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| CONSTITUTION MAKING & TRANSITION TO DEMOCRACY IN FIJI |
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# INTRODUCTION[[1]](#footnote-1)

Constitution-making over the years has developed into an important element of transition from authoritarian regime to democracy where the intended outcome of the new constitutional order is democracy. An effective transition to democracy involves “a new social contract between and within the governed and the governors”. Constitution making in transitioning societies is complex and multi-dimensional which involves several processes with various actors consulting with each other to reach a settlement on the nature of the constitution. The measures adopted in reaching agreements vary - while some countries choose to modify the existing constitution others repeal the existing one thereby setting in motion a process for drafting a new one. This renewed interest in the processes of democratization has led to more emphasis being placed on the importance of citizen participation in the drawing up and implementation of constitutions. This form of constitution making is referred to as democratic or participatory constitution making. In ethnically diverse societies, constitutions are seen to play an important role. They offer a clear basis for the development of common relationships between different communities and also illustrate the views and attitudes of the dominant communities with regard to other communities. Therefore the processes involved in constitution making have become an important measure of the success or failure of democratization efforts in ethnically diverse societies. According to Angela Banks (A. Banks 2007, 138), participatory constitution-making is premised on the idea that democratic constitutions should be created and adopted through democratic processes.

This paper will critically analyze the constitution–making process that started in 2012. In particular, the paper will critically scrutinize public participation in the process and locate the 2012-13 constitution-making process in Fiji within the broader debates surrounding constitution making in ethnically diverse societies with the intention of assessing the democratic credentials of the new 2013 Constitution unilaterally drafted, endorsed and promulgated by the regime in September 2013.

## CONSTITUTION-MAKING AND DEMOCRATIZATION

In democratic transitions, constitution-making frequently plays a major role. As Andrea Bonnie-Blanc states, “a constitution legitimizes a democracy…it is the democratic prerequisite without which no democracy fully exists” (Bonnie-Blanc 2010, 421). In her study of democratic transition of Spain, she notes,

Constitution-making is at once the most varied and the most concentrated form of political activity during the transition, in it, political maneuvering, bargaining and negotiating take place and the political positions, agreements, and disagreements between groups and leaders come to the fore. How the constitution drafters handle these issues may tell us crucial things about the transition and the regime it leads up to. (Bonnie-Blanc 2010, 421-422)

Constitution-making at its best is a thorough effort at socio-political reform and conflict resolution. In the course of a democratic transition, it entails a critical set of choices that may shape the sustainability of the future regime. Future local political relations may also be revealed through the form the constitution-making takes.

In divided societies, the way a constitution is drafted, discussed, adopted and implemented can to a large extent shape the success or failure of democratization efforts (United Nations Development Program 2004) (Samuels 2006, 2-20) (Reynolds 2007, 42-47) (Choudhry 2008). Sujit Chourhry identifies two functions a constitution plays in a divided society: *a regulative conception* and *a constitutive conception* (Choudhry 2008: 5-6).

The regulative conception of the constitution is two-fold. Firstly, a constitution enables decision-making through the creation of the institutions of government and allocation of powers to them, by establishing rules of procedures that enable these institutions to make decisions and outlining how interaction between these institutions take place. Alternatively, a constitution also enacts procedural roadblocks (thus disabling decision-making) to decision-making such as super-majority rule) and by setting substantive limits on political decision-making (such as a Bill of Rights). For example, while the constitution might create an executive and the legislature where decisions are made on a majoritarian basis, a constitution in a divided society may also provide for a minority veto or protection of minority rights through the Bill of Rights.

The constitutive conception enables a constitution to go further and constitute the people which governs itself under and through a constitutional regime. Due to a history of conflicts and disagreements in divided societies, there is a lack of shared existence, sense of belonging (Choudhry 2008: 6). A constitution therefore is usually a key instrument in forging common political identity which is necessary to make that constitutional arrangement successful. A constitution fosters development of a common political identity through the creation of institutional spaces for decision-making among members of diverse ethno-cultural groups.

## PARTICIPATORY CONSTITUTION-MAKING

There is an ever-growing literature on constitution making in transitional societies. Constitution making has overtime shifted from elite-led closed-session events to ones with high levels of civic engagement (Moehler and Marchant). Whilst scholarly literature during the second wave of democratization and constitution-making focused on the content and provisions of constitutions when judging democratic credentials, the later stages of third wave of democratization and constitution-making placed more emphasis in the process (Moehler & Marchant, n.d., pp. 1-2; Ginsburg, 2012, p. 4; Saunders, 2014, p. 3). This shift has led scholars and policy makers to advocate greater public involvement and greater transparency as an international norm and as the best practice for constitution-making (Moehler & Marchant, n.d., p. 3; Frank & Thiruvengadam, 2010; Abdelgabar, 2013; Ghai & Galli, 2009, Banks, 2008, p. 1046).

In spite of the near universal acknowledgment of these standards, the way in which participation is translated into practice varies greatly. Jon Elster identifies and distinguishes the type and intensity of participation and citizen engagement as either ‘upstream’ or ‘downstream’ (Elster 1995). ‘Upstream’ engagement refers to engagement through the election of members to a Constituent Assembly and from direct engagement via consultation during drafting phases, to indirect forms of engagement through civic education programs whereas ‘downstream’ engagement refers to participation through a referendum on a final document (Elster 1995). However, there is no agreement thus far amongst scholars and policy makers as to what level and system of participation and engagement produces the most desirable outcome.

## INTERNATIONAL STANDARDS FOR PARTICIPATORY CONSTITUTION-MAKING

Minimum obligations concerning public participation in public affairs are established by international human rights law and subsequent proclamations and elaboration by various human rights bodies. Such obligations are spelled out in Article 21 of the Universal Declaration on Human Rights (UDHR, 1948)[[2]](#footnote-2) and Articles 1 (1) and 25 of the International Covenant on Civil and Political Rights (ICCPR, 1966)[[3]](#footnote-3). These rights are further elaborated in General Comment 25 by the UN Human Rights Committee.[[4]](#footnote-4) According to General Comment 25, conduct of public affairs has been expanded from voting in elections to encompass participation in constitution making processes as well. However, the Comment goes on to point out that this right to participate in public affairs is a ‘subjective right’ meaning that citizens do not have the unconditional right to choose how they wish to participate. Rather, the state chooses the modality of participation ensuring that people are provided with opportunities to participate in the process (Hart 2010).

## WHY PARTICPATE IN CONSTITUTION-MAKING PROCESSES?

A well thought-out and planned participatory constitution-making process does offer some significant benefits.

### Nation-building and Unity

More and more importance is being placed on constitution making in multi-ethnic societies because constitution making is now also seen as a means to build a nation as well as a state (Dann, Reigner, Vogel, & Wortmann, 2011, pp. 3-4; Saunders, 2014; Miller, 2010, pp. 644-647; Benomar, 2004; Benomar C. , August 2003; Hayson, 2005; Brandt, Cottrell, Ghai, & Regan, 2011, pp. 86-87). To achieve this goal of nation building, the constitution-making process must be ***inclusive*** and it needs to be a confidence-building process between people of different communities. Saunders also points out that there is now general agreement that a constitution must, in one way or another, originate from citizens, therefore citizen’s ***participation*** in the process of making a constitution has become very important (Saunders 2014).

### Enhancing Legitimacy of the Constitution

With greater emphasis placed on citizen participation and the inclusiveness in the process of constitution making, it is argued that this will lead to greater ***legitimacy*** of the Constitution and citizens, through participation in the process, will ultimately have ***national ownership*** of it therefore guaranteeing that the Constitution will be respected and followed (Saunders, 2014; Benomar C. , August 2003; Benomar J. , 2004; Moehler & Marchant, pp. 5-6; Elkins, Ginsburg, & Blount, 2008, pp. 367-375; Blount, 2011, p. 39; Brandt, Cottrell, Ghai, & Regan, 2011).

### Well-informed and Active Citizenry

Constitution-making offers people a chance to be educated on issues relating to democracy, human rights, and the rule of law through civic education and awareness programs. There are long-term benefits of this as through these programs citizens become democratically empowered (Benomar J. , 2004; Dann, Reigner, Vogel, & Wortmann, 2011; Samuels, 2006; Saunders, 2014; Brandt, Cottrell, Ghai, & Regan, 2011).

## DANGERS OF PARTICIPATION

While public participation in constitution making is emerging as a general international norm and best practice, there are some clear dangers of allowing too much participation.

Brandt, Cottrell, Ghai, & Regan (2011: pp.87-90) caution that for divided societies, participation may be counter-productive. Groups and people may use the constitution making process to seek self-interested positions and not be prepared to work with other groups to seriously discuss the future that would reduce conflicts. Another potential problem with participation in divided societies is that debate and discussions tend to be narrow, usually revolving around sectional/ethnic interests as opposed to interests of the nation as a whole. The participatory process may be used by leaders of fundamentalist and intolerant groups to manipulate people and cause further divisions. Therefore instead of the process being one about nation building, it could turn out to be more divisive (Blount, 2011, p. 39).

There is another related danger to public participation. Due to the diversity of interests involved in the process, it becomes harder to find a practical settlement in divided societies (Blount, 2011, p. 39; Brandt, Cottrell, Ghai, & Regan, 2011: pp.87-90). Time and effort spent on trying to reach a consensus, sometimes making the process a lengthy one. Added to this is the reality of politics and decision-making in divided societies. Decisions in divided societies are usually made by a small group of influential elites in a manner that might be non-participatory and nontransparent.

On occasions, decision-makers as a form of appeasement, put in provisions in (draft) constitution that they think will be most likely accepted by people (such as religious, ethnic groups) (Cottrell, Ghai, & Regan, 2011: pp.87-90).

With broad participation there is also a danger that the contitutional text that emerges out of this process may be “an adhoc creations, rife with internal incosistencies and institutional mismatches” (Blount, 2011, p. 39).

## EVALUATING THE IMPACT OF PARTICIPATION IN CONSTITUTION-MAKING

Evaluating the impact of public participation in constitution-making processes is not easy. Just as there lack of consensus on what participation means and how to achieve it, there is no consensus amongst academics and policy-makers on how to measure the impact on public participation in constitution-making. At times focus is placed on the end result i.e. whether a constitution has been achieved regardless of its quality while at other times if a bad constitution was prevented through public participation. Some have even gone beyond these two criteria and measured the impact of participation scrutinizing the process and the broader implications by analyzing whether the process was transformative by creating spaces for constructive public discourse and creating an informed and active citizenry (Brandt, Cottrell, Ghai, & Regan, 2011: pp.85).

Brandt, Cottrell, Ghai, & Regan (2011) have attempted to come up with a set of 8 criterias for assessing the impact of public participation in costitution-making. These are:

1. The effect of public participation on the content of the constitution;
2. The effect of public participation on the resolution or creation of conflicts;
3. The effect of public participation in broadening the poltical reform agenda
4. The effect of public participation on then responsiveness of the constitution to national goals and issues;
5. The effect of public participation on the legitimacy of the constitution;
6. The effect of public participation on citizen’s understanding of the system of governance;
7. The effect of public participation on creating an informed and active actizenry;
8. The effect of public participation on creating and promoting an understanding and support for constitutionalism and the rule of law.

With this background, this paper would later analyse public particiation in the 2012 Fiji constitution-making process.

##

## CONSTITUTION-MAKING IN FIJI

Constitution making processes in Fiji have largely been elite-driven, dominated by political representatives/leaders of the two major communities in Fiji. The public have largely been excluded from the process. The debates surrounding issues of constitution making has also been primarily focused on ethnic distribution of power between the two groups rather than on issues related to nation building.

Before independence in 1970, the constitution making process was mostly carried out in private by leaders of major political parties together with colonial officials and the deliberations of these meeting were largely confidential (Cottrell and Ghai 2010, 278-279). Participation of the public during constitutional discussions was negligible.

After the coup in April 1987, the Governor General under pressure from the coup makers and the Taukei movement appointed Sir John Falvey to chair a Constitutional Review Committee that would “review the Constitution of Fiji with the view to proposing to the Governor-General amendments which will guarantee indigenous Fijian political interests with full regards to the interests of other people in Fiji” (Cottrell and Ghai 2010, 280). This was undoubtedly the first time that the public were to be engaged in the constitution making process albeit in a restrictive political climate. The Falvey Committee conducted public hearings in the four major urban centers in Fiji, as a result receiving nearly 950 written and oral submissions. People’s participation in the process was limited by geography and the prevailing political climate (Cottrell and Ghai 2010, 280).

However, the CRC was unable to produce a unanimous report which led to further political uncertainty. In response to the uncertainties, Rabuka carried out another coup on 25th September 1987, declaring Fiji a republic, installing himself as the head of an interim government, and later inviting the former Prime Minister, Ratu Mara to lead an interim government. A Cabinet sub-committee was formed to prepare a draft constitution that largely took into account the proposals made by the Great Council of Chiefs. In 1989, the government appointed a retired colonel, Paul Manueli to lead a Constitutional Inquiry and Advisory Committee to ascertain public response to the draft committee. The Committee conducted 32 public hearings in 14 centers, receiving more than 500 written and oral submissions. The Manueli Report culminated into the 1990 Constitution (Lal 1992, 284-295).

The 1990 Constitution provided for a review with 7-10 years of its promulgation (Lal 1992). In 1993 an expanded Cabinet sub-committee, that included representatives of the Opposition parties, was setup to look into reviewing the 1990 Constitution. After much deliberation, a three-member committee headed by Sir Paul Reeves was appointed to review the Constitution in 1995 (Lal 1992, 284-295).

After much debate and discussion, a wide-ranging and highly ambitious ‘terms of reference’ was drawn up for the constitutional review process. The Commission was tasked with the responsibility “to recommend constitutional arrangements to meet the future needs of the people of Fiji, and promote racial harmony, national unity and economic and social advancement of all communities.” In attempting to fulfill this, the recommendations “had to guarantee full protection and promotion of rights and interests of the indigenous Fijian and Rotuman people, have full regard for the rights, interests and concerns of all ethnic groups and take into account internationally recognized principles and standards of individual and group rights.” In order to achieve this, the Commission had to “scrutinize, facilitate widest possible debate on the terms of the Constitution, and after ascertaining the views of the people, suggest how the 1990 Constitution could be improved to meet the needs of Fiji as a multiethnic and multicultural society.” (Lal 1992, 284-295).

From July to November 1995, the Reeves Commission travelled throughout Fiji, receiving almost 800 written and oral submissions. In 1996, the Commission presented its report titled “The Fiji Islands: Towards a United Paper” to the parliament for deliberations (Fiji 1996). It was only at the public hearings that citizens participated in the process. Once the Commission’s report was submitted to the parliament, citizen’s participation ceased to exist. at this point, the Joint Parliamentary Select Committee (JPSC) took over and deliberations took place behind closed doors without any public involvement. The JPSC finalized the Commission’s report with some modifications into a Bill that was then subjected to the parliament for endorsement (Cottrell and Ghai 2010).

In 2013, Fiji completed another process of drafting a constitution, the third in its short history since independence in 1970. All three changes came about after military coup d’états. It is almost as if the occurrence of these coups signified a rejection of the constitution which was in place at the time. In some ways, Fiji’s coups have not only been coups against governments but also coups against constitutions and constitutional arrangements. This project focuses on the processes of 2012 constitution-making in Fiji. Three fundamental characteristics that should be apparent to any avid observer of Fiji’s constitutional history are; the lack of citizen participation in the process, the exclusivity of the process itself which then naturally leads to a lack of ownership.

Constitution-making processes in Fiji prior to 2012, subscribed to the international trends in constitution-making in conflicting societies by restricting public participation and leaving most of the negotiations relating to constitutions to the political elites to representatives of different ethnic communities.

During the various constitution-making processes in Fiji public participation has generally been restricted, in terms of having the agenda and the parameters of deliberations set in advance. It can be argued that constitution making has been an elitist project, mainly driven by politicians. Public participation has also been restricted due to the lack of civic education on issues relating to the contents of the constitution and broader principles of democracy as a system of government. People have therefore been vulnerable to manipulation by the political elites before, during, and after constitutional deliberations. Debates on critical issues around nation building, such as national identity and representation, have been missing from the public sphere; these have mostly been decided by political elites acting on behalf of their constituents. Together the limited public participation and inclusiveness has led to a lack in ownership of constitutions in Fiji and the subsequent political upheavals.

## OUTLINE OF THE 2012 PROCESS

On the 9th of April 2009, the Fiji Court of Appeal ruled that the 2006 military coup unconstitutional. The response by the military government was both swift and predictable. On the very next day, President Ratu Josefa Iloilovatu announced that the 1997 constitution had been abrogated. One of the reasons cited by the President was that this would “facilitate the holding of true and democratic elections.” (President of Fiji - Address to the Nation 2009). Apparently, the military regime deemed that the 1997 Constitution was not conducive to the facilitation of true democracy. The military government announced a roadmap for achieving “true democracy” for Fiji. One of the important aspects of this road map was to be the adoption of a new constitution which should reflecting the aspirations already articulated in the Peoples Charter for Change, Peace and Progress, a government led initiative (National Council for Building a Better Fiji 2007). Since the abrogation of the Constitution (and the absence of the parliament), the military government went about ruling by decrees (with presidential assent). The formulation of the decrees have no input and consultation from the public. The 2009 Administration of Justice Act removed the jurisdiction of the court to hear or determine a challenge to any government action. What actually happens is that the Cabinet considers and approves decrees in secret which are then ratified by the President.

With elections already scheduled to take place in 2014, it was imperative that a new constitution should be in place well beforehand. In 2012, the regime issued two decrees to facilitate the work on the new constitution -the Fiji Constitutional (Constitution Commission) Process Decree 2012 or Decree 57 and the Fiji Constitutional Process (Constituent Assembly and Adoption of Constitution) Decree or Decree 58. The former, Decree 57 established and stipulated the mandate of the Constitution Commission whereas the latter provided for the establishment and mandate for a Constituent Assembly. The role of the commission was to inform the public at large about the process, to collect and receive submissions from them and finally to draft a constitution in line with the views of the people and the non-negotiable principles that would then be presented to the Constituent Assembly for further deliberations. The role of the Constituent Assembly was to debate the draft Constitution, as well as the Explanatory Report of the Commission, and the views of the people of Fiji expressed on the draft Constitution;keep the people of Fiji fully informed of the progress of debate and adoption of the draft Constitution in its passage through the Constituent Assembly; ultimatelyadopting the draft Constitution.

Together the two decrees provided for a constitution-making process was divided up into four stages with specified timelines. The first phase was the civic education phase (the primary responsibility of the government) which was to run from May to August of 2012. This phase entailed the organizing of trainings for the people, to enable them to actively and effectively participate in the constitution making process.

The second phase was to begin in July and be finished by October. This phase was the consultation phase where the Commission actually went out to hear and collect the views of the people. Upon the completion of this phase, the Commission was then required to prepare the initial draft of the Constitution to be handed to the President by the first week of January. The last phase involved the tabling of the draft constitution to a Constituent Assembly which would deliberate further before the Constitution finally came into effect. The whole process was scheduled to be completed by March of 2013.

The very first principle and objective that Decree 57 laid out for the Constitution Commission was to “ensure that the people of Fiji are able to participate in the process without any distinction based on race, gender, religion, age, occupation, status, residence, learning or disability” (Fiji Government 2012). The Constitution Commission was given a very wide mandate which required it not only to collect people’s views but also to prepare the people and facilitate their participation (Fiji Government 2012). Decree 57 stipulated 11 non-negotiable principles which the Commission had to take into account in the draft Constitution- namely *a common and equal citizenry; a secular state; the removal of systemic corruption; an independent judiciary; elimination of discrimination; good and transparent governance; social justice; one person, one vote, one value; elimination of ethnic voting; proportional representation; and voting age of 18*. Overshadowing these 11 principles was the requirement for the Constitution to grant immunity for events of 2006 and thereafter.

The regime through its Roadmap to Democracy, viewed constitution-making as legitimizing its Charter process. They went to the extent of limiting public debate on issues that the regime felt strongly about, the 11 non-negotiables with the non-conditional granting of immunity. At the center of the Fiji Constitutional Process Decrees (57 and 58) was public participation and the regime kept reminding people that this was their process and that they should take part it in to determine a democratic and stable future. If changes were to be made to the draft constitution, Decree 58 (establishing the Constituent Assembly) made sure that a supermajority of two-thirds was required. Perhaps a reason for this was that, the regime felt with the non-negotiables, public participation would not jeopardize their vision for what the constitution should look like. This also indicates a high degree of legitimacy for the participatory process.

## PARTICIPATION IN PRACTICE: What did this mean?

Participation is much more than just opening spaces for dialogue. More importantly, it involves analyzing the motive of the participation process and inculcating skills that empower and enable citizens to participate effectively and meaningfully. *“Here the contrast and the relationship between spaces that are created through invitations to participate and those that people create for themselves become especially important.”* (Cornwall 2008, 274-275). Cornwall further states that invited spaces and the opportunities that are available for participation are frequently controlled and owned by those who have opened up the spaces (power wielders), and it does not matter how participatory they seek and claim to be (Cornwall 2008, 275). For Fiji, the questions to be asked here are: What were the motivations behind allowing people to participate in the constitution-making process? And more importantly how effective and meaningful was people’s participation?

By analyzing public participation, it can be concluded that the constitution-making process was merely tokenistic. Decree (No. 57) was clear regarding the functions of the Constitution Commission. Sections 7 and 8 mandated the Commission to “inform”, “collect”, and “receive” people’s views. While doing this, the Commission was to ensure that this process is coordinated with civic education so as to ensure that people have a good understanding of the issues before they expressed their views (Fiji Government 2012). People had no control over what the Commission did with the information, how the Commission used the information collected, and whether or not their submissions were taken onboard or not. This is not to say that the Commission did not intend to use the information gathered during the consultation phase. The commission was genuine in its commitment and was actively forthcoming in asking people to make submissions to them and get their voices heard.

This is too simplistic an analysis of the extensive and exhaustive work that the Constitution Commission undertook. A more comprehensive analysis would offer more insight into the different interests at play during the public consultation phase, through the analysis of how, why and by whom participation was being used.

 **For the people**, participation signified ***inclusion***. Since 5th Dec 2006, people have felt emasculated, unable to air their views with constant threats to safety and security. Decisions had been made with no consultation or input of the communities. Finally after almost 5 and ½ years of suppression, they felt they could finally have their say. Initially, there was some skepticism from the certain sections of the society regarding the whole process. It was seen as a regime-initiated and regime-driven project intended to legitimize the regimes agenda. There were also concerns regarding the composition of the Commission especially the 3 local commissioners who were known regime loyalists. However, as time passed people and organizations started to see the process as independent. This could be attributed to the impartial leadership of the Commission Chairman. People started feeling confident about the process thereby lending it legitimacy. During this time the regime tried to interfere with the work of the commission through public pronouncements (elaborated later).

**For the Constitution Commission,** participation meant a number of things. Firstly, it meant ***legitimation*** for the process they were implementing and the draft constitution. It also meant ***sustainability and empowerment*** that would ensure that the people at large through participation, understand and take ownership of their destinies. This, the Commission tried to do with the draft constitution that they ultimately produced where they tried to balance the demands of the regime with what the citizens had shared with them. Apart from granting the wishes of the regime (non-negotiables and immunity) albeit with conditions, the Commission tried to ensure that people’s participation in the new constitutional order was guaranteed and that they had a significant and active role to play in the future governance of the country.

**For the regime**, participation meant ***legitimation*** (Nominal Participation). As Cornwall (2008) and White (1996) noted, participation is about motivations that lead to [governments] adopting participatory approaches and about power and control. It was evident from the beginning that the regime had predetermined the outcome of this process and that public participation for them meant giving credibility to their ambitions. There was a gap in the rhetoric of “genuine participatory process” and the actions of the regime and the military prior to, during, and after the public consultation phase. From the very beginning, the regime set the tone (setting the timeline, selecting the Commissioners and so on) for the process without much consultation. The actions from the regime towards the later stages of the Constitution Commissions work and the deterioration of the relationship suggests that the regime was unhappy with how things were unfolding. It also indicates that the regime felt that they could no longer influence the process as they had wished. The changes to the Decree (No. 57) that stripped away the power of the Commission to review all the decrees that had been in place and also the powers of the Commission to present its draft to the people was rather unfortunate. A day before the draft constitution was to be presented to the President; police officers had seized copies of the draft being printed, with the Land Forces Commander defending the actions of the police by saying that it was not the Commission’s duty to print it (Australia Network News 2013). The Permanent Secretary of Ministry of Information Sharon Smith-Jones was quoted as saying “that police burned printers’ proofs “for security reasons”, in an action taken “to preserve the integrity of the constitutional process” (Callick 2013)

After the Commission presented its draft to the President, the regimes public relations machinery together with the military went on the offensive, personally attacking the Chair (Tikoitoga had said that the commission *“was trying to destroy the process…his actions were unbecoming and he should be ashamed of themselves”)* and some of the provisions of the draft constitution as undemocratic and unacceptable.

On January 10th the President, informed the nation that while the Commission’s draft contained a few good elements, *“many of the provisions of the Ghai Draft positions us in the past. It has unfortunately perhaps succumbed to the whims of the few who have an interest in perpetuating divisions within our society”* (Fiji Times 2013). He instructed the regime to draw up a new draft after extracting “*the positive elements of the Ghai Draft that will create true democracy, accountability and transparency and infuse into it, the key elements of the Peoples Charter and internationally accepted practices and standards and formulate a new Draft Constitution for me to present to the Constituent Assembly”* (Fiji Times 2013).

It is fair to speculate that the regime was unhappy with the contents of the Commission’s draft and sought to de-legitimize the commission and its draft by personal and unwarranted attacks. Ultimately and quite ironically the regime used a very secretive and un-participatory process to draft its own version of what it thought should go in a constitution and present it to the people.

## THE REGIME’S CONSTITUTION: A democratic future?

The regime strayed significantly from the constitution –making process that was announced in March 2012. A draft Constitution was released on 31st March 2013, where the people were asked to be the Constituent Assembly by providing comments, with a month, on the regime’s draft constitution to the Attorney General’s Office. The one month of “public participation” that the regime allowed for comments was too short a period for any real participation to take place. Since then no effort has been made by the regime to release the 1093 submissions that were received, making it hard to ascertain the changes that had been made to the draft and to what extent public participation had an impact on these changes.

Added to this was the fact that the Constitution that was released on 22nd of August 2013 was made out to be the final version, yet when compared to the version of the Constitution that was assented to by the President on 6th September 2013, there were revisions made, without any public information. These actions by the regime clearly violated one of the main principles of the constitution-making process they had outlined in March 2012, i.e. “full, inclusive and fair participation of all Fijians”.

After assenting the constitution the President, in an address to the nation stated that “With this document, we lay to rest the institutionalized divisions and inefficiencies' that have plagued us and embrace a common future in which we all have an equal stake. And we lay the foundations of a new Fiji – taking our place among the great democracies and fulfilling the dream we all share of better days to come.” (The Fijian Government 2013). Bainimarama described the new constitution as a "blueprint for democracy", marking a "new beginning" for the island nation. He proclaimed that the 2013 constitution will make Fiji democratic - "The 2013 Fijian constitution enshrines principles that are at the heart of all the great liberal democracies...an independent judiciary, a secular state and a wide range of civil, political and social-economic rights" (Australia Network News 2013).

*What do these events and proclamations indicate?*

### Major Features of the 2013 Constitution

The 2013 Constitution has taken provisions from the 1990 and 1997 Constitutions and also from the 2012 draft (Citizens' Constitutional Forum 2013).

Some major and new features of the 2013 Constitution are:

* Provisions for a secular state
* A common citizenry
* An expanded Bill of Rights chapter that includes socio-economic rights and rights to natural resources and royalties
* A 50 member unicameral parliament, elected through an open list proportional representation system
* An Accountability and Transparency Commission
* Code of Conduct and Freedom of Information provisions – to be passed within a specified time

Despite these, there are major shortcomings of the 2013 Constitution. As stated earlier in the paper, the way a constitution is drafted, discussed, adopted and implemented can to a large extent shape the success or failure of democratization efforts. The question that arises is; *what does the 2013 constitution mean for a transition to democracy and the establishment and consolidation of democracy in the aftermath of the 2014 elections?*

This paper will highlight some key sections of the 2013 Constitution that indicates that the transition to democracy and further democratic consolidation would not be as smooth as it is made out to be.

#### Bill of Rights and the “Claw-back clauses”

In comparison from the 1997 Constitution provisions, the Bill of Rights in the 2013 Constitution has been expanded to include socio-economic rights including provisions to protect customary land (section 28), provisions to protect existing rights and interests in land (section 29) and a provision recognizing the rights of landowners and customary fishing right beneficiaries to an equitable share of royalties to mineral exploitation (section 30) (Citizens' Constitutional Forum 2013).

In spite of these expansive provisions of rights, the protection mechanisms are weak, providing the parliament an option to limit rights and freedoms without much qualification where it deems ‘necessary’, a low test for limitations when compared to the 1997 consitutional provisions where limitations could be set forth only if it was ‘reasonable and justifiable in a free and democratic society’.

Section 6 (5) (c) of the Constitution, in defining limitations, states that

“The rights and freedoms set out in this Chapter apply according to their tenor and may be limited by –

Limitations which are not expressly set out or authorized (whether by or under written law) in relation to a particular right or freedom in this Chapter, but which are necessary and are prescribed by law or provided under law or authorized or permitted by a law or by actions taken under the authority of law”.

This could lead to potential abuses of rights by authorities, as it sees fit. Civil and political rights such as that of expression, assembly, movement requires limitations that are only “to the extent ***necessary***’.

Rights such as labor rights are severely restricted, giving power to the parliament power to limit right to freedom of association that could regulate registration of trade unions, collective bargaining processes and essential services and industries (section 19).

There are no provisions apart from the equality and non-discrimination clause, to protect and promote rights of women, Fiji being a signatory to CEDAW.

#### Parliament

The Constitution has severely reduced the role of the Leader of Opposition when compared to the 1997 Constitution while also reducing the role of MP’s to check on government actions through parliamentary committees. With a 50 member parliament, it might be difficult at times to have an effective and workable committee system.

#### Executive

The Constitution grants the Prime Minister extensive powers such as appointing all independent offices through the Constitutional Officers Commission (CoC); sets remuneration of Chief Justice, President of the Court of Appeal and other independent offices; and initiates removal of CJ, president of the Court of Appeal and most independent offices, through the establishment of the tribunal.

The Attorney General also has wide-ranging powers when compared with the 1997 Constitution. Apart from advising governments, as its chief legal advisor, the AG chairs the Mercy Commission and is consulted by the Judicial Services Commission(JSC) on the appointment of 4 other members; influences all judicial appointments by being consulted, either by the PM (on CJ and President of Court of Appeal) or by the JSC (on all other judges); directly involved in appointment of all other independent commissions and offices (being a CoC member); involved indirectly in determining remuneration for members of independent commission and offices; initiating removal of office holders of independent commissions; is required to be furnished with regular reports from independent offices and institutions.

#### Judiciary

The independence of the Judiciary in the constitution is severely compromised. The PM and AG significantly control the judiciary through appointments, setting of remuneration and removal of judges. The appointments of the CJ and the President of the Court of Appeal are done by the PM after consultations with the AG, whilst the appointment of other judges and magistrates are done by the JSC which is controlled by the CJ and the AG. The 5 JSC members are all appointed by the executive.

#### Independent Institutions and Commissions

The Constitution establishes the following commissions:

Independent legal Services Commission;

Fiji Independent Commission Against Corruption;

Solicitor General;

Director of Public Prosecutions;

Legal Aid Commission;

Mercy Commission;

Public Service Disciplinary Commission;

Accountability and Transparency Commission.

The appointments of members to these independent commissions are controlled by the executive, either through the JSC or the CoC.

#### Role of the Military

The role of the military under the Constitution is quite expanded, giving it ‘overall responsibility… to ensure at all times the security, defense and ***well-being of Fiji and all Fijians***’.

#### Future Amendments

Chapter 11 provides for the amendment of the Constitution, making this Constitution almost impossible to change. This is because the provisions require that a bill for amendment be voted on twice by parliament by at least 75% of MPs and then approved through a referendum by more than 75% of registered voters. The amendment provisions also state that the immunity and the transitional provisions of the Constitution can never be changed.

#### Decrees since 2006

According to the transitional provisions, all decrees are to remain in force in their entirety and override all inconsistencies with the Constitution until amended by the incoming parliament

## CONCLUDING REMARKS

According to Cottrell and Ghai (2012, 14-15), there is a connection between the process and the outcome, although the connection might not as be straightforward. The constitution-making process has many stages such as “defining the agenda, designing the process, the breath and nature of stakeholders, the degree of participation and transparency, the division of functions and responsibilities, the span of time and deadlines, and the rules for adoption of the draft” and any of these can influence the outcome (Cottrell and Ghai 2012).

The recent constitution-making process offered many promises and hopes for a transition to democracy that would have helped in further consolidation however, after the regime hijacked the process in Phase 2, these hope vanished only to confirm the suspicion that the regime had some other outcome in mind.

*What does it mean for people’s participation in both the processes and will a constitution materializing from such a process have the ownership and legitimacy with the people of Fiji? Does the 2013 Constitution provide a blueprint for democratic transition and consolidation?*

Whether this transition would lead to a full restoration of democracy after the September elections is hard to determine yet. However, one thing that is clear is that whoever gets into power will have immense powers to control appointments to the judiciary and independent commissions, in limiting human rights prescribed in the bill of rights through a simple majority and having weak accountability mechanisms during the term of the parliament.

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2. For the full text of the UDHR, see: <http://www2.ohchr.org/english/law/udhr.htm> [↑](#footnote-ref-2)
3. For the full text of the ICCPR, see: <http://www2.ohchr.org/english/law/ccpr.htm> [↑](#footnote-ref-3)
4. For the full text of General Comment 25, see: <http://www.unhchr.ch/tbs/doc.nsf/0/d0b7f023e8d6d9898025651e004bc0eb> [↑](#footnote-ref-4)