) not part of or appointed by the government. Through this Commission, the Prime Minister effectively controls appointments to ten significant offices or commissions (see Appendix B). They include politically sensitive institutions like the RFMF Commander, the Commissioner of Police, the Supervisor of Elections, the Electoral Commission, the Public Service Commission, and the Human Rights and Anti-discrimination Commission.

By contrast the 1997 Constitution provided for a three person Constitutional Offices Commission with all members appointed by the President (143). As the President was appointed by the Great Council of Chiefs, it was a process that government did not control. The 2012 Draft went further. The same Commission was to be made up of two independent constitutional office-holders, and two men and two women selected either jointly by the Prime Minister and the Leader of the Opposition, or, (if they could not agree), each of them choosing one woman and one man (151). Under this arrangement, the Government would participate in the Commission through its chosen 'representatives, but would not have the numbers needed to determine any outcome.



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### Chapter 7 - Revenue and Expenditure

Constitutions normally contain limited provisions on government revenue and expenditure, the focus being upon financial accountability of the executive to the legislature. There are usually requirements both that that revenue and expenditure proposals must be initiated by government, and that they must be approved by the legislature, generally through an appropriation law which is linked to a budget, which contains the details of both revenues and expenditure. There are often additional requirements, including such matters as: creation of a consolidated fund into which revenues are paid and from which expenditure is made; authorisation of expenditure when an appropriation act has not been passed; for how borrowings, and sometimes guarantees, are handled; provision of standing appropriations for holders of independent offices (meaning the funds needed for their salaries and allowances are automatically appropriated without reference to the annual budget); and various other matters.

The Fiji Government Constitution is based almost entirely on the equivalent provisions of the 1997 Constitution, with just parts of two sections drawn from the 2012 Draft (139, 145). All revenue raised for the State must be paid into a Consolidated Fund other than exceptions provided by law (132). If no appropriations act is passed, the Minister for finance may authorise up to a third of the last budget to cover ordinary government expenditures (134). There are standing appropriations of the Consolidated Fund for the President, judges, and all members of commissions and independent offices except members of the Independent Legal Services and Judicial Services Commissions. While the Commander of the RFMF was not included in standing appropriations in the 1997 Constitution, that position is covered by the Fiji Government Constitution.

The 2012 Draft contained a number of provisions that could usefully be included in the Fiji Government Constitution. They include:

- A statement of basic principles of public finance, intended to guide government in decision-making, including:
  - provision that 'public participation, transparency and accountability' be promoted in public financial decision-making and reporting;
  - promotion of a just society by sharing the tax burden fairly, and by public expenditure promoting fair and balanced development, including 'making special provision for local government and remote areas'; and
  - equitable sharing of the 'burdens and benefits of the use of resources and public borrowing ... between present and future generations (152),
- A requirement for an act of Parliament for the state to borrow money; and
- A requirement for Parliament to enact a law to 'ensure expenditure control, transparency and independent internal audit mechanisms in government' (158).

There are some problems with inconsistencies between provisions on 'standing appropriations' from the Consolidated Fund in section 147, which lists 20 standing appropriations for particular institutions, and specific provisions for standing appropriations for many of the same institutions contained in sections elsewhere in the Fiji Government Constitution that



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make specific provisions for those institutions. The relevant sections and the issues involved are identified in Table 1, below.

### Chapter 8 - Accountability

The principle of 'accountability and transparency' is crucial to ensuring that all other constitutional values in Chapter 1 are given effect. A constitution should provide a web of institutions, rules and tools to allow citizens to hold their elected government to account for their actions.

#### ***Code of Conduct***

The Fiji Government Constitution requires a written law to establish a Code of Conduct for public office holders (149). The 1997 Constitution contained a similar provision (156), but although it required that such a law be passed 'as soon as practicable after the commencement' of the 1997 Constitution, it was never passed. The Accountability and Transparency Commission will monitor and enforce the Code. Each officer will have to declare all assets and liabilities, including those of his or her family. Whistleblowers who, in 'good faith,' disclose violations will be protected. Despite these are positive steps, there is a major problem. Instead of including this Code in the Fiji Government Constitution, it is left to the very people who the Code governs to write the law at a future date.

Resistance from senior politicians who did not relish being subject to the code of conduct was a major factor in the failure of the legislature to pass the similar law required by the 1997 Constitution. It is not uncommon for enforceable codes of conduct, sometimes called leadership codes, to be included in constitutions, there being no need to provide for them to be provided in later laws. Examples include Uganda, Papua New Guinea and Solomon Islands. The 2012 Draft took the same approach (64-7, and Schedule 4). A Government committed to a 'non-negotiable' principle of 'removal of systemic corruption' would include such a provision. At the very least, section 149 should require such a law to be passed within a specified time of the commencement of the Fiji Government Constitution.

#### ***Freedom of information***

Provision is made for Parliament to pass a law to allow the public to exercise their right to access information (150). This is the same as 1997 except that there is no longer any requirement for the law to be passed 'as soon as practicable', (though that requirement also had no impact, as no such law was ever passed (174)). The Fiji Government Constitution no longer requires the Access to Information Law that the 2012 Draft required to come into force immediately after the Constituent Assembly completed its work [23]. This is a problem since citizens will have no way to exercise their right to access government information until whenever Parliament decides to pass a law in the future. The Fiji Government Constitution should require this law, too, to be passed within a specified time of the commencement of the Fiji Government Constitution.



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### ***Auditor-General***

The Auditor-General is responsible for inspecting and reporting on the finances of the state (151). The office is appointed by the COC after consulting minister for finance [similar to 1997 and 2012]. The Auditor-General must report its findings at least once a year to Parliament by sending a report to the Speaker and minister for finance, and then the minister must table to report in Parliament. For Parliament or the public to use the Auditor-General's report, it must be made public and accessible. An added worry is that a written law can specify that the Auditor-General shall not audit a 'specified body corporate'.

### ***Reserve Bank of Fiji***

The Governor is responsible for the usual reserve bank function of protecting the value of the currency to ensure economic growth (153). In the 2012 Draft, the Minister of Finance made the appointment (which the Prime Minister had to act on). Now the Constitution requires the COC to appoint the Governor after only consulting the Minister of Finance. Given the composition of the COC, it is unlikely the Governor will be independent. In 1997 and 2012, more truly independent COCs appointed the Governor after consulting the Minister of Finance and the Board of the Reserve Bank. On a positive note, the Reserve Bank must provide quarterly and annual reports to Parliament.

## **Chapter 9 – Emergency Powers**

The most significant legal consequence of a declaration of a state of emergency is that governments gain significant extra powers to respond to the emergency situation. In particular, they can usually make laws that restrict many constitutionally guaranteed human rights. For example, in response to a tsunami causing massive destruction in a large area of Fiji, laws passed during a state of emergency imposed to respond to the situation might restrict freedom of movement into the affected area, and permit government to appropriate property (vehicles, buildings for housing displaced persons etc.) without just compensation. Usually such laws can be passed by the executive because it may be difficult to get Parliament to meet rapidly enough to pass the necessary laws.

The Fiji Government Constitution does away with many of the safeguards in the 1997 and 2012 Draft constitutions in its emergency powers provisions (43 and 154):

- the Prime Minister may declare a state of emergency on the recommendation of the Commissioner of Police and the RFMF Commander, if:
  - the security and safety of Fiji is threatened; and
  - the declaration is necessary to deal with the threat [151].
- Parliament must be called within 24 hours if it is sitting, or within 48 hours if out of session for confirmation, a majority vote being required, but there is no time limit within which confirmation is required;





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- If confirmed, the state of emergency is extended for one month from the date of confirmation, and is renewable by further votes; and
- Regulations made by the Prime Minister may limit all but nine of the rights provided, and the basis for judicial scrutiny is considerable, as limitations must be 'strictly necessary and required by the emergency', and consistent with Fiji's international law obligations.

There is no explicit statement in the Fiji Government Constitution either that Parliament must meet within a specified time after a declaration of an emergency, nor that the declaration lapses if it is not confirmed within a specific time. Without such requirements (clearly stated in both 1997 and the 2012 Draft), it may be possible for a government to operate in the absence of Parliament, for an unlimited period, and without the declaration of emergency being confirmed.

Compare this with 1997 [187-9] and 2012 Draft [49 and 181] constitutions:

- Cabinet could declare an emergency (though only on recommendation of the National Security Council in 2012);
- Parliament had to be called immediately, and the proclamation confirmed within a few days (5 sitting days in 1997; 10 days after declaration in 2012, plus required a 2/3rds majority vote or it will lapse);
- The initial maximum period for an emergency was three months unless renewed by Parliament;
- Emergency laws could derogate only specified rights and judicial scrutiny was strict (mainly evaluating consistency with Fiji's international obligations in 1997; on the basis of strict necessity consistent with international obligations, and 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' in 2012); and
- In 2012 Draft, the Supreme Court could also terminate the state of emergency, on application by any person, if circumstances did not justify the declaration.

### Chapter 10 – Immunity

The Fiji Government Constitution includes absolute and unconditional immunity provisions covering both the 1987 and 2006 coups. The only exception is for certain acts defined by the Crimes Decree 44/2009, including a vast range of offences like those related to: (i) bribery and corruption; (ii) forgery and perjury; (iii) sexual crimes and prostitution; or (iv) property (156). In doing so, it complies with the non-negotiable principle concerning immunity provisions set out in the *Fiji Constitutional Process Decree 2012*. The provisions are unable to be amended in any way (including by repeal) (159).

This approach is different to that of the 2012 Draft, which satisfied the non-negotiable principle by granting immunities, but only to those individuals who renounced their past actions in an Oath or Affirmation of Reconciliation and Allegiance.

The breadth of the immunity provisions, which seemingly exceed the permissible scope of amnesties under international law, are concerning for several reasons. Firstly, they do little to deter future coups. Indeed, the conferral of blanket



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immunities seemingly encourages them. This is at odds with attempts to otherwise ‘coup-proof’ the Fiji Government Constitution (such as through the inclusion of express anti-coup provisions and provisions prohibiting abrogation or suspension of the Fiji Government Constitution).

There has also been a distinct lack of open and democratic process in the drafting and adoption of the Fiji Government Constitution (see Part 2). The imposition of broad and unqualified immunities, without adequate public consultation, means that such provisions may well be contrary to popular desires. Even to the extent that they are not, attitudes may well change over time. The Constitution of Turkey, for example, which was approved by 91.4% of Turks in a 1982 referendum, was amended in 2010 to abolish immunity provisions and allow for prosecution of members of the previous regime.

Given the nature of the immunity provisions, the Fiji Government Constitution will be unable to change in keeping with any change in Fijian attitudes.

### Chapter 11 - Amendment of Constitution

Amendment provisions are an important part of modern democratic constitutions. On the one hand, they seek to provide flexibility for a constitution to be amended such that it can evolve with the changing needs and circumstances of a country and its people. On the other hand, such provisions also seek to make the amendment process difficult enough so as to protect constitutions from unnecessary change.

Chapter 11 includes provision in section 161(1) for Cabinet to amend the Fiji Government Constitution by Decree on or before 31 December 2013, provided such amendment is necessary: (i) to give full effect to a provision; or (ii) to rectify any inconsistency or error. Given the significant drafting issues noted throughout this analysis, and the otherwise onerous amendment requirements (discussed below), this transitional provision is much-needed. It will provide the opportunity for at least some drafting errors to be remedied. And, under one interpretation, will provide the basis for more substantial amendments needed to ensure that the provisions of the Fiji Government Constitution are given full effect (see Appendix A).

Transitional amendment clauses of this nature are not entirely uncommon in modern constitutions. However, the Government Constitution’s transitional amendment provision is unusual for at least two reasons. Firstly, the time period for transitional amendments is quite short. The Papuan New Guinean Constitution, by contrast, provides for transitional amendments for a period of four years following the enactment of the constitution. Secondly, the transitional amendment provisions typically apply for a period commencing from the first sitting of the first Parliament under the Fiji Government Constitution. Given that some of the functional problems with respect to the Fiji Government Constitution may not be apparent until that time, an extension of the transitional amendment provisions would have allowed for such problems to be amended such that the constitution could remain functional.



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The requirement in section 161(2) for Supreme Court certification for any amendment (presumably as to the requirements in section 161(1) having been met) may mean that it will take some time to get amendments approved, and so early steps will be needed to ensure amendments can be made in the limited time available.

Nonetheless, it must also be remembered that the Fiji Government Constitution continues to suffer from many of the significant structural and drafting issues which were previously identified in analyses of the March 2013 Draft. It is unclear why the drafters failed to take the opportunity when amending the March 2013 Draft to remedy at least the most problematic issues identified.

The Fiji Government Constitution may only otherwise be amended by a bill debated three times in Parliament, and voted on twice by at least three-quarters of members of Parliament; those votes being separated by at least 30 days. The Electoral Commission must then hold a referendum on the proposal, which three-quarters of registered voters must approve (160). It will be extremely difficult to meet these requirements, in particular those concerning the referendum.

This requirement for a double super-majority in Parliament and a referendum will make the Fiji Government Constitution one of, if not the, most difficult constitutions in the world to amend. There is every likelihood that the Fiji Government Constitution will never be changed from its current form. This is highly problematic for numerous reasons.

First, the Fiji Government Constitution makes no on-going distinction between technical amendments (to correct inconsistencies, typographical errors, etc) and substantive amendments (bill of rights, government powers, etc). Even after 31 December 2013, substantial constitutional changes are likely to be necessary to deal with the Fiji Government Constitution's significant structural and drafting issues. In addition to concerns about meeting the amendment thresholds, passing such amendments will now require the huge expense and time of both multiple parliamentary votes and referenda. For these reasons, at least those amendments that do not impact upon substantive provisions should be easier to amend.

Second, the difficult amendment procedures all but remove the opportunity for democratic engagement through which citizens could make the Fiji Government Constitution their own over time. For example, it will be difficult to remove Parliament's almost unfettered power to infringe basic human rights, or to limit the power of the Attorney-General. Given that there has been limited public participation in the development of the Fiji Government Constitution, and no legitimate test of public support for the Fiji Government Constitution, this outcome is particularly concerning.

The Fiji Government Constitution also provides that no amendment can ever be made to the amendment provisions (Chapter 10), the immunity provisions (Chapter 11) or the transitional provisions (Part D of Chapter 12). Given the very real possibility that the country may have difficulty meeting the amendment thresholds, particularly with respect to the referendum, future Governments may one day need to re-visit the question of the amending formula. Without this



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ability, citizens may well be stuck with a constitution that does not work, or that is incapable of responding to changes in needs or circumstances

### Chapter 12 - Commencement, Interpretation, Repeals and Transitional

In a transition from military to civilian rule, a constitution can provide for a middle ground for a neutral administration to prepare for the scene for 'free and fair' elections. This period balances the need of the military regime to peacefully return to the barracks while providing stability and fairness until a new government is elected by the people.

#### ***Transition***

The Fiji Government Constitution allows all office-holders in the current government to remain in office until the first sitting of the new Parliament following the 2014 elections. The election must be held before 30 September 2014 with at least 60 days' notice (170). The Prime Minister will have the power needed to dictate the entire transition process up to *and after* the election. He will remain in office and perform the functions of the COC (166) until his successor is elected (166). This presents at least two dangers.

First, the Prime Minister will appoint all the individuals who are responsible for ensuring a 'free and fair' election. In a situation where elections are being held for the first time in the eight years since a coup, and where military officers occupy many public offices, 'free and fair' elections will only be possible if there is a transition where the military government hands over to a caretaker government a reasonable period before the elections are held.

Second, even after the election (which he can stand in as a candidate), the current Prime Minister will continue in the office until the new Parliament elects his successor. This is contrary to the Commonwealth practice and Fiji's own past elections experiences of a caretaker government administering the State from the time elections are called until a new government is elected.

Compare this to the 2012 Draft that contained an elaborate process for a transition from military to civilian government. Six months before elections, a Transitional Advisory Council, representing many sectors of society, would choose a caretaker government and an independent electoral commission would run the elections. All decrees hindering 'free and fair' elections and an independent judiciary would be repealed. After the election of a civilian Parliament, all these provisions would cease to operate. Even if this particular model was not chosen, there are many other ways to ensure 'free and fair' elections that many sectors of society could support.

The Fiji Government Constitution was also revised on 6 September to deny offices like the DPP or Auditor-General power to determine staff employment and other matters until after 1 January 2014 (167).



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### ***Decrees as 'super laws'***

All promulgations and decrees passed since 2006 (except for five setting up the military government: 164) will remain in force 'in their entirety' (173). If they are inconsistent with the Fiji Government Constitution, the decrees will override any conflicting provision. For example, if a decree on the media violates the right to freedom of expression (17), the restriction will override the freedom. The 'validity' of decrees (whether they were made properly) is also not open to challenge in courts. The new Parliament will be able to amend decrees, but any amendment cannot: (i) have retrospective effect; (ii) 'nullify any decision made' under a decree; or (iii) grant compensation for anyone affected by the decree. The decrees, in short, are 'super laws' that trump the Fiji Government Constitution.

At the very least the transitional arrangements could allow particular provisions of decrees to be challenged in courts on the grounds that they are unconstitutional. Prohibiting such limited challenges is very rare even in transitional constitutions. The 2012 Draft, for example, would have repealed specific parts of decrees that violated the Fiji Government Constitution.

### ***Implementation***

It is common for governments to be reluctant to implement provisions of constitutions that limit their powers or enlarge the freedoms of citizens (e.g. implementation of the Code of Conduct and Freedom of Information under the 1997 Constitution). Recognising such problems, some modern constitutions provide for implementation of such provisions to occur within a specified timetable (e.g. Ghana 1992, South Africa 1996, Kenya 2010) or give the courts powers to fill gaps in the Constitution (as with Papua New Guinea, 1975). Another approach used by the Kenya 2010 Constitution involves creating an implementation commission to 'monitor, facilitate and oversee the development of the legislation and administration procedures as required to implement the Constitution'.

The Fiji Government Constitution provides for many new laws to be made and new institutions to be established. It also keeps in operation many existing laws and decrees that are in various ways inconsistent with the Fiji Government Constitution, and provides for them to be superior to the Constitution until they are amended or repealed. A Government committed to the 'non-negotiable' principle of 'good and transparent governance' as well as to 'true democracy' would not accept such a situation. There is an imperative need for tight constitutionally provided timetables for the implementation of the Fiji Government Constitution in each of the ways just outlined.



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### Part 4. Section 161 Amendments

Although the process for amendment of the Fiji Government Constitution not only prevents any change to two Chapters of the Constitution and part of another, it also makes it remarkably difficult to alter any other part of the Constitution. During a brief period until 31 December 2013, however, the current Cabinet can make amendments under section 161 for: (i) allowing correction of 'any inconsistency or error'; and (ii) ensuring that 'full effect' is given to the provisions of the Fiji Government Constitution.

#### Correcting Inconsistencies and Errors

The chapter-by-chapter analysis demonstrated that time-pressures and lack of technical drafting skill have led to a constitution with a number of: (i) mistakes; (ii) inconsistencies; (iii) redundancies; and (iv) problems with organisation and structure of provisions.

#### **Example: National elections to elect 1 person**

If the seat of an independent MP becomes vacant (by retirement, death, etc), then there must be a by-election to fill the vacancy (64.2). This is a new section with expensive consequences. Since the Fiji Government Constitution now has a single constituency, a by-election would require *every single registered voter* to participate. In short, every time an independent candidate vacated their seat, the Constitution demands a whole new, nation-wide election to elect one person!

These and related difficulties (like failure to use simple language drafting, and lack of clarity in a number of provisions) contribute to significant problems in understanding what is intended by many parts of the Fiji Government Constitution. Such issues will add greatly to the tasks of implementing, applying and interpreting the Fiji Government Constitution, which will inevitably give rise to practical and other problems common to even the best drafted constitutions.

In the short time that has been available to develop this analysis, it has not been possible to undertake anything close to a comprehensive analysis of all the drafting and related problems. This has also been difficult since the government again amended the Fiji Government Constitution released on August 22, 2013 on September.6<sup>th</sup>, 2013. Yet enough problems have been identified to illustrate the extent of the problem. They are summarised in Table 1 (at the end of this part of the analysis). Table 1 is intended to assist the Government in the important task of identifying amendments designed to



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remove inconsistencies and errors, and make all provisions consistent with the principles set out in Chapter 1 of Fiji Government Constitution.

### Giving 'Full Effect' to the Constitution

Amendments to give 'full effect' to the Fiji Government Constitution could be developed by reference to at least three sets of criteria:

1. The internal consistency of the Fiji Government Constitution itself, so that amendments can be made where there are obvious gaps or contradictions that restrict the obvious intent of the provisions being given full effect;
2. The Preamble of the Fiji Government Constitution, which sets out its key goals and values; and
3. The Governments own set of purposes and 'non-negotiable' principles for the Fiji Government Constitution [Decree 57/2012].

### Does the Government Constitution meet its own criteria?

The Preamble and 'non-negotiable' principles are intended to direct what it is that the provisions of the Fiji Government Constitution should seek to achieve, and so provide the fundamental basis for the Fiji Government Constitution. Amendments to ensure that these goals and principles are reflected are within the scope of a reasonable interpretation of section 161. Of course, these principles are already partially reflected in the Preamble. To the extent that they are not, the Preamble should (ideally) be amended to reflect the fact that the Fiji Government Constitution seeks to give effect to them.

Decree 57 of 2012 sets out the purposes of the constitution-making process is to draft a constitution that(a) results from full, inclusive and fair participation of Fijians; (b) meets the needs of Fiji and the aspirations of its people; (c) unites the people of Fiji; (d) includes provisions appropriately designed to achieve, among others: (i) true democracy; and (ii) respect for, and protection and promotion of, human rights; and (e) includes provisions that achieve the non-negotiable principles and values.

The Fiji Government Constitution's stated purpose to promote the 'unity of Fiji' and 'true democracy' are undermined by aspects of the open list PR system, and especially the 5 per cent threshold. In relation to human rights, as the discussion of Chapter 2 of the Fiji Government Constitution shows, the 'Limitation of Rights' clause and other limitations on rights make the otherwise impressive set of rights and freedoms to little more than a set of unenforceable political aspirations. This undermines the respect, protection and promotion of human rights.

The Fiji Government Constitution has succeeded in realizing some of the non-negotiable principles concerning 'a secular state', 'proportional representation' and a 'voting age of 18 years'. But others have, to varying to degrees, not been met.



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Table 2 lists all the 'non-negotiable' principles and values, and then examples of failures to realize them in the Fiji Government Constitution and possible changes to give them 'full effect' under section 161.

Since it is difficult for constitution-makers to anticipate every future possibility, the amendment process in the Fiji Government Constitution must be addressed. At the very least, there must be an easier method to amend uncontroversial parts of the Constitution or (as the example above illustrates) it risks trapping future governments in unforeseen problems.





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Table 1: Proposed List of Corrections Under Section 161

Section	ISSUE	PROPOSED CORRECTION
3.3	-	Should refer to “Fiji Hindi” to be consistent with 31.3.
13.1.e	Conflicts with 41.1.e.ii, which requires that detained children be kept separate from adults, without providing exception where it may be in the child’s best interest.	Delete 13.1.e and amend 41.1.e.ii to allow for exception from children being detained separate from adult if in the child’s best interest; OR Amend clauses such that they are consistent.
14 15	Repetition and overlap of the rights expressed in each section (see, for example, 14.2.i and 15.7.).	Re-draft to remove overlap.
25	Use of the expression “public office” is inappropriate in the context, as 163.1 defines “public office” by reference to offices held by individuals (rather than a government body). This could make it difficult for people to assert their right to access information.	Should refer to information “held by a State organ”.
25.4	As drafted, the provision does not prevent indirect or direct imposition of a limitation (which is assumed to be the purpose of the provision).	Replace the word “may with “must”.
26.8		For consistency with the rest of the section, the reference to “grounds prescribed under subsection (3)” should instead refer to “prohibited grounds”.
29.2	It is unclear whether “rights and interests in a land lease...” is a reference the rights and interests that exist between the parties pursuant to a land lease, or whether it refers to the rights and interests in land conferred by a land	For clarity, this provision should be re-drafted.



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	lease, or both.	
29.3	The use of the word “while” would indicate that fair and equitable return must be somehow balanced against the protection of land lessees and tenants, rather than existing as an absolute right.	Redraft such that: (i) fair and equitable return; and (ii) the protection of land lessees, are expressed as two stand-alone rights.
45.4.e	-	For grammatical correctness, should refer to “taking” instead of “take”.
45.4.f	-	For grammatical correctness, should refer to “making” instead of “make”.
45.1	See comment (b) on 147.	
64.2	If the seat of an independent MP becomes vacant, then there must be a by-election to fill the vacancy. In a PR system with a single constituency, that means a whole new, nation-wide election to elect one person. Further, there would be likelihood of the by-election affecting the composition of Parliament, as there would be advantage for larger parties.	Amend 64.2, probably to permit the seat to remain vacant.
63.6	An application must be determined within 21 days of the date of application, which is impossible in practice.	Amend to provide a realistic time limit.
70	The term ‘subordinate legislation’ in section 70 differs from the term ‘subordinate law’ defined in section 163(1).	Alter either section 70 or section 163(1).
79.9	See comment (a) on 147.	
82	There is no provision allowing the President to act on her or her own discretion in cases where the Constitution or a law does not indicate an advice-giving body.	Re-include section 96.2 of the 1997 Constitution to clarify the President’s powers.
101.1	There is no provision on how the Chief Magistrate is appointed.	Provide for method of appointment – e.g. by the Judicial Services Commission



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104.3	The word “are” appearing before “may be prescribed in a written law” should be “as”.	Amend accordingly.
105.3 107.1 109 112.1-5 113.3	The references to ‘Magistrates’ do not include the ‘Chief Magistrate’, and as a result many protections for the independence of members of the Magistrates Court, and other provisions regarding Magistrates, may not be regarded as applying to the Chief Magistrate.	Insert the phrase ‘Chief Magistrate’ in the relevant provisions, or deal with the issue by altering the definition provisions in 163.1, which at present do not contain a reference to either the ‘Chief Magistrate’ or ‘Magistrate’.
113.4	See comment (a) on 147.	
114.8 115.3 118.3 121.8	Sections providing for the Independent Legal Services Commission, the FICAC, the Legal Aid Commission and the Accountability and Transparency Commission all provide that ‘the authority, functions and responsibilities of the Commission shall be prescribed by written law, <b>and a written law may make further provision for the Commission</b> ’. The highlighted wording is unclear. If the possible ‘further provision’ relates to ‘authority, functions and responsibilities’, the highlighted words are redundant. (Similar provision about statutes providing additional powers only can be seen in 45.6, 75.3., 76.2.c, 104.3, 119.11, 126.1.d and 152.3. However, the use of quite different formulations to provide for the same thing in relation to differing offices and institutions is itself a source of confusion.) If the highlighted words are intended to allow statutes to make some other kind of provision, then the provision should be clarified, and	Amend the sections to clarify the position, and consider use of standard wording not only in 114.8, 115.3, 118.3, 121.8, but also 45.6, 75.3, 76.2.c, 104.3, 119.11, 126.1.d and 152.3.



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	included in a separate subsection.	
115.13	See comment (b) on 147.	
116.3	See comment on 147.	
117.14	See comments (a) and (b) on 147.	
120.16	See comments (a) and (b) on 147.	
134-138, and sections creating most constitutional offices and commissions.	134-138 provide many of the same vitally important protections for the independence of constitutional offices and commissions that are included in great detail in each of the sections creating the offices and commissions. Two main issues arise. First, there is repetition in protections for some institutions, sometimes with slightly different wording. Second, the inclusion of much the same wording in each section adds unnecessarily to the length and complexity of the Constitution.	A single set of sections applying to all relevant offices and commissions would be preferable, and to the extent to which particular offices or commissions might require any unique provision, exceptions could be provided either in the general provisions, or in the section creating and providing for the office or commission in question. Accordingly, amendments may be required for 134 and the provisions creating and providing for each office or commission.
(a) 147 79.9 113.4 116.3 117.4 120.16	(a) Included in the list of constitutional offices in respect of which 'salaries or allowances' are payable out of the Consolidated Fund ('standing appropriation') are several offices where a slightly different provisions to similar effect (the guarantee is for payment of 'remuneration and benefits', 'salaries, benefits and allowances') is repeated in the section creating the office. The result is both: <ul style="list-style-type: none"> <li>• Duplication; and</li> <li>• Inconsistency in the items covered by constitutionally guaranteed standing appropriations.</li> </ul>	(a) Remove the duplication, and ensure consistency in what is required to be paid.
(b) 147 45.10 115.13	(b) For several institutions – the Office of the Attorney-General, the Office of the DPP, FICAC, the Auditor General, the	(b) Amend 147 to apply the requirement for standing appropriations to officers of the institutions, and delete the requirements in



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117.14 121.16 152.8	Human Rights and Anti-Discrimination Commission, and the Accountability and Transparency Commission – the ‘salaries, benefits and allowances’ of officers employed by those bodies are the subject of standing appropriations, in addition to the similar protection offered to the office-holder or commissioner(s). It is unclear why provision was not included in 147 to the effect that both the office-holder and the staff of the office concerned had the same protection.	the sections providing for the institutions.
152.8	See comment (b) on 147.	
159.2.c	As drafted, there could never be an amendment to the provisions setting out the amendment procedure.	Delete 159.2.c.
163,1	See comment on 70.	
171	171 makes redundant the standard provision for most commissions and offices that the body in question, created by decree, ‘continues in existence’: 45.1, 75.1, 76.1, 104.1, 114.1, 115.1, 116.1, 117.1, 118.1, 119.1, 125.1, 129.2, 130.2, 151.1.	Delete all ‘continues in existence’ clause and clarify that 171 covers all institutions currently in existence.
173.3.b.ii-iii		For clarity in drafting, references to “these laws” should instead be a reference to “any such Promulgation, Decree or Declaration or subordinate legislation”.

**Table 2: Proposed List of Changes to “Give Full Effect” Under Section 161**

‘Non-negotiable’ Principle	Problem	Possible Change
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(i) a common and equal citizenry	No provisions to readdress historical exclusion of women.	Include at least temporary special measures to promote women in Parliament and government.
(ii) a secular state		
(iii) the removal of systemic corruption	Concentration of power in the executive (especially in the offices of Prime Minister and Attorney-general), the limited independence of the judiciary, the politicisation of the Public Service through vesting appointment powers in Permanent Secretaries, etc.	Include an enforceable code of conduct; make COC and other bodies truly 'independent' and not under the Prime Minister's exclusive control.
(iv) an independent judiciary	Prime Minister controls judicial appointment and removal processes.	Reintroduce bipartisan appointment process; alter the composition of the JSC to ensure that it is not dominated by the Prime Minister.
(v) elimination of discrimination	The 'Limitation of Rights' clause undermines the anti-discrimination rights; the Human Rights and Anti-Discrimination Commission is not independent.	Remove the 'Limitation of Rights' clause; provide for an independent appointment process for the HRADC.
(vi) good and transparent governance	Political control of appointment and removal processes in relation to key accountability institutions, and the remarkably limited scope for amendment of the Constitution.	Provide for gender balance; a reflection of Fiji's diversity in the composition of public offices; and a maximum number of 15 Cabinet ministers; clarify the 'overall responsibility' of the RFMF and its relationship to civilian authority; introduce a more flexible amendment process.
(vii) social justice	The 'Limitation of Rights' clause undermines the positive new socio-economic rights.	Remove the 'Limitation of Rights' clause.
(viii) one person, one vote, one value	Undermined by a threshold figure of 5 per cent in the PR electoral system.	Reduce the threshold to no more than 2.5 per cent; include temporary special measures promoting the inclusion of




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		women in the Parliament.
(ix) the elimination of ethnic voting	Not best achieved by an open list PR system.	Provide measures to prevent voters and parties from replicating 'ethnic' preferences in the open-list system.
(x) proportional representation		
(xi) voting age of 18 years		



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### Appendix A: Fiji's Constitution-Making Timeline

#### 2006

Dec 5 Commodore Bainimarama, head of the Fiji Military, dissolved the elected Parliament.

#### 2012

January Prime Minister of Fiji announced that the government would undertake a constitution-making process that would result in elections by September 2014.

March Prime Minister declared 'non-negotiable' principles and four-phase process: (i) civic education process; (ii) consultation process by Constitution Commission; (iii) constitution drafting by Constitution Commission; and (iii) debate of Commission draft by a Constituent Assembly.

July 18 Fiji Government established the Constitutional Commission (Decree 57/2012) and a Constituent Assembly (Decree 58/2012), both based on the process announced in March.

Aug 3 to Oct 15 Commission consulted Fijians by holding 120 meetings across the country, and receiving and publishing over 7,100 submissions.

Oct 31 Fiji Government made a major change to the process by removing the Commission's mandate to: (i) publish its draft constitution; (ii) consult with the people on the draft; and then (iii) report to the Constituent Assembly on people's views of the draft (Decree 64/2012). The Decree also removed the Commission's mandate to review and amend existing decrees to make them consistent with the Draft Constitution.

Oct 2 High Court found Fiji Times newspaper guilty of contempt of court for a sports story quoting a foreigner who questioned independence of Fijian courts; ordered to pay \$3,000 fine.

Dec 21 Commission completed its work and formally presented the Draft Constitution to the President.

Dec 24 Military government made minor changes; for example, by creating a co-chair for the Constituent Assembly (Decree 80/2012).

#### 2013

Jan 10 President and Prime Minister stated on television that the military government would not accept the Commission's draft and instead would write their own constitution to be considered by the Constituent Assembly in February (Decree 1/2013). The decree also removed the requirement that the Constituent Assembly submit its approved draft constitution to the Chief Justice to test whether it complied with the 'non-negotiable'





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principles.

- Jan 15 First stage of election process began with a law to register political parties (Decree 4/2013). All new and old parties had to meet a very high test register including thousands of signatures in each division and a financial audit or fold and forfeit their assets to the state.
- Feb 16 Military government placed more restrictions on political parties, as well as trade unions and the media (Decree 11/2013).
- March 21 Prime Minister announced on television another major change to the constitution-making process. The Constituent Assembly was abolished and the military government would instead release its draft constitution directly to the public (Decree 12/2013). After 8 working days, the military government would consider all public submissions and adopt the final constitution a week later on 12 April.
- May 4 High Court found Citizens' Constitutional Forum and its CEO, Reverend Akuila Yabaki, guilty of contempt of court for reporting a United Kingdom Law Society Charity report questioning the independence of Fijian courts; CCF fined \$20,000 and Akuila sentenced to 3 months' imprisonment (suspended for 12 months).
- Aug 22 Fiji Government Constitution released to public.
- Sept 6 President assented to the Fiji Government Constitution (with amendments and revisions) to bring it into force.

### Appendix B: Separation and Concentration of Power

The Fiji Government Constitution provides for the traditional separation of powers between the three branches of government: the legislature (Parliament and Prime Minister), executive (President and Cabinet) and judiciary (the courts). In general, the legislature makes the law, the executive implements the law, and the judiciary interprets the law. As the chapter-by-chapter analysis shows, this process is much more complicated. To avoid one branch of government dominating the others, their powers are balanced against one another. In the 1990, 1997 and 2012 Draft, there were many checks and balances to ensure this happened. In particular, a set of 'independent' commissions and offices were established as further checks on the three main branches.



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The Fiji Government Constitution, as the chapter-by-chapter analysis has shown, largely does away with the checks and balances of past constitutions. The most striking feature is that the office of the Prime Minister has been granted unprecedented power relative to the legislature and judiciary, and over the supposedly 'independent' offices.

The diagram on the following page illustrates this by showing (in a simplified form) which body is appointed by which other body. For example, Parliament selects the Speaker and Deputy Speaker. The picture illustrates how the Prime Minister appoints directly or indirectly nearly every commission or office. For example, the Prime Minister directly appoints the Attorney-General and indirectly appoints the Electoral Commission. The Electoral Commission is appointed by the Constitutional Offices Commission, a body controlled by the Prime Minister since it is composed of the Prime Minister, two of his or her appointees, the Attorney-General and the Leader of the Opposition and one of his or her appointees. Not only does the Prime Minister control appointments (as the picture shows), but also the removal and remuneration of these office holders.

Each section setting out these bodies contains similar provisions cut and pasted from the 1997 or 2012 Draft constitutions. The provisions provide for the discipline and employment of staff, the source, guarantee and security of funding. But these bodies remain little more than arms of the Prime Minister, who controls appointments to most bodies, especially through the COC as seen above. The Prime Minister also controls removals by establishing tribunals through the COC to remove members of the commissions, although for some bodies this is done by the JSC. The COC and JSC also set the remuneration for the bodies. For the COC, however, it must follow the advice of an independent committee established to determine fair salaries. Nevertheless, this is an unprecedented concentration of power in one office at the expense of Parliament, the judiciary and, ultimately, the independence of the commissions and offices.

**Table 3: Appointments to Commissions**

Commissions	2013 Fiji Government Constitution	2013 Draft Constitution
Accountability and Transparency	(President on "recommendation") of Judicial Services Commission (JSC) after consulting Attorney-General	President after consulting PM and CJ
Constitutional Offices	PM as chair; LO; A-G; 2 members by PM; 1 member by LO	
Electoral	COC	Chairperson by PM; 3 members by PM; 1 member by Leader of the Opposition
Fiji Independent	no provision in the Constitution (FICAC	AG



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Commission against Corruption	Promulgation 2007: President appoints Commissioner and Deputy Commissioner)	
Human Rights and Anti-Discrimination	COC	Not provided for (Decree 11/2009: chairperson by President after consulting PM; two members by PM)
Independent Legal Services	JSC after consulting A-G	AG
Judicial Service	CJ as chair; President of Court of Appeal; Permanent Secretary of Ministry of Justice; a legal practitioner with at least 15 years experience by CJ after consulting AG; a lay member by CJ after consulting AG	CJ as chairperson; President of Court of Appeal; Permanent Secretary of Ministry of Justice; 2 members by AG
Legal Aid	no provision in the Constitution (Legal Aid Act 1996: 3 members by Law Society; a lay member; a lay member for "legally assisted persons" a legal practitioner by A-G)	
Mercy	A-G as chairperson; 2 members by JSC consulting A-G	AG as chairperson; 2 members by President
Public Service	COC	PM
Public Service Disciplinary Tribunal	JSC after consulting A-G	PM after consulting the CJ

**Table 4 Appointments to Offices**

Offices	2013 Fiji Government Constitution	2013 Draft Constitution
Auditor General	<b>COC</b> after consulting Minister for finance	<b>PM</b> after consulting Minister for finance
Commissioner of Corrections	<b>COC</b> after consulting Minister for corrections	<b>PM</b> after consulting Minister for corrections



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Commissioner of RF Military Forces	<b>COC</b> after consulting Minister for military forces	<b>PM</b> after consulting Minister for military forces
Commissioner of Police	<b>COC</b> after consulting Minister for police	<b>PM</b> after consulting Minister for police
Deputy Public Prosecutor	JSC after consulting A-G	JSC after consulting A-G
Governor of Reserve Bank of Fiji	<b>COC</b> after <i>consulting</i> Minister for finance	<b>PM</b> on <i>advice</i> of Minister for finance
Permanent Secretaries	PSC with agreement of PM	PSC with agreement of PM
Secretary General to Parliament	<b>COC</b>	<b>PM</b>
Solicitor General	JSC after consulting A-G	JSC after consulting A-G
Supervisor of Elections	<b>COC</b> after consulting Electoral Commission	<b>PM</b> after consulting Electoral Commission