An Analysis: 2013 Fiji Government Draft Constitution

Authored by the Citizens' Constitutional Forum.
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The CCF is a non-government organization that educates and advocates for good governance human rights and multiculturalism in Fiji. We are not aligned with any political party.

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Acronym Glossary

A-G	Attorney-General
CJ	Chief Justice
BLV	Bose Levu Vakaturaga (Great Council of Chiefs)
DPP	Director of Public Prosecutions
GDC	Government Draft Constitution, Fiji
JSC	Judicial Service Commission
LoO	Leader of Opposition
(s..)	reference section in GDC
RFMF	Republic of Fiji Military Forces
PM	Prime Minister Frank Bainimarama
[1997]	Fiji 1997 Constitution
[2012]	Draft Constitution by the Yash Ghai led Commission

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OVERVIEW: THE 2013 GOVERNMENT DRAFT CONSTITUTION

The new Government Draft Constitution [GDC] is an ambiguous document—at times continuing the traditions of the 1997 Constitution [1997] and 2012 draft of the Constitution Commission [2012], while at others making major departures from the past. The GDC clearly satisfies many of the 'non-negotiable principles' that the Government established as the basis for the constitution-making process [decrees 57/2012, 58/2012].

A secular state is defined as a founding principle in the GDC (see s.4). The electoral system provides for a version of 'one person, one vote, one value' based on proportional representation for all Fijians 18 years and older and does away with communal seats. The Bill of Rights includes many rights—including non-discrimination—previously provided in 1997 and 2012, as well as some new social and economic rights. Corruption is tackled in various ways by measures like entrenching the Fiji Independent Commission against Corruption.

Despite all these achievements in meeting the non-negotiable principles and values, the GDC falls short in at least four important ways. Hopefully the analysis below will contribute to efforts that the government will make to revise the GDC in the coming weeks as it seeks to realize all its aspirations to ensure Fiji becomes a 'true democracy' founded on 'respect for, and protection and promotion of, human rights.'

First, the GDC concentrates nearly all executive authority in the offices of the Prime Minister and Attorney-General. Together they control nearly all appointments to the judiciary and independent commissions and offices [see appendix 1], as well as senior state service and other appointments. The Prime Minister also controls the remuneration and removal of members of constitutional commissions and 'independent' constitutional office holders. Some crucial institutions provided for in 1997 and 2012, like the Constitutional Offices Commission and Ombudsman, have been removed entirely [see appendix 2]. There is an extreme concentration of power in the Prime Minister and Attorney-General that is unprecedented in most modern, democratic constitutions, and dangerous for Fiji.

Second, the otherwise impressive Bill of Rights comes at the expense of severe limitations on many rights. In general, a future government will no longer have to justify laws limiting rights before an independent court on the grounds that they are necessary in a free and democratic society [as in 1997 and 2012]. Instead, the government will usually only have to show that the limitation is 'reasonable'. In some cases (especially for labour rights) the standard is even lower. This effectively undermines the real value of nearly every right under the GDC. Social and economic rights are a partial exception. It is not clear, however, why these rights are formulated as an obligation on the State to 'progressively' meet those goals rather than a 'right' of every citizen [as in 2012]. A final worry is that the Bill of Rights will depend on the existence of an independent judiciary.

Third, the GDC does not provide the necessary structural protections for the judiciary to be seen as independent. The Chief Justice and President of the Court of Appeal will effectively be political appointments. They will both be appointed* by the Prime Minister after consulting the Attorney-General and may be removed by a process controlled by the Prime Minister. This is rare in modern constitutions [and in 1997 and 2012] that seek to de-politicize judicial appointments. The Judicial Services Commission is a critical body to manage and discipline the judiciary, and so should be free from executive interference. However, the Commission in the GDC is composed of members appointed exclusively by the Prime Minister and Attorney-General. Also worrying is that the GDC [unlike in 1997 and 2012] does not allow appeals from military courts to the civilian courts.

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*[*An appointment power vested in the President must be exercised in accordance with advice of a specified authority. If that authority is the Prime Minister, it is that office that has the actual power of appointment. This document will refer to the office that has the actual appointment power.]*

Fourth, there are very few avenues under the GDC for citizens to participate in and ensure 'good and transparent governance'. Citizens have a right to attend parliamentary committees and to somehow participate in the making of government regulations (ss.47(2) and 71(1)(b)). However, all the 2012 provisions for public participation in government are removed. The GDC will also not include the Access to Information law included in 2012. It also did not include the 1997 requirement that Parliament pass such a law 'as soon as practicable'.

There are also two significant omissions from the GDC involving several other important issues affecting the 'needs of Fiji and aspirations of its people'. First, women are not mentioned once in the GDC. Indeed, there are no positive duties on the State to promote participation of women or protect their distinct needs. Second, the land and governance rights of iTaukei, Rotuman and Banaban communities are no longer protected by the constitution. For example, 23 members of Parliament can vote to repeal any law like the *iTaukei Lands Act* that protect these rights.

All of these areas of serious concern with the GDC, as well as some of perhaps lesser significance, emerge from the chapter-by-chapter analysis which follows. As a final note, this analysis includes recommendations and suggestions to remedy drafting errors in what was surely the rapid process required to develop the GDC in the limited time available to the government. The final section highlights some of the most evident mistakes that can be easily remedied.

THE CONSTITUTION-MAKING PROCESS

Significant changes to the previously provided constitution-making process were announced by the Prime Minister when releasing the GDC. They included:

- Abolishing the Constituent Assembly [decree 58/2012];
- Asking people to become the constituent assembly by making comments on that draft by no later than 5th April, with the government to then finalise the draft Constitution within seven days (by 12th April).

There are a number of possible consequences of these changes that could make it difficult to ensure proper scrutiny of the new draft Constitution.

First, it is now quite difficult for the people of Fiji to have an informed debate about the GDC. That document has emerged from internal government procedures that have not included anyone from outside. This is quite different from a draft emerging from a Constitution Commission that has held public consultation and published an explanatory report (as with 1997 and 2012), or from public debates of a Constituent Assembly. The Prime Minister has announced that the government will publish 'explanatory notes on each section, laying out what they mean in order to make it more understandable for ordinary Fijians'. But these will not be available until towards the end of the two week periods for comment.

Second, a draft national constitution such as the GDC is a complex document, covering many technical issues, using a language with which most people are not familiar. Evaluation by technical experts is needed if the wider community is to understand the issues. It would be normal for many different interests groups to carry out their own technical evaluations of the aspects of the

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constitution of particular interest to them. The two weeks provided—including a long Easter weekend so valued by many Fijians—is not nearly enough time to intelligently digest, debate and respond to the GDC.

Third, the request of the Government for the people of Fiji to make submissions on the GDC gives the appearance of public participation and of testing public support. But not only is the period for participation far too short to enable real participation, but the majority of the people of Fiji, living in rural areas and informal urban settlements do not have access to either the text itself or to technical assistance to help understand it. In addition, they do not have ready access to internet and other mechanisms needed to make submissions.

As a test of public support, this limited consultation period and lack of technical analysis means it is not a fair test. Further, the process is open to manipulation, because it is not being managed by an independent body. Instead it is being managed by a government which has a clear interest in the outcome of the consultative process. A legitimate test of public support, considering international standards, would involve at the least a far longer period of public debate and possibly a referendum.

All of the factors just outlined indicate that the process for making the Constitution will no longer provide for 'full, inclusive and fair participation of all Fijians' as required by the *Fiji Constitutional Process Decree 2012* (s.3(a)). As a result, there are serious risks that any new Constitution emerging from this process will not be 'owned' by the people of Fiji. It may not have legitimacy.

Elections by September 2014

The current government has repeatedly stated that 'free and fair' elections will take place by September 2014 and this is confirmed in the GDC (s. 166(1)). If elections are held under the GDC, it is difficult to see how they will meet the international standards for a 'free and fair' election.

- In the transitional provisions, the Permanent Secretary responsible for elections performs the functions of the Electoral Commission and Supervisor of Elections until these officials are appointed under the GDC provisions (s. 166(2)). The Permanent Secretary is neither impartial nor independent. Even if new officers are appointed, they are also beholden to the (current) Prime Minister under the GDC appointment provisions.
- The Bill of Rights in the GDC allows the government to limit labour relations and the freedoms of association, movement and expression for the 'orderly conduct of elections.' This blanket ground for limitations will allow any government to severely and arbitrarily limit crucial rights during elections held under the GDC.
- Even more worrying is that all the decrees will continue in force after the GDC is made law. Now that the Constituent Assembly is abolished, various decrees restricting public meetings and speech, and will come back into effect and these decrees cannot be challenged for violating anything in the Bill of Rights in the GDC (s. 169(4)). In addition, the Political Parties Decree severely restricts the rights to form political parties, and places particularly heavy restrictions on former political parties, as pointed out by the International Senior Lawyers Project.

Given these grave concerns, it is difficult to see how 'free and fair' elections consistent with international standards can be conducted under the GDC. The same problems about meeting the requirements of the *Fiji Constitutional Process Decree 2012* for 'full, inclusive and fair participation of all Fijians' arise in relation to the conduct of elections.

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CHAPTER-BY-CHAPTER ANALYSIS

Preamble

While a preamble to a constitution is usually not enforceable, it can still play important roles. It can state the way a country defines itself, as well as the country's vision for itself. It can highlight the key principles and values underlying the constitution. To do all of this, it is usually framed in words intended to inspire. Further, it can then be used by courts when interpreting the constitution, and by government bodies in developing policy etc. In that way a preamble can have significant influence.

The 1997 Constitution, and the 2012 draft, provides examples of preambles that set out visionary statements, intended to be inspirational and to highlight principles.

Amongst the principles that could have been expected to be emphasised in any 2013 Constitution would have been the non-negotiable principles in the *Fiji Constitutional Process Decree 2012*. The Preamble to the GDC is a rather pedestrian statement, lacking inspiration, and giving little recognition to principles, including key 'non-negotiables'. In this sense it represents a wasted opportunity.

There are also some obvious ironies in terms of what the Preamble does include. In particular, it talks of establishing the Constitution as involving 'recognition and protection of human rights'. But as the discussion of Chapter 2 demonstrates, the provisions on rights involve significantly increased limitations on most of the rights contained in previous Fijian constitutions.

Chapter 1 - The State

The structure of Chapter 1 of the GDC reflects the equivalent chapter in 1997, while many of the provisions draw heavily on sections of the 2012 draft. For the most part the provisions are unexceptional. A few issues require brief comment.

Secular State

The provision on Fiji as a 'Secular State' (s.4) is clearly intended to meet the requirements of the 'non-negotiable principles and values' in s.3(e)(ii) of the *Fiji Constitutional Process Decree 2012*. That provision also needs to be read together with s.22, on Freedom of Religion. Together those sections constitute positive provisions that establish a secular State that respects freedom of religion.

Founding Values

The founding values of the State of Fiji set out in s.1 are admirable. In the main they are drawn from s.1(1) and (2) of the 2012 draft Constitution. 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. There are some values in s.1 of the GDC which are not reflected in substantive provisions. In particular:

- In relation to independence of the judiciary (GDC, s.1(a)), its protection has been severely weakened, as discussed in relation to Chapter 5 of the GDC, below;

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- In relation to 'civic involvement' (GDC, s.1(e)), provision in relation to civic life and the involvement of civil society in engagement with the state contained in the 2012 draft (e.g. s.7(c) and (e), and ss.53-7) has been omitted from the 2013 draft;
- In relation to 'a prudent, efficient and sustainable relationship with nature' (GDC, s.1(h)), apart from provision on 'Environmental Rights' (s.37 – identical to s.38 of the 2012 draft), the more detailed and progressive provisions of the 2012 draft on 'The Natural Environment', 'Principles of Land Use and Environmental Protection', 'Natural Resources' (ss.10, 12 and 14) have been omitted.

There is little point in bare statements of values with no elaboration about how they are to be given effect.

Languages of Fiji

There is no provision in Chapter 1, or anywhere else in the GDC, concerning languages of Fiji. 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 and Immunities

The provision against future coups (s.2(4)) is taken from the 2012 draft (s.2(3)). There are major ironies, and inconsistencies here, particularly in respect of the provision against immunities for anything done in furtherance of an attempt to establish a government other than in compliance with the Constitution. 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 of the GDC.

Chapter 2 - Bill of Rights

The Bill of Rights in the GDC includes many of the same rights as in 1997 and the 2012 draft, as well as several new socio-economic rights. At times the GDC improves on formulations in earlier constitutions (including the 2012 draft)—for example the rights are extended to bind all public office holders (s.6). In general, however, rights under the GDC are more severely limited and restricted than in 1997 and 2012. This leaves most rights open to arbitrary or at best 'reasonable' restrictions by future governments.

Limitation of Rights

The GDC sets out the specific purposes for which a particular right or freedom may be limited [as in 1997]. Most worrying is the removal of the requirement that any limitation for a right be 'reasonably justifiable in a free and democratic society'. Under such a provision [as in 2012], the State must justify to a court any law limiting most civil and political rights on this basis (civil and political rights including freedoms of expression, assembly, association, movement and rights to unrestricted labour relations). The approach means that in the end the independent judiciary can act as a check on action by Parliament to pass laws to restrict rights. The GDC approach is at odds with most modern constitutional human rights instruments, which include few (if any) specific limitation provisions and instead rely on general provisions setting out the grounds upon which all rights and freedoms may be limited [like 2012]. Any limitations in this system must be justifiable as 'necessary or reasonable in a democratic society'.

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Most rights in the GDC include a subsection limiting the right described for certain legitimate aims. The problem with this approach is that it grants future governments broad grounds on which to limit these rights. For example, the right to environment may be limited by any law (s.37). This means that any future government can use an ordinary Act of Parliament to limit environmental rights as far as they wish without needing to justify the limitation. The civil and political rights under the GDC are similar to 1997, but in a number of instances the list of possible limitations is longer, and in most instances the absence of any 'must be justified in a democratic society' provision takes away much of what has been recognised as a right. The State is given the right to do most of what it might want to do, without the courts being able to say this was unnecessary or excessive. Unlike earlier constitutions (and to some extent 2012) there is little recognition that sometimes the protection of culture and community might justify limits in individual rights (like rules about participating in village clean-ups, or laws restricting movement in some areas to protect culture).

As an extreme (and disturbing) example, the right to life (s.8) is limited because the right is not protected in any case of deaths 'from the use of force which is no more than is absolutely necessary' in three sets of circumstances:

(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
(c) in action lawfully taken for the purpose of quelling a riot or insurrection'.

This section is taken from article 2 of the European Charter of Human Rights, but very few democratic constitutions permit deprivation of life in their own bill of rights. This limitation is also a major departure from 1997 and 2012.

Labour rights in particular are severely restricted in the GDC. The government may limit the right to freedom of association to regulate:

(a) the registration of trade unions and similar bodies,
(b) collective bargaining processes, and
(c) essential services and industries (s.19(2)).

Such broad limitations on labour rights are rare in other democratic constitutions. They continue restrictions set out in decrees, which have been strongly criticized by the ILO.

The Bill of Rights allows extra grounds for limitations in the case of elections and states of emergency. To ensure the 'orderly conduct of elections,' the GDC also permits limitations on labour relations and the freedoms of association, movement and expression. This unrestricted authority to limit specific rights may allow a future government to restrict political parties and citizens for reasons other than those 'reasonably justifiable in a free and democratic society.' It is difficult to see how this is consistent with a commitment elsewhere in the GDC to 'free and fair elections' (ss.49 & 74(2)) or to the creation of a 'true democracy'.

Limitations During a State of Emergency

In a state of emergency, all rights (other than a few prescribed ones) may be limited to the extent 'strictly required by the emergency' (s.40). 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 an open and democratic society. Without a more clear limitation clause, there is potential for greater abuse of rights during a state of emergency.

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Application and interpretation

The Bill of Rights applies to all branches of government [1997 and 2012] as well as public officials (s.6). The rights also have horizontal application. Courts interpret the Bill similarly to 1997 and 2012, but no longer *must* consider relevant international law (as required in 2012). The GDC also does not include either a right for courts to consider laws in 'open and democratic societies' or a recognition of customary law [as in 2012]. Most such rights do, however, include 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 the 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.

Enforcement

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 grave concerns, discussed below, about the structural independence of the judiciary in the GDC. Without an independent and impartial judiciary, there may not be a strong check against violations of the Bill of Rights by a government. Enforcement also includes a significant role for the Attorney-General, which is problematic because of the concentration of power in that office, as discussed below.

Human Rights and Anti-Discrimination Commission

The Commission is a continuation of the body created by decree [11/2009] (s.42). However, there is no provision for how it will be composed. In the decree the Commission includes a chairperson appointed by the President after consulting the Prime Minister and two other members appointed by the Prime Minister. In 1997 the Commission was composed of the Ombudsman as chairperson, plus two others (one of whom had to be qualified to be a judge) appointed by the Prime Minister after consulting the Leader of the Opposition and the House sector standing committee for human rights. In 2012 the Commission members were appointed by the Constitutional Offices Commission. If the GDC does not state the composition of the Commission, then Parliament may alter it at any time by law. Otherwise the Commission has similar authority to 2012 except that it is restricted to making recommendations only to government (the Prime Minister) and not to all public bodies (s.42(2)).

As a final point, the Bill of Rights does not mention:

- the rights of women, or
- cultural, linguistic or religious rights, or
- Customary rights.

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Chapter 3 - Parliament

Parliament

The legislature consists a 45-member Parliament. There is no Senate [1997] or National People's Assembly [2012]. Parliament has a 4 year term, similar to 2012, unless dissolved after at least 3.5 years by the President on the advice of the Prime Minister (s.56). Most internal checks on Parliament have been removed in the GDC draft. For example, the Secretary-General to Parliament is appointed by the Prime Minister (s.78(2)) and the members of Parliament pass a law to determine their own salaries (s.79). In contrast, under the 1997 Constitution, the Secretary-General was appointed by the Constitutional Offices Commission after consulting the Speaker. In both 1997 and 2012, an independent commission set the salaries of Parliament members [2012, s.161; 1997, s.83]. The GDC also undermines the role of the Leader of the Opposition, who now has very limited constitutional roles, namely:

(a) introducing a resolution for the early dissolution of Parliament,
(b) appointing 1 of the 5 members of the Electoral Commission,
(c) nominating a candidate for President.

Parliament must make its meetings open and facilitate public participation, but this is no longer a citizens' right as it was in 2012. The Speaker can exclude the public in exceptional circumstances on 'reasonable and justifiable' grounds, while in 2012 such an exclusion also had to be justifiable in an open and democratic society based on human dignity, equality and freedom. Any regulations made under the authority of the Constitution or a law must provide for public participation, as far as is practicable (s.47(2)).

Elections

Under the GDC, members of Parliament are elected by secret ballot in 'free and fair' elections administered by the Electoral Commission (s.49). An electoral law must set out the details of elections based on a multi-member, open list proportional representation system where 'each voter has one vote, with each vote being of equal value' (s.50). Like 2012 there are four electoral divisions: Central with 18 members; Western with 16; Northern with 7; and Eastern with 4. The Electoral Commission may alter the number of members and the distribution of seats in the divisions, which are then deemed to amend the Constitution (s.51(4) and s.52(5)). All Fijian citizens 18 or over may register to vote except for those:

(a) serving a prison sentence of 12 months or longer,
(b) of unsound mind, or
(c) disqualified for an election offence [same as 1997].

All those nominated by a registered party or registered as an independent may stand for elections if they meet the following conditions (s.54):

- Fiji citizen [same as 2012], but also not a dual national,
- registered voter,
- ordinary resident in Fiji [same as 2012], but also must have lived here for past two years,
- not a member of Electoral Commission for last four years [same as 2012],
- not subject of imprisonment of more than12 months when nominated [same as 2012],
- not been imprisoned for offence related to dishonesty or violence during past 5 years [same as 2012], plus any abuse of office, corruption or sexual offence,

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- not guilty of an offence against election law, registration of parties or voters

The most important change is that all elected or paid officials in trade unions are deemed to have vacated their offices after submitting their nomination as candidates (s.55(3)). This means that any trade union leader must sever at least official ties with their unions before contesting an election.

A final point concern open list proportional representation in the Fijian context. The GDC leaves the details of the system to future legislation. To avoid manipulation by future governments, it might be worthwhile setting out further criteria for this electoral system. Two main problems that the current provision does not provide for include ethnic voting and women's participation. First, there are no constitutional restrictions on ethnically-based voting or parties organized on an ethnic basis. While this is included in decrees and possibly in a future electoral law, any future government can amend the electoral law and decrees to remove this restriction. Second, as Fiji's history has shown, women are greatly under-represented in any electoral system that does not provide for quotas in some way. The cost of a commitment to an open list system is to effectively exclude women from participating fully as candidates for political parties.

Electoral Commission

The Commission is responsible for registering voters and conducting 'free and fair elections'. Under the GDC it is dominated by appointments of the Prime Minister. Unlike the 2012 draft, there is no provision for an interim body of non-political and international members to supervise the first election. The Supervisor of Elections is appointed by the Prime Minister after consulting the Electoral Commission (s.75(4)). This is likely to result in far less independence that the 1997 Constitution, under which the Constitutional Offices Commission made that appointment.

Chapter 4 - The Executive

President

Under the GDC the President is the Head of State, vested with the 'executive authority of the state' as in 1997 (s.80(1)). But there is no Vice-President. The criteria for selecting the President is similar to 2012. The President is appointed after a vote in Parliament for two candidates, one each appointed by the Prime Minister and Leader of the Opposition (s.83). In 1997 the BLV 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. If the President cannot perform his or her duties, the Chief Justice steps in (s.87) as opposed to the Vice-President in 1997 and the Speaker 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. The Prime Minister must act on advice of this tribunal (s.88). This is a similar procedure to 1997.

Prime Minister and Cabinet

The Prime Minister is elected by Parliament (s.92) as in 2012 and similar to 1997. The Prime Minister directly appoints and dismisses Ministers (s.91). All Ministers must be from Parliament (s.94) (though special provisions apply to the office of Attorney-General – below)., There is no requirement for a multi-party Cabinet [as in 1997]. As in earlier constitutions, Cabinet is individually and collectively responsible to Parliament and must have its confidence (ss.89-90). The process for a 'no confidence' vote in Parliament is similar to that in 2012 (s.93).

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Attorney-General

The Attorney-General is 'the chief legal advisor of Government' and a Minister in Cabinet (s.95(1)) [same as 1997]. The Attorney-General must be a member of Parliament who (s.95(2)):

- is admitted as legal practitioner in Fiji [same as 1997], including a minimum 15 years of practice,
- was not found guilty of any proceeding before the Independent Legal Services Commission, or earlier laws for barristers and solicitors.

If no member of Parliament meets these criteria, the Prime Minister may appoint someone from outside Parliament (s.95(3)-(4)). They become a Minister and may sit but not vote in Parliament [similar to 1997]. This is a dangerous and circular system since the Attorney-General controls the Independent Legal Services Commission, the same body that disqualifies potential candidates from Parliaments. The 2012 draft omitted provision for an Attorney-General.

Chapter 5 - Judiciary

Independence of the Judiciary

This chapter reflects the same remarkable degree of concentration of power in the hands of the Prime Minister and the Attorney-General found throughout the GDC. This is a major factor in a high degree of political control of the judiciary and a seriously inadequate level of protection for its independence. In modern constitutions it is normal to provide for a non-political appointment process for all judicial offices, including the highest office, usually the Chief Justice. The independence of that position is of particular importance because it often exercises significant powers, in both major judicial decisions and in respect of other judicial appointments. But under the GDC the two highest judicial offices (Chief Justice and President of the Court of Appeal) are political appointees. The Prime Minister appoints them after consultation with the Attorney-General, and the process for their removal is initiated by the Prime Minister.

There are several other troubling provisions in the GDC. First, any judge (including a Chief Justice or President) who is not a Fiji citizen serves only for maximum three year terms. This could open a non-citizen Chief Justice or President of the Court of Appeal to additional political pressures. Second, the Judicial Service Commission (JSC) established under s.103 is to be the main body making appointments, and removing and disciplining, of judges, magistrates, court officials (registrar, masters etc.), and also controlling all non-judicial officers working for the courts. All such appointments will be made only after consulting the Attorney-General.

In modern constitutions, the independence of bodies such as the JSC is normally protected through provisions on their composition. For example:

- JSC members usually reflect a range of interests, including the professional body for lawyers;
- A majority of JSC members are usually not government appointees (the process for their appointment not being controlled by government);
- There is usually strong constitutional protection from direction and control of the JSC by government.

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But under the GDC:

(α) All JSC members are government appointees. The Prime Minister has authority over appointment of three members (the Chief Justice – who is chairperson of the JSC - and the President of the Court of Appeal, and the Permanent Secretary of the Department of Justice), and the Attorney-General appoints the other two members.

(β) While one of the latter two appointees must be a lawyer, there is no provision for Law Society representation. This is a most unusual omission. Because judicial appointees must normally be senior legal practitioners, there are good reasons to include legal profession representation in the institution making judicial appointments.

(χ) The freedom of the JSC from direction and control is far from clear. No provision for its independence is included in the section establishing the JSC (s.103), and the protection offered by s.147(5) extends only to the two members of JSC appointed by the Attorney-General, and not to the JSC itself, or to the Chief Justice, the President of the Court of Appeal or the Permanent Secretary when they sit as members of the JSC. This lack of certainty about independence may well be just a drafting error, but if so, it needs attention.

(δ) In exercising its powers over appointments of judges, magistrates etc., the JSC must always consult the Attorney-General, a requirement that opens the appointment process to political considerations.

It is most unusual for the 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. This extension of the powers of a JSC that is subject to a high degree of political control raises further concerns about that control.

Courts and Accountability of Government

The High Court, the Court of Appeal and the Supreme Court all play important roles in keeping government accountable. Key roles include interpretation of the Constitution, and handling appeals from decisions of lower courts. The GDC limits the role of these courts in relation to constitutional interpretation compared to 1997 (s.123) and 2012 (s.120). The result could be a considerable reduction in the extent to which government is subject to judicial scrutiny. Further, the 2012 draft sought to ensure that Fiji military courts are subject to scrutiny by the normal courts of appeal (s.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.

Fiji Independent Commission Against Corruption

It is not clear why the Fiji Independent Commission Against Corruption is provided for in the chapter on the Judiciary (s.114), as it is not a judicial institution, but rather (for the most part) an institution intended to achieve accountability. The provision would be better located in chapter 8 (Accountability and Transparency).

Director of Public Prosecutions

It is also not clear why the DPP is provided with a degree of protection of independence so much stronger than any other institution. The office is not subject to control by a court, or by provisions elsewhere in the Constitution or provided by other law (s.116(1)). By contrast, the freedom from

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control of other institutions whose independence is protected are open to such limits (ss.113(5), 114(7) and 147(5)).

Independent Legal Services Commission

Most unusually, the draft Constitution includes provision for the Independent Legal Services Commission. It is an institution established by decree [16/2009] with extensive powers over the legal profession. Its head is a political appointee (appointed by the Attorney-General). These arrangements involve a high degree of government control of the legal profession, A democratising Constitution would have been expected to move away from political control of the legal profession.

Errors

There are some errors in the chapter. For example, s.97(3)(c) gives the Supreme Court jurisdiction to deal with 'constitutional questions referred under' s.90(6), when in fact the correct provision appears to be s.90(5).

Chapter 6 - State Services

Concentration of Power

There is a high degree of control concentrated in the office of the Prime Minister, consistent with much of the rest of the draft Constitution. That office appoints, or has a key role in appointment of, almost all key officials involved in management of the state services. This is a significant change from 1997, when the Cabinet was the appointing authority for most such offices. The offices in question in the 2013 draft include:

1. The Chair and other members of the Public Service Commission (PSC) (s.121(2));
2. All permanent secretaries (although appointed by the PSC, the Prime Minister's agreement is required) (ss.122(1) and 123(4));
3. Ambassadors (s.124(1));
4. Members of the Public Service Disciplinary Board (s.127(2);
5. The Commissioner of Police (s.128(4));
6. The Commissioner of Corrections (s.129(4));
7. The Commander of the RFMF (s.130(3)).

Political Control of Public Service Agencies

Another significant area of concern involves the political control that ministers will have over the state services. In particular, the 2013 draft requires the agreement of the minister responsible for any particular Ministry before the permanent secretary can make decisions on terms and conditions of employment, qualifications for appointments and processes of appointment, salaries and benefits, etc. (s.123(7)). Further, the ministers for police and correctional services can give general policy directions to the Commissioner of Police and the Commissioner for Correctional Services, respectively.

Accountability and Control of, the RFMF

Both 1997 and 2012 aimed to provide some accountability by the RFMF to the elected government. The 2012 draft provided for a National Security Council to 'exercise civilian oversight of the

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security services'. The GDC does not make provision for accountability of the RFMF to the elected government.

It is most unusual that the Prime Minister is made the Commander-in-Chief of the RFMF (s.91(2)) and sole authority to appoint the Commander. Under past Fiji constitutions, the President was made commander-in-chief (1997, s.87), but that was under constitutions where the President's roles were largely ceremonial. In this case, the office of Prime Minister has already been made remarkably powerful, severely undermining past roles played by Cabinet. So the vesting of this authority in the PM is clearly intended to add a significant element to the PM's powers. As commander-in-chief, the PM is likely to have the authority to direct the Commander of the RFMF appointed under s.130(3), a person who will also be appointed solely by the PM. These arrangements will place the military under direct control of the PM, and are likely to politicise both the office of commander and the RFMF.

The military should be part of the security structures of the state, protecting the state and its interests. Placing it under control of the PM is likely to result in the military identifying more with the government of the day, rather than the state. There is a serious risk of not just politicising the military, but also of personalising military power.

Chapter 7 - Revenue and Expenditures

All revenue raised for the State must be paid into a Consolidated Fund other than exceptions provided by law (s.132) [same as 1997]. If no appropriations act is passed, the Minister for finance may authority up to a third of the last budget to cover ordinary government expenditures (s.134) [similar to 2012]. 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 Service Commissions. Also, the Commander of the RFMF is included on this list for the first time.

The GDC does not include several specific protections contained in the 2012 draft. No act of Parliament is required for the state to borrow money [2012, s.157]. Parliament is also not required to enact a law to 'ensure expenditure control, transparency and independent internal audit mechanisms in government' [2012, s.158]. Instead, the GDC adopts the less strict 1997 requirement to account for monies on accepted principles of the private sector [1997, s.182].

Chapter 8 - Accountability and Transparency

Accountability and Transparency Commission

The Commission is composed of a chairperson, a qualified judge, and 2 other members all appointed by President *after consulting* the Prime Minister and Chief Justice (s.141). This is a strange provision since nowhere else does the President have the authority to act on his or her own discretion. Parliament must pass a law to establish rules for (ss.141-2):

- a Code of Conduct for public office holders [like 2012],
- monitoring procedures and powers to enforce violations by criminal and disciplinary proceedings and removal of office,
- protecting whistle-blowers, and
- requirements for public officials to disclose assets, liabilities and financial interests

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Freedom of information

Provision is made for Parliament to pass a law to allow the public to exercise their right to access information (s.142). This is the same as 1997 except that there is no longer any requirement for the law to be passed 'as soon as practicable.' The GDC also does not include the Access to Information Law that would have come into force immediately after the Constituent Assembly adopted the 2012 draft. This is a problem since citizens will have no way to exercise their right to access government information until whenever Parliament decides to do so in the future.

Auditor-General

The Auditor-General is responsible for inspecting and reporting on the finances of the state (s.143). The office is appointed by the Prime Minister after consulting Minister for finance. In 1997 and 2012 the Constitutional Offices Commission appointed the Auditor-General.

Reserve Bank of Fiji

The Governor is responsible for protecting the value of the currency to ensure economic growth (s.145). The Prime Minister appoints the Governor after consulting the Minister of Finance. In 1997 and 2012 the Constitutional Offices Commission appointed the Governor after consulting the Minister for finance and the Board of the Reserve Bank. No provision is made for the independence of the Governor of the Reserve Bank.

General provisions for public offices

The term limits for 'independent' officers and commissioners are set at 3 or 5 years with the possibility of re-appointment (ss.146-7) [similar to 1997]. The Prime Minister controls the process of their remuneration and removal. For remuneration, the Prime Minister sets salaries and allowance—which may not be reduced while any one is in office—on advice of a committee that he or she appoints (s.148). The Prime Minister may also appoint a tribunal to remove any of these officers or commissioners on grounds of inability or misbehaviour and must act on the advice of the tribunal (s.149). In 1997 and 2012, remuneration was set by Parliament. The Constitutional Offices Commission (or occasionally the President) controlled the removal process.

Chapter 9 - Emergency Powers

The Prime Minister may declare a state of emergency on the recommendation of the Commissioners of Police and the Republic of Fiji Military Forces if:

(α) the security and safety of Fiji is threatened, and
(β) this is necessary to deal with the threat (s.151(1)).

In contrast, the power to declare such a state was granted to Cabinet by legislation in 1997 and Cabinet on recommendation of National Security Council in 2012. In the GDC the Prime Minister must refer the declaration to Parliament within 24 hours if it is sitting or 48 hours if out of session for confirmation. If a majority approve it, the state of emergency is extended for one month renewable by new votes.

This is an extremely dangerous chapter since it grants the Prime Minister and a majority in Parliament the authority to impose and maintain a state of emergency—possibly forever. The GDC does not expressly provide for an external check on the emergency authority of the Prime Minister.

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It is possible for the Prime Minister to prorogue a pliant Parliament indefinitely under a state of emergency.

In contrast, 1997 and 2012 include significant checks against indefinite states of emergency. In 1997 the House of Representatives could end the state of emergency at any time by a majority vote. The Prime Minister also could not extend the term of the House for longer than 12 months past its scheduled election date. In 2012 two-thirds of Parliament must approve the declaration, which is granted for 3 months. There were two further checks against unjustified declarations of states of emergency. First, all government actions taken and regulations made during state of emergency must be consistent with international obligations. Second, the Supreme Court could terminate the state of emergency, on application by any person, if circumstances did not justify the declaration.

Chapter 10 - Immunity

Immunity is entrenched ('shall not be reviewed, amended, altered, repealed or revoked') for all actions:

- taken by the military and police from 1987 to 1990 [Constitution 1990, ch 14] (s.152),
- taken against the elected governments by the military in 2000 and 2006 [Decree 18/2010]
  (s.153), and
- taken by public officials from December 2006 until first sitting of Parliament after elections held under the GDC (s.154).

The 2012 draft grants the same immunities, but only to those individuals who take the Oath or Affirmation of Reconciliation and Allegiance. In contrast to the GDC, it does not entrench the immunity clause against repeal or amendment.

Chapter 11 - Amendment of Constitution

The GDC may only be amended by a bill passed three times in Parliament and by three-quarters of members supporting the last two votes. The Electoral Commission must then hold a referendum on the proposal, which three-quarters of voters must approve (s.157). The requirement for these super-majorities in Parliament and a referendum is problematic for at least two reasons. First, the GDC makes no distinction between technical amendments (to correct inconsistencies, typos, etc) and substantive amendments (bill of rights, government powers, etc). Many technical changes are likely to be necessary due to the limited time available for drafting the GDC. Passing such amendments will now require the huge expense and time of both multiple parliamentary votes and referenda. Second, the requirement for a double super-majority will make the GDC one of the most difficult constitutions to amend in the world. In the future, it invites constitutional crises and, possibly, risks further coups.

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Chapter 12 - Commencement, Interpretation, Repeals and Transitional

The most significant provisions are in 'Part D – Transitional'. Two aspects of those provisions are of considerable concern.

Current Government to Remain in Office till After 2014 Elections

The GDC provides for the current government to remain in office until the first sitting of the new Parliament following the 2014 elections. That is not consistent with the need for free and fair elections to establish a democratic government. It is likely to be contrary to the *Fiji Constitutional Process Decree 2012*, which:

(a) provided that the new Constitution should include provisions designed to achieve 'true democracy' (s.3(d));
(b) included among the 'non-negotiable principles' for the new Constitution a requirement for 'good and transparent government'.

In a situation where elections are being held for the first time eight years after a coup, a period in which there has been a military regime in power, free and fair elections will only be possible if there is provision for the government in office to stand aside for a reasonable period before the elections are held (as was provided for in the 2012 draft). Without such provision, there is a strong likelihood of the government using its powers to its advantage and to the disadvantage of perceived opponents. Even if government does not do that, the fear that such things may occur can be expected to be enough to make it difficult to have a free and fair election.

Most Decrees and Promulgations to Remain in Force

All save five of the promulgations and decrees passed since 2006 (those listed in s.160) will remain in force 'in their entirety', even if they are inconsistent with the 2013 draft Constitution (s.169(2)). While the new Parliament will be able to amend such decrees etc., amending laws will not be able to have retrospective effect, nor 'nullify any decision made' under the decrees (s.169(3)). No challenge to the validity of the decrees will be possible in any court (s.169(4)).

At the very least the transitional arrangements should ensure that provisions of decrees that are inconsistent with the Constitution can be challenged. The most likely basis for such challenges would be breaches of human rights. It is most unusual for a constitution to prevent challenges to laws alleged to have breached human rights.

The provisions in question are likely to be contrary to the same requirements of the *Fiji Constitutional Process Decree 2012* just mentioned.

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OMISSIONS AND TECHNICAL POINTS

Women

The GDC is silent on the rights of women except for including 'gender' as a prohibited ground for discrimination. Not one of the many 2012 provisions to protect women's rights and promote women's participation are included in the GDC. Even the 1997 provisions for affirmative action for women (s.6(k), s.134 and s.140(c) are excluded from the GDC. Women can also expect to be greater under-represented in any open list electoral system that does not include quotas. There is a danger that women will be excluded from parliamentary politics in the name of 'representative' democracy.

Land rights and indigenous rights

The GDC is also silent on land and indigenous rights, which has several implications. First, there is no constitutional protection for any law on iTaukei, Banaban and Rotuman land and governance. In contrast, the 1997 and 2012 drafts provided special entrenched protections for key laws, including the *iTaukei Lands Act*, *iTaukei Land Trust Act*, *Rotuman Lands Act*, *Banaban Lands Act* and *Agricultural Landlord and Tenant Act*. Under the GDC, all these laws may be amended by a simple majority in Parliament. Second, there is no recognition of 'customary law,' so it is no longer protected as it was in 1997 and 2012. Third, there is no constitutional requirement that land owners or customary fishing rights beneficiaries receive an equitable share of royalties to mineral exploitation. Last, the government has no constitutional duty to consult with land owners for any development projects.

The GDC does include the 2012 right to a clean and healthy environment and freedom from the arbitrary expropriation of property (however the GDC adds several new grounds for expropriation of property).

Local government

Local government is not mentioned anywhere in the GDC. This means that there are no constitutional guiding principles on local government issues. Local government bodies of all kinds can be created by ordinary legislation, without reference to any constitutional requirement. All iTaukei, Rotuman and Banaban laws are not protected in the constitution. This means that they can be amended or repealed like any other ordinary legislation.

Drafting issues

There are a number of inconsistencies, mistakes and other drafting problems in the GDC. The most likely reasons for these problems are:

(a) that it has been drafted quickly, and
(b) that its primary sources include a number of existing documents, such as the 1997 Constitution, the 2012 draft Constitution, various decrees made since 2006, the European Convention on Human Rights, and other sources, which are not always consistent with one another.

There are many instances of such issues, and so just a few examples are provided here:

- On horizontal application of rights, sometimes the drafters of the GDC pasted directly from

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1997 without realizing that the right in question was already extended horizontally by the general provision. For example, the 'right of access, without discrimination on a prohibited ground' to public places like shops or restaurants is already covered by the general provision (s26(5));

- Provisions on the powers of the President, where although s.81 states that he/she 'acts only on the advice of Cabinet' or other specified authority, other sections make contrary provision (e.g. s.117(2)(b) empowers the President to make appointments to the Mercy Commission 'acting in his or her own judgment', while s.141(2) empowers appointments to the Accountability and Transparency Commission 'following consultation with the Prime Minister and the Chief Justice');
- There are three different formulations about the protection of the independence of constitutional commissions and offices (see s.116(10) for what seems to be the highest level of protection, as opposed to ss.113(5), 114(7) and 147(5)) which involve two slightly different formulations offering a lesser degree of protection);
- It is not clear what is intended by the numerous provisions in relation to commissions and offices that continue in existence bodies or offices established by promulgations or decrees made since 2006;
- While most of those provisions then go on to provide for the composition and powers etc. of the commission or office in question, the Human Rights and Anti-Discrimination Commission (s.42) is an exception, where the absence of provision in s.42 on composition of that body would mean that it would always be necessary to refer to the *Human Rights Commission Decree 2009* to know the membership of that constitutional commission;
- The reference in s.97(3)(c) to the Supreme Court having authority to deal with constitutional interpretation questions referred under s.90(6) is a mistake, as there is no such section, it probably being intended to refer to s.90(5).

Two important substantive issues arise here. The first concerns the time available to make comments and submissions on the GDC. In the five days since the GDC was released, those preparing this analysis have not had time to complete a thorough examination of every aspect of the GDC. There are certainly many other errors and inconsistencies in the GDC. Much more time will be needed if the government is to be assisted in improving the draft. The second issue concerns the process for amendment of the GDC (Chapter 11). The presence of the mistakes and inconsistencies highlights the problems with the very inflexible amendment process, as discussed in the analysis of chapter 11 (above).

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APPENDIX 1: 'INDEPENDENT' COMMISSIONS AND OFFICES

2.1 – Appointments to Commissions and Offices in the 2013 Government Draft Constitution

Commissions	Appointed By
Accountability and Transparency	President after consulting Prime Minister (PM) and Chief Justice (CJ)
Electoral	Chairperson by PM; 3 members by PM; 1 member by Leader of the Opposition
Fiji Independent Commission against Corruption	Attorney-General (A-G)
Human Rights and Anti-Discrimination	Not provided for (Decree 11/2009: chairperson by President after consulting PM; two members by PM)
Independent Legal Services	A-G
Judicial Service	CJ as chairperson; President of Court of Appeal; Permanent Secretary of Ministry of Justice; 2 members by A-G
Mercy	A-G as chairperson; 2 members by President
Public Service	PM

Offices	Appointed By
Auditor General	PM after consulting Minister for finance
Commissioner of Corrections	PM after consulting Minister for corrections
Commissioner of Police	PM after consulting Minister for police
Director of Public Prosecutions	Judicial Service Commission after consulting A-G
Governor of the Reserve Bank of Fiji	PM on advice of Minister for finance
Secretary-General to Parliament	PM
Solicitor General	Judicial Service Commission after consulting A-G
Supervisor of Elections	PM after consulting Electoral Commission

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APPENDIX 2: COMMISSIONS AND OFFICES

2.1 – Comparison of Public Commissions

2013 Government Draft	2012 Commission Draft	1997 Constitution
		Constituency Boundaries
	Constitutional Offices	Constitutional Offices
Electoral	Electoral	Electoral
Accountability and Transparency	Ethics and Integrity	
Fiji Independent Commission against Corruption		
Human Rights and Anti-Discrimination	Fiji Human Rights	Human Rights
Independent Legal Services		
Judicial Service	Judicial Service	Judicial Service
Mercy	Mercy	Prerogative of Mercy
	Police and Corrections Services	Disciplined Services
Public Service	Public Service	Public Service
	Salaries and Benefits	Parliamentary Emoluments

2.2 – Comparison of Public Offices

2013 Government Draft	2012 Commission Draft	
Director of Public Prosecutions	Director of Public Prosecutions	Director of Public Prosecutions
Solicitor General	Solicitor General	Solicitor General
Auditor General	Auditor General	Auditor-General
	Ombudsman	Ombudsman
Secretary-General to Parliament	Secretary-General to Parliament	Secretary-General to Parliament
		Secretaries of House and Senate
Commissioner of Police	Commissioner of Police	Commissioner of Police
Commissioner of Corrections	Commissioner of Corrections	
Supervisor of Elections		Supervisor of Elections
Governor of the Reserve Bank of Fiji	Governor of the Reserve Bank of Fiji	Governor of the Reserve Bank of Fiji