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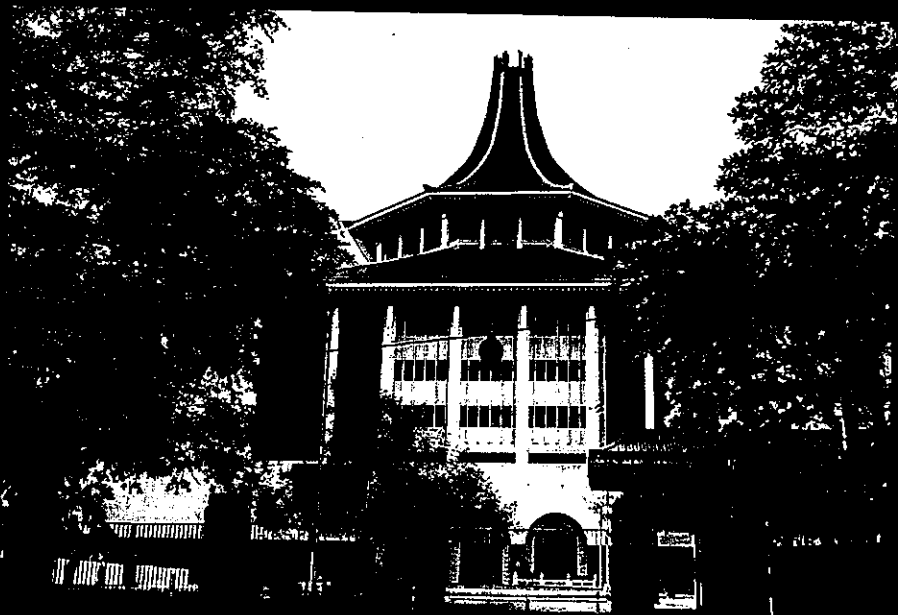
# LAWASIA Journal

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# FJI'S 1997 AND 2013 CONSTITUTIONS: A COMPARATIVE LEGAL ANALYSIS

Nainendra Nand<sup>1</sup>

## 1. INTRODUCTION

Fiji became a Crown colony in 1874 when Fiji's paramount chiefs headed by Ratu George Cakobau ceded sovereignty to Queen Victoria. Fiji remained a colony until the first written document for its governance was given in 1966 followed by the 1970 *Constitution*.<sup>1</sup> This *Constitution* came into force as a result of protracted negotiations between the British Government and Fiji's two main political parties, the Alliance and the National Federation Party. The 1970 *Constitution* served Fiji well until two coup d'états in May and September 1987. The coup leader Colonel Sitiveni Rabuka abrogated the 1970 *Constitution*, severed Fiji's ties with the Queen and declared Fiji a republic.<sup>2</sup>

A Constitutional committee, headed by former Fiji Military Forces Commander Colonel Paul Manueli was then tasked with producing a report for a new Constitution. This report, produced in August 1989, was adopted by the President and in 1990 a new Constitution was promulgated by him. The 1990 *Constitution* was widely criticised both nationally and internationally. Its critics were overseas governments, non-governmental organisations, political parties in Fiji and some academics. Fiji Labour Party and National Federation Party were leading critics of this Constitution. The Citizens' Constitutional Forum, a non-government Fiji-based organisation was also vocal. The 1990 *Constitution* however, despite its many objectionable provisions, provided that the *Constitution* should be reviewed within 7 years from its promulgation.<sup>3</sup> During its first five years, international and domestic pressure persuaded the Rabuka government to set up a three member review commission. Sir Paul Reeves, a former Governor General of New Zealand, was appointed Chair of the Commission. Other members of the Commission were Tomasi Vakatora, nominated by Government and Dr Brij Lal, nominated by the Opposition. The Commission set up by the President commenced work on 15 June 1995 and following wide consultation with the people of Fiji concluded and presented its report in September 1996.<sup>4</sup> A joint parliamentary committee was subsequently formed to look into Sir Paul Reeves' committee's report and suggest changes to the 1990 Constitution.<sup>5</sup>

The report, titled *The Fiji Islands: Towards a United Future* ('Reeves Report') made a total of 694 recommendations. This Joint Parliamentary Select Committee (JPSC) adopted 577 recommendations, amended 40 and rejected 77. The amendments were accepted and passed by Parliament in July 1997. The new document made a number of changes to the 1990 *Constitution* and in doing so gave minority communities greater say in running Fiji. This was not the case under 1990 *Constitution* as the indigenous community had a major say in running the day to day affairs of Fiji. The amended *Constitution* came into force on

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*Laws of Fiji* (1985, Revised Edition).

<sup>2</sup> *Appointment of Head of State and Dissolution of Fiji Military Government Decree 1987*, Decree No. 25.  
<sup>3</sup> *Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990*, Decree No. 22 of 1990, s 161.

<sup>4</sup> Parliament of Fiji, *The Fiji Islands: Towards a United Future: Report of the Constitution Review Commission*, Part Paper No 34 (1996).

<sup>5</sup> Parliament of Fiji, *Report of Joint Parliamentary Select Committee on the Report of the Fiji Constitution Review Commission*, Part Paper No. 17 (1997).

28 July 1998. Following promulgation of the new amendments, the first elections were held in May 1999 which resulted in Mahendra Chaudhry, a Fijian of Indian descent, becoming Prime Minister. The ethnic Fijian vote was divided under the preferential voting system and soon after the elections political discord led to the 2000 civilian coup of George Speight. Mr George Speight was a businessman who was supported by a military faction known as the Counter Revolutionary Warfare (CRW) Unit. They took the Government hostage for 56 days. Fiji Military Forces in attempting to end the crisis abrogated the 1997 *Constitution*. Once the crisis ended the abrogation was challenged by a farmer named Chandrika Prasad. The Fiji Court of Appeal ruled that the 1997 *Constitution* had not been abrogated and still remained intact.<sup>6</sup> The interim civilian government that was in place at the time respected the Court's ruling, restored the *Constitution* and held new elections under it.

The 2001 elections saw the interim Prime Minister's Party (Sogosoqo Duavata ni Lewenivanua Party (SDL) elected to Parliament and it formed government. The next elections took place in May 2006. Once again Mr Qarase came in as Prime Minister and led a multi-party government until December 2006 when the Military ousted him from power and started to rule Fiji thereafter. The Fiji Military Forces Commander, Josaia Voreqe Bainimarama, became Prime Minister. The deposed Prime Minister Laisenia Qarase challenged his dismissal and sought various declarations from the courts. In April 2009, the Fiji Court of Appeal delivered a ruling in his favour.<sup>7</sup> The Court of Appeal overruled the High Court decision, which had held that the President had acted lawfully under prerogative power despite Fiji having a written Constitution. The Fiji Court of Appeal rejected the lower court's reasoning and found no basis for prerogative powers for the President in Fiji's written *Constitution*. This ruling was not well received by the interim government. On 10 April 2009, President Iloilo issued a statement abrogating the 1997 *Constitution* and appointed himself Head of State. He dismissed all judicial officers and promulgated Public Emergency Regulations.<sup>8</sup>

The interim government appointed by President Iloilo was made up of almost entirely the same group of people who had been in government until 1 April 2009. The government continued to rule by Decree until September 2014 when the country went to the polls under a *Constitution* promulgated in September 2013 by the interim government. This *Constitution* stemmed from the Fijian Government's own draft after it had earlier rejected a draft constitution prepared by internationally renowned academic, Professor Yash Ghai and his team who were commissioned by the Government to prepare a draft Constitution for Fiji.<sup>9</sup>

This paper will examine and critically compare, chapter by chapter, the 1997 and 2013 Constitutions. Where relevant, reference will also be made to 1970 and 1990 Constitutions.

## 2. CHAPTER 1 – THE STATE

Chapter 1 of 2013 *Constitution* has similarities with other constitutions that Fiji had previously. The 2013 *Constitution* sets out issues of unity, equality, respect for human

rights, fundamental freedoms and Bill of Rights provisions.<sup>10</sup> The 2013 *Constitution* however includes some additional values such as human dignity, respect for the individual, personal integrity and responsibility, civic involvement and right to economic participation and environmental rights.<sup>11</sup> The 2013 *Constitution* further includes words such as "prudent, efficient and sustainable relationship with nature".<sup>12</sup> Whilst these stated values are commendable, there is no provision on how these rights and responsibilities can be achieved, nor is there any specific mention that Parliament is required to provide funds to meet these objectives.

The 2013 *Constitution* is also silent on Fiji's constitutional history. By comparison, the 1997 amendments acknowledged the abrogation of the 1970 *Constitution*, the making of 1990 *Constitution* and affirmed contributions from all communities to the well-being of Fiji, and to the rich variety of faiths, traditions, languages and cultures that exist in this multi-cultural and multi-ethnic society. The 1997 *Constitution* also recognised the descendants of all those who chose to make Fiji their home. The 2013 document simply mentions communities living in Fiji. This has drawn criticism from political parties and recently the National Federation Party (NEP) criticised the use of the words "descendants of the indentured labourers from British India." Dr Binan Prasad, leader of the National Federation Party, said:

It is the preamble that is injurious to the Indo-Fijian community because it is a reminder of our gimri and not the choice of our forefathers who chose to make Fiji their only home after completion of the indenture period in 1916.<sup>13</sup>

The 2013 Constitution also fails to mention cession and history preceding this epic event in Fiji's history. Nor is there any link to the history of colonisation, independence, or becoming a republic, nor the events that gave birth to the 2013 *Constitution*. Unlike the 1997 *Constitution*, there is no mention of a review clause in this constitutional instrument, or recognition of any role that the people of Fiji played in acceptance of this document.

The 1997 *Constitution* allowed freedom of religion and worship, but specifically mentioned Christianity and its influence on Fiji since cession in 1874.<sup>14</sup> The 2013 *Constitution* departed from acknowledgement of the influence of Christianity altogether and declared Fiji a secular state.<sup>15</sup> This provision has drawn both negative and positive reaction from different sectors of the community. For example, the Social Democratic Liberal Party (SODELPA), called the 2013 *Constitution* "Godless" and vowed to amend it when it came into power.<sup>16</sup>

Another significant difference between the two constitutions lies in the use of language. In the 1997 *Constitution*, English, Fijian and Hindustani languages had equal status; the constitution was in English but translation in Fijian and Hindustani were available.<sup>17</sup> In addition a Member of Parliament was permitted to address Parliament in a language of his or her native tongue. By contrast, the 2013 *Constitution* provides that English language will

<sup>6</sup> *Republic of Fiji Islands v Prasad* (2001) FJCA2.

<sup>7</sup> *Qarase v Bainimarama* [2009] FJCA9.

<sup>8</sup> President Ratu Josefa Iloilo's "Address to the Nation", <<http://www.fijitimes.com/context/ratu-fiji-president-speech-annulling-Constitution-judiciary.pdf>>.

<sup>9</sup> *Fiji Constitutional Process (Constitutional Commission) Decree 2012*, Decree No. 57 of 2012.

<sup>10</sup> 2013 *Constitution of the Republic of Fiji* ("Constitution"), Chapter 2.

<sup>11</sup> *Ibid* Chapter 2.

<sup>12</sup> *Ibid* s 1(b).

<sup>13</sup> National Federation Party Parliamentary Leader, Binan Prasad, "Bigger priorities than changing flag: Fiji Opposition".

<sup>14</sup> <<http://www.pina.com.fj/?p=pacnews&m=read&o=168729395354d19bd7735b0e961713>>

<sup>15</sup> 2013 *Constitution*, s 4.

<sup>16</sup> The Manifesto of SODELPA (Social Democratic Liberal Party) *Reclaiming Fiji*, 12

<sup>17</sup> 1997 *Constitution*, s 4.

be the sole medium of communication in Parliament.<sup>18</sup> The only exception is that the *Constitution* be translated in the iTaukei (Fijian) and Hindustani languages.<sup>19</sup>

Unusually, the 2013 *Constitution* has a specific provision which prohibits the abrogation and the suspension of the *Constitution*, unless it is in accordance with the amendment procedures.<sup>20</sup> None of the three previous Fijian constitutions had this provision. Such a provision is, however, of little practical effect given that two of Fiji's constitutions were abrogated following military intervention.

The 1990 *Constitution* had a full chapter entitled 'Compact'.<sup>21</sup> There is nothing equivalent in its 2013 counterpart. Like preambles, compacts are not usually enforceable through the courts; however, they still play a key role. On occasion, courts have given specific recognition to them as was the case in Fiji's first Presidential Reference when the Supreme Court made specific mention of the Compact in the 1997 *Constitution*.<sup>22</sup> Governments also use preambles to develop their economic policies.<sup>23</sup>

### 3. CHAPTER 2 – BILL OF RIGHTS

There are many similarities between the Bills of Rights in the 1997 *Constitution* and 2013 *Constitution*. However, on closer analysis the human rights protections provided under the 2013 *Constitution* are relatively weak. The 2013 document gives Parliament an *unqualified* right to limit fundamental freedoms. The 1997 *Constitution* also imposed limitations on such rights but the test there was what is "reasonable and justifiable in a democratic society."<sup>24</sup> The 2013 *Constitution* empowers Parliament to limit the right as it deems just.<sup>25</sup> The Citizens Constitutional Forum, a Fiji civil society organisation, argues that:

Any future government can use an ordinary act of Parliament to limit the right to executive and administrative justice as far as they wish without needing to justify the limitation.<sup>26</sup>

Closer examination of a few specific rights, such as labour rights and the right to strike, will illustrate this point clearly. The 1997 *Constitution* did not prevent workers from going on strike to secure fair wage and better working conditions. Under the 2013 *Constitution*, the workers may go on strike but the Government can pass a law regulating strikes and lockouts.<sup>27</sup> In addition, Parliament can pass a law to limit the right of workers' freedom to associate for the purpose of trade union activity or for a meeting

<sup>18</sup> Parliament of the Republic of Fiji, *Standing Order* 28.

<sup>19</sup> 2013 *Constitution* Section 3(3)

<sup>20</sup> *Ibid* s 2(5)

<sup>21</sup> 1997 *Constitution* Ch 2

<sup>22</sup> *President of the Republic of the Fiji Islands v Kibubola* [1999] FJSC 8. The Supreme Court judges said, 'a central purpose of the 1997 Constitution is the sharing of power. The Republic of Fiji Islands is declared in the course of the preamble to be a multi-cultural society. While some particular protection of Fijian interests is contemplated by section 6 (f) political power is shared equitably amongst all communities.'

<sup>23</sup> Since independence in 1970 successive Fijian governments have developed economic policy to deal with redistribution of income and wealth by introducing different types of taxation regime. They have given tax relief to farmers for more economic growth by utilising land more productively.

<sup>24</sup> 1997 *Constitution* ss 30(2), 31(2), 32(2), 33(2), 34(1), 37(2) and 38(7).

<sup>25</sup> 2013 *Constitution* ss 16, 24 and 25.

<sup>26</sup> Citizens' Constitutional Forum, *An Analysis: 2013 Fiji Government Constitution* (September 2013) <[www.ccf.org.fj](http://www.ccf.org.fj)>

<sup>27</sup> 2013 *Constitution* s 20(5)(e).

to discuss collective bargaining issues.<sup>28</sup> The 2013 *Constitution* is the only Fijian constitution that contains such restrictions.

Furthermore, the 1997 *Constitution* provided a fairly generous provision for legal aid. Every person charged with an offence had a right to legal representation either from a lawyer from the Legal Aid Commission or a representative from the private profession.<sup>29</sup> The 2013 *Constitution* has similar provisions to 1997 *Constitution*, but it remains to be seen whether the courts will interpret these provisions in the same way as the 1997 *Constitution*. In the *Attorney General of Fiji v Timoci Sitalohi*,<sup>30</sup> the Court of Appeal was asked to rule on Sitalohi's right to legal representation under section 28(1) (f) and 38(2) of the *Constitution*. The Court ruled that if the interest of justice required it, then the impoverished person should be provided legal assistance. Where legal aid funds are insufficient to pay for the private lawyer, then the state must meet that shortfall.<sup>31</sup>

In the case of *Allen Lyndon v the Legal Aid Commission and the State*,<sup>32</sup> Lyndon was a US citizen who faced multiple charges of fraud. The High Court ruled that he was eligible for legal aid. The Court found that the 1997 *Constitution* was drafted broadly enough to so as to require legal aid for all impoverished persons irrespective of Fijian citizenship.<sup>33</sup> To its credit, in the years preceding the case, the Fiji Government had provided generous annual funding to allow for legal aid to expand its services to remote parts of Fiji. Legal aid is now able to provide assistance to many more individuals including non-Fijian nationals. The challenge under 2013 *Constitution* will be to continue providing adequate funding to Legal Aid Commission to meet its growing demand.

Another area which has changed significantly from the 1997 *Constitution* is on ownership of customary land. Native or iTaukei<sup>34</sup> land has always been a sensitive issue in Fiji. So much so that it has been subject of much discussion leading up to military coups in 1987 and the attempted coup in 2000. The 1997 *Constitution* entrenched legislation such as the *Fijian Affairs Act*, *Fijian Affairs Fund Act*, *Native Land Trust Act*, *Rotuma Act*, *Rotuma Lands Act*, *Banabau Lands Act* and *Banabau Settlement Act*. Amending these Acts required passage of bills in both Upper and Lower Houses of Parliament and required approval of at least 9 of the 14 members of the Senate.<sup>35</sup> The 2013 *Constitution* no longer entrenches any of these statutes. Under this *Constitution*, there is no specific protection given to iTaukei land and amendment to these pieces of legislation can now be made through an ordinary Act of Parliament. There is also no longer a requirement that landowners be consulted by the State or land developers in respect of development of iTaukei lands. The 2013 *Constitution*, however, provides that the owners of native land or customary fishing rights have an equitable share of royalties and other payments from mineral exploitation on their land or from the seabed.<sup>36</sup> The lack of protection of iTaukei land under 2013 *Constitution* has received and continues to receive criticism from the indigenous community, including the former Prime Minister Mr Laisenia Qarase and leading iTaukei advocates. However, there are new provisions in the 2013

<sup>28</sup> *Ibid* ss 19(2) and 20(5).

<sup>29</sup> 1997 *Constitution* s 28(1)(f).

<sup>30</sup> *Attorney General of Fiji v Timoci Sitalohi* [2003] FJCA 12.

<sup>31</sup> *Ibid* at 15.

<sup>32</sup> *Lyndon v Legal Aid Commission* [2003] FJHC 323.

<sup>33</sup> *Ibid* at 11.

<sup>34</sup> Since 2010 Native Fijians are officially referred to as iTaukei. 91% of land in Fiji is owned by the iTaukei, administered by the iTaukei Lands Trust Board (ITLB) <<https://www.itlb.com.fj/>>

<sup>35</sup> 1997 *Constitution* s 185.

<sup>36</sup> 2013 *Constitution* s 30.

*Constitution* which protects land leases and tenancies and provides that landowners receive a fair and equitable return for their leased land.<sup>37</sup>

The 2013 *Constitution* contains public right to access information held by another person or another office.<sup>38</sup> This provision is wider than that which was in the 1997 *Constitution*.<sup>39</sup> In November 2006, Mr. Qarase's cabinet had given approval to publish a draft bill on access to official information. That Bill was never published due to the December 2006 political upheaval. The present government has now published an Information Bill.<sup>40</sup> This Bill is designed to meet the requirement to enact legislation giving effect to sections 25 and 150 of the 2013 *Constitution*.

The 2013 *Constitution* expands the 1997 constitutional provisions on freedom of expression by adding freedom of imagination and creativity, academic freedom and freedom of scientific research.<sup>41</sup> Similarly, the 1997 provisions on freedom of assembly have been extended under the 2013 *Constitution* to allow people the right to peacefully assemble, demonstrate, picket or present petitions.<sup>42</sup> However, both sections 17 and 18 of the 2013 *Constitution* contain provisions for curtailing or restricting rights in certain situations. The 2013 *Constitution* allows for a law to be passed by a simple majority in parliament to limit these rights in the interest of national security, public safety, and public order or for the protection or maintenance of the reputation, privacy, dignity, rights or freedoms of other persons.<sup>43</sup> 1997 *Constitution* lacked this provision.

A clear omission from the 2013 *Constitution* is the lack of positive provisions relating to cultural or ethnicity matters. In comparison, Fiji's harmonious and diverse society was recognised in the 1997 document.<sup>44</sup> There is, however, one matter of some note which the 2013 *Constitution* incorporates; i'vaukei and Fiji Hindi languages must now be taught at primary school level.<sup>45</sup> This is a welcome development.

The 1997 *Constitution* provided a robust approach to enforcement of constitutional rights. A plethora of litigation was brought in Fiji courts between July 1998 and December 2006. Section 41 allowed individuals whose rights were contravened to bring proceedings before the High Court. The High Court had original jurisdiction to hear and determine all applications before it, or to determine specific questions that may have arisen elsewhere but which raised constitutional issues.<sup>46</sup> Whilst the High Court adjudicated on breaches of constitutional issues, it was quick to point out to litigants who brought actions before it, if proper procedures had not been followed. Further, if an applicant had an alternative remedy available, then that person was required to exhaust it before bringing constitutional litigation to court. The 2013 *Constitution* contains a similar provision, but since its enactment in September 2014, there has not been any constitutional litigation of note to date. One can only speculate but perhaps one reason is that a Human Rights Commission only became functional in May 2015. Under the 2013 *Constitution* there are also restrictions which prevent people from instituting civil law proceedings against termination

and dismissal from office due to an ouster clause in the *Constitution*. In addition, aggrieved parties cannot bring a challenge in court questioning the legality of any Proclamation, Decree or Declaration that was declared between 5 December 2006 and October 2014 - the first sitting of Parliament under the *Constitution*.<sup>47</sup>

One of the key features of the 1997 *Constitution* was the creation of a Human Rights Commission.<sup>48</sup> The Human Rights Commission was quite vocal in its 10-year existence as its mandate was to educate the general public about human rights and make recommendations to Government. The Commission's Complaints and Legal Division investigated and brought many complaints to court on abuse of individual rights and freedoms, children's issues and other matters which needed clarification or constitutional interpretation. It was abolished after the abrogation of 1997 *Constitution* in April 2009, but was subsequently reinstated by Decree.<sup>49</sup> This Decree reconstituted the Commission but reduced its independence substantially. The Commission's functions, powers and duties did not extend to receiving complaints or investigating, questioning or challenging the legality and validity of the *Fiji Constitution Amendment Act 1997, Revocation Decree 2009* and any of the other Decrees made by the President.<sup>50</sup> This prohibited any challenge to Decrees passed by the interim Government during December 2006 until elections in September 2014.

The Human Rights Commission continues in existence under the 2013 *Constitution*. It is not clear how the complaints lodged with the Commission are being handled. What is significant is that any complaint lodged after 21 August 2013 must relate to complaints from that date onwards and not before it. This will deny many complainants who may have suffered during the period prior to August 2013 from bringing a matter before the Commission.<sup>51</sup> This in itself constitutes a denial of a person's rights. The Commission has been revived in 2015 with the appointment of a Chairperson, Director and some staff. Its effectiveness is yet to be tested.

#### 4. CHAPTER 3 – PARLIAMENT

Under 2013 *Constitution*, Parliament now consists of a 50 member assembly elected from a single national constituency through open list proportional representation. Under the 1997 *Constitution*, there were 71 elected members chosen from different constituencies. There was also an Upper Chamber known as Senate which kept the executive dominated Lower House in check and held to account. The term of Parliament under the 1997 *Constitution* was five years. Under the 2013 *Constitution*, its term was reduced to four years and it can be dissolved after three and a half years. The 2013 *Constitution* reduced the previous voting age from 21 to 18. This is a positive development, allowing many young adults to vote for the first time.

Parliamentary elections are held through secret ballot and administered by the Electoral Commission similar to arrangements under the 1997 *Constitution*. The difference now is that there is a single national register of voters who elect candidates under an open list proportional representation system. Unlike under the 1997 *Constitution*, this is a positive change in that for the first time each voter has one vote which is of equal value. Parties win

<sup>37</sup> *Ibid* s 29.

<sup>38</sup> *Ibid* s 30.

<sup>39</sup> 1997 *Constitution* s 174.

<sup>40</sup> Information Bill 2016 (Bill No. 34 of 2016).

<sup>41</sup> 2013 *Constitution* ss 17(c) X(d).

<sup>42</sup> *Ibid* s 18(1).

<sup>43</sup> *Ibid* ss 17 (3) and 18 (2).

<sup>44</sup> 1997 *Constitution, Constitution Amendment Act 1997* (Act No. 13 of 1997 as amended by Act No. 5 of 1998) and Chapter 2 *Compact*.

<sup>45</sup> 2013 *Constitution* s 31(3).

<sup>46</sup> 1997 *Constitution* s 41(3).

<sup>47</sup> 2013 *Constitution* s 173 (4) (5).

<sup>48</sup> *Human Rights Act 1999*.

<sup>49</sup> *Fiji Human Rights Decree 2009* (Decree No. 11 of 2009).

<sup>50</sup> *Ibid* s 11(2).

<sup>51</sup> 2013 *Constitution* s 172 (5).

seats according to the total votes that the candidates receive. This is a new provision which was not in any of the previous constitutions. The criteria for candidates for election are similar under both constitutions. Under the 1997 *Constitution*, if a candidate had an interest in an agreement or contract with government, then that person was ineligible to stand as a candidate for Parliament.<sup>52</sup> This is a major omission from the 2013 *Constitution*.

Under the 2013 *Constitution*, all political parties and independent candidates must get at least 5 per cent of the total votes cast. The 5 per cent threshold has proven difficult for smaller political parties and independent candidates to overcome successfully. In the September 2014 general elections, seven registered political parties and two independent candidates contested elections. Only three political parties met the 5 per cent threshold. The four political parties and two independent candidates who missed out on seats received a total of 35, 726 votes. The smallest party in Parliament, the National Federation Party received 27 066 votes and qualified for three seats. The 2014 election showed that the 5 per cent threshold is a huge deterrent for minority parties and independent candidates. One election candidate (Ithania Vinnyagawa) who polled the 12<sup>th</sup> highest number of votes (4956) lost out on a seat in Parliament as his party did not pass the threshold test. However, a candidate who polled only 875 votes (Veena Bhanagar) now occupies a seat in Parliament and serves as Assistant Minister.<sup>53</sup>

The 2013 *Constitution* also does not include a separate provision for having by-elections. In a single national constituency, a nationwide election will be necessary to fill a vacant seat. The *Constitution*, however, does contain a unique provision which most modern constitutions do not have. If a seat is vacated by a member of parliament who is a member of a political party, then a national by-election is not required under the *Constitution*. The Fijian Electoral Commission is now required to award that seat to the candidate of the same party who is the highest ranked and did not get elected to parliament, provided that person is eligible to serve. A by-election will be necessary if an independent candidate vacated his or her seat. This provision has so far enabled six unsuccessful candidates from the ruling Fiji First Party to enter parliament after their colleagues vacated their seats. Four members resigned to pursue other activities in the private sector while one candidate was chosen as the Speaker. Jogi Komrore, a serving Minister, was elected President of Fiji.

A 50 member parliament has also meant that fewer members are now available to sit on parliamentary committees to conduct daily business. The current government has 32 members in Parliament of which 15 sit in Cabinet, leaving 17 to sit on committees.<sup>54</sup>

Under the 1997 *Constitution*, the President appointed a Prime Minister from members of the House of Representatives who in his opinion had the majority support to form the government.<sup>55</sup> The *Constitution* did not provide for a time frame during which this had to be done, though the better interpretation is that it should be done within a reasonable time. The 2013 *Constitution* has a different process for choosing a Prime Minister. Under the 2013 *Constitution*, Parliament is required to sit within 14 days after the election. If a party wins the election outright, then choosing a prime minister should not present any obstacles, as was the case following the 2014 general elections. If that is not the case, then the *Constitution* requires the Members of Parliament to elect a prime minister within 14 days. A further requirement is that this should be done within 48 hours of the first sitting of

Parliament. If a prime minister is not chosen in this time, then there must be fresh election.<sup>56</sup> This provision may present difficulty in future general elections and it is likely to place political parties under pressure to form coalitions and agree on a prime minister in a relatively short period of time. The alternative will be to go to the polls for a fresh mandate.

Under the Westminster parliamentary system, upon which all of Fiji's constitutions have been previously modelled, the Leader of Opposition plays a significant role. She or he is the shadow Prime Minister and is required to perform many important functions. This was reflected in the 1997 *Constitution* which gave the Leader of Opposition important roles to perform. But the 2013 *Constitution* has significantly reduced these roles. The Leader of Opposition is given a role to sit as a member of the Constitutional Offices Commission and to nominate one other person who is appointed by the President. This Commission is, however, dominated by the Government side and will always have a majority.<sup>57</sup> Under the 1997 *Constitution*, the Leader of Opposition played an important role on all appointments to Senate, other independent Commissions, and appointment of the Chief Justice and other judicial offices. These functions have been removed from the Opposition Leader under 2013 *Constitution*.

The Leader of the Opposition is now elected by opposition members. Following the 2014 general election, this process was fairly smooth given that the two parties in opposition had 15 and three members respectively. The Party with 15 members (SODELPA) provided the Leader of the Opposition. The Leader was supported by her own Party and also by the three members of National Federation Party. Where two or more opposition parties cannot agree on a leader and if a vote is taken and there is a tie, there is no mechanism provided for under the 2013 *Constitution* to break the deadlock. In that event, the *Constitution* envisages that the Office can remain vacant.<sup>58</sup>

There are further differences in the two constitutions on the process of appointment of Secretary General to Parliament who is the Chief Executive Officer. Under the 1997 *Constitution*, the Secretary General was appointed by the Constitutional Offices Commission in consultation with the Speaker.<sup>59</sup> Under the 2013 *Constitution*, the President makes the appointment on the advice of Constitutional Offices Commission.<sup>60</sup> It is ironic that the Speaker who works very closely with the Secretary General has no say on the appointment.

The 1997 *Constitution* established an independent Parliamentary Emoluments Commission whose principal task was to determine salaries and allowances of the Prime Minister, Ministers, the Leader of Opposition and other key functionaries of Parliament.<sup>61</sup> This Commission comprised of three members, two of who had to be qualified and experienced as actuary or accountant. The 2013 *Constitution* has removed this Commission and now allows Members of Parliament to determine their own salaries and allowances. These salaries and allowances cannot be varied to the disadvantage of members unless it is part of austerity reduction.<sup>62</sup> Given the huge majority that the Government enjoys in current Parliament the opposition would not be able to veto salary and allowance hikes when they are tabled. In September 2016, Fiji's Parliament approved increases in parliamentarians' allowances amidst criticism from National Federation Party which said that it was unfair

<sup>53</sup> 1997 *Constitution* s 58(2)(c).

<sup>54</sup> Fiji Elections Office 'Final results for the 2014 General Elections',

<<http://www.elections.fiji.gov.fj/2014-election-results/>>

<sup>54</sup> Fiji Government Directory, 'Ministers and Departments'

<<http://www.fiji.gov.fj/Government-Directory/Ministers-and-Department.aspx>>

<sup>55</sup> 1997 *Constitution* s 98.

<sup>56</sup> 2013 *Constitution* s 93.

<sup>57</sup> 2013 *Constitution* s 132.

<sup>58</sup> *Ibid* s 78(6).

<sup>59</sup> 1997 *Constitution* s 84(2).

<sup>60</sup> 2013 *Constitution* s 79(2).

<sup>61</sup> 1997 *Constitution* s 83.

<sup>62</sup> 2013 *Constitution* s 80.



for an in-house committee of members to decide what they should get in allowance. The party further called for establishment of an independent emoluments committee to oversee this function.<sup>63</sup>

## 5. CHAPTER 4 – EXECUTIVE

The Executive arm of government under the Westminster system manages day to day business of a Commonwealth country. This is no different in Fiji. There are similarities under the two constitutions on how the Executive should operate, but there are also important differences. Under both constitutions, the President is the Head of State. The 1997 *Constitution* provided for a Vice President who performed the President's functions in his or her absence.<sup>64</sup> This has been removed from 2013 *Constitution*. Under the 2013 *Constitution*, the Chief Justice now acts as President when the President is away overseas or unable to perform his or her duties.<sup>65</sup>

The 2013 *Constitution* has, however, whittled down the President's role to a ceremonial figurehead whose principal duty is to open each session of Parliament with an address outlining the policies and programs of his or her Government. Under the 1997 *Constitution*, the President was appointed by the Great Council of Chiefs (Bose Levu Vakaturaga) which was a formal assembly of Fiji's senior hereditary chiefs following consultation with the Prime Minister.<sup>66</sup> This body was abolished by Decree in 2012.<sup>67</sup> The President is now elected in Fiji Parliament from two candidates nominated by the Prime Minister and Leader of the Opposition respectively.<sup>68</sup> A new President was chosen in October 2015 who was a sitting Minister nominated by the Prime Minister to succeed the outgoing President. Voting took place on partisan party lines where the Government nominee won comfortably by 31 votes to 14, with three abstentions. The National Federation Party abstained from voting, claiming that the President should have been chosen by consensus.<sup>69</sup> Under the new *Constitution*, the President will now serve two terms of three years, as opposed to two 5-year terms under 1997 *Constitution*.<sup>70</sup>

A significant departure from Fiji's previous constitutions is the omission of discretionary or reserve powers which the President enjoyed. Under the 1997 *Constitution*, the President had discretionary powers to act in his or her own judgement. For example, the President could appoint a Commission of Enquiry under the *Commissions of Enquiry Act*.<sup>71</sup> In addition, the President could appoint a Prime Minister or an alternative Prime Minister in his or her deliberate judgement.<sup>72</sup> The President could also, following Cabinet endorsement seek opinion of the Supreme Court on matters of public interest.<sup>73</sup> Under the 2013 *Constitution*, the President cannot do any of these things. Whilst the President still appoints

the Prime Minister, this is not by virtue of his or her own deliberate judgement. Under the 2013 *Constitution*, the Cabinet refers matters of constitutional interpretation to the Supreme Court.<sup>74</sup>

Additionally, whilst under the 1997 *Constitution* the President was the Commander in Chief of Fiji Military Forces, the 2013 *Constitution* provides that the President now performs the ceremonial functions and responsibilities as the Commander in Chief of the Fiji Military Forces.<sup>75</sup> The Prime Minister on the other hand has more powers under 2013 *Constitution* than under the 1997 *Constitution*. Whilst the Prime Minister under the 1997 *Constitution* appointed all ministers and assigned ministerial responsibilities, under the 2013 *Constitution* the Prime Minister is involved in many other appointments as well. He or she does the following:

- Appoints all independent officers through the Constitutional Officers Commission (COC) except the Solicitor General
- Appoints two independent commissioners through the COC, Human Rights and Anti-Discrimination Commission (HRADC) and Public Service Commission (PSC)
- Appoints as many ministers as he or she wants including the Attorney General
- Sets remuneration for the Chief Justice and the President of the Court of appeal (on the advice of a Commission established by him or her).
- Initiates the process for removal of the Chief Justice, the President of the Court of Appeal by establishing a tribunal and does the same for most other independent commissions.<sup>76</sup>

The Fiji Prime Minister's powers are greater in comparison with what prime ministers can do under other modern Constitutions from Commonwealth countries.

The 2013 *Constitution* has also done away with the mandatory requirement of a multi-party cabinet which was a unique feature of the 1997 *Constitution*.<sup>77</sup> This allowed the Prime Minister greater flexibility in choosing his/her cabinet ministers.<sup>78</sup> Although compulsory multi-party cabinet under the 1997 *Constitution* was initially a difficult provision to implement following two early elections under that *Constitution*, the then Prime Minister used the multi-party concept effectively and formed a very workable government. There were 4 separate court cases between 1997 and 2006 which helped resolve many ambiguities on political parties' entitlement to Cabinet seats.<sup>79</sup>

Another notable deviation from the 1997 *Constitution* is the absence of an equivalent provision to section 123. This section enabled the President, upon endorsement by Cabinet, to seek the opinion of the Supreme Court on constitutional matters, where public interest dictated. This helped overcome potential conflict between political factions and resolved

<sup>63</sup> Fiji Village –NFP opposed motion of increasing allowances all MPs and Ministers' <<http://fijivillage.com/news/NFP-opposed-motion-of-increasing-allowances-all-MPs-and-Ministers-56269/>>

<sup>64</sup> 1997 *Constitution* s 88.

<sup>65</sup> 2013 *Constitution* s 88.

<sup>66</sup> 1997 *Constitution* s 90.

<sup>67</sup> *Tankel Affairs (Amendment) Decree 2012* (Decree No. 22 of 2012).

<sup>68</sup> 2013 *Constitution* s 84.

<sup>69</sup> Fiji TV – National Federation Party MPs abstain from President Elect vote <<http://fijione.vfnfp.mps-abstain-from-president-elect-vote/>>

<sup>70</sup> 2013 *Constitution* s 85 and 1997 *Constitution* s 91.

<sup>71</sup> *Commissions of Enquiry Act*, Cap 47, Laws of Fiji (Section 2).

<sup>72</sup> 1997 *Constitution* ss 98 and 108.

<sup>73</sup> *Ibid* s 123.

<sup>74</sup> 2013 *Constitution* s 91.

<sup>75</sup> 1997 *Constitution* s 87, and 2013 *Constitution* s 81(3).

<sup>76</sup> Citizens' Constitutional Forum, above n 26>.

<sup>77</sup> 1997 *Constitution* s 99.

<sup>78</sup> Jon Fraenkel, 'Multi-party cabinet and power-sharing: lessons from elsewhere', Ch 28 in Jon Fraenkel and Stewart Firth, *From Election to Coup in Fiji: The 2006 Campaign and Its Aftermath* (2007 ANU E Press).

<sup>79</sup> *President of the Republic of Fiji Islands v Kumbadola* (1999) FJSC8. *In re the Constitution Reference by HE the President* (2002) FJSC1; *Qarase v Chandhry* (2003) FJSC1; and *Qarase v Chandhry* (2004) FJSC1 and FJSC9.



issues for Parliament. The Supreme Court's opinion was binding on the President and all the people of Fiji. Under the 2013 *Constitution*, it is *only* Cabinet which can seek an opinion from the Supreme Court and not the President.<sup>80</sup> Since the elections in Fiji in September 2014, there have not been any constitutional references brought before the Supreme Court. Of the four references that were brought before the Supreme Court under the 1997 *Constitution*, three were at the instigation of the opposition parties. Disagreeing with government, the opposition parties wrote to the President and urged him to seek Supreme Court's opinion as to the correct interpretation. The President then asked Cabinet to endorse a request for Presidential reference to the Supreme Court. It remains a moot point whether constitutional references will now come before the Supreme Court from the opposition, given that the 2013 *Constitution* is a document which was prepared and implemented by the current government. It will be difficult for opposition parties to have the government refer constitutional references before the Supreme Court as it will entail getting the ruling party's cabinet to endorse that request. The avenue provided under the 1997 *Constitution* was somewhat easier because all requests for Supreme Court referral were sent directly to the President who then asked for cabinet endorsement to refer the matter to the Supreme Court for its opinion which was readily given.

The Attorney-General's position has also come under scrutiny in the 2013 *Constitution*. The Citizen's Constitutional Forum claims that "[T]he Attorney-General has remarkable and wide ranging powers, far wider than other Commonwealth Constitutions."<sup>81</sup> In addition to the traditional role, as the Government's chief legal advisor, the Attorney-General: (1) Chairs the Mercy Commission and is consulted by the Judicial Services Commission (JSC) on the appointment of the other four members of the Commission; (2) Influences all judicial appointments by being consulted (i) by the Prime Minister on the appointment of the Chief Justice and the President of the Court of Appeal, and (ii) by the JSC for appointments of all other judges; (3) Is directly involved on the appointment of almost every 'independent' commissioners and officers, either directly or indirectly; (4) Is indirectly involved in determining remuneration for members of every single 'independent' commission and office; (5) Initiates the process for removal of holders of most 'independent' offices and the Electoral Commission, Human Rights and Anti-Discrimination Commission and the Public Service Commission by participation in Constitutional Officer's Commission decision establishing a tribunal, and indirectly involved in process for removal of others through the Judicial Services Commission; and (6) Is required to be provided with regular reports by Offices and Institutions otherwise supposed to be independent bodies that under most Constitutions would be required to report only to parliament.

Under the 2013 *Constitution* the Attorney-General enjoys extensive control over many matters and discharges functions usually performed by committees of elected members of parliament. Whilst the Attorney-General under the 1997 *Constitution* was chairperson of the Prerogative of Mercy Commission, he had a rather limited role on appointment of judges and other independent commission members.<sup>82</sup>

The 1970 and 1990 Constitutions provided that in the absence of the Attorney General, another lawyer from Parliament or private practice could act in that position. The 1997 *Constitution*, however, allowed the Solicitor-General to perform statutory functions of the Attorney General whilst another Minister would perform his or her political functions.<sup>83</sup>

This allowed the political role of the Attorney-General to be performed by a non-lawyer cabinet minister; if there was no other legal person in Cabinet or on government side of the bench. It allowed for continuity within the office and avoided the need to bring a private practitioner to avoid potential conflict. The 2013 *Constitution* now takes that responsibility away from the Solicitor-General. Under the 1997 *Constitution*, the Attorney-General was required to be a person who was qualified to practice law. This has been enhanced by the 2013 *Constitution* in that the person appointed should be a legal practitioner with 15 years post qualification experience and someone who has not been found guilty of any disciplinary offence under the Legal Practitioner's legislation.<sup>84</sup> This is a positive development.

## 6. CHAPTER 5 - JUDICIARY

An independent judiciary is central to any constitutional democracy to maintain a high standard of the rule of law. In the absence of a strong independent judiciary ordinary citizens cannot expect impartial decision making on matters that affect their daily lives. It is common for all constitutions to protect the role of judges as independent guardians of the rule of law by separating them from undue influence from Parliament and the Executive. If this is guaranteed then the courts will be free to decide cases impartially on their merits, as opposed to being unduly influenced by political considerations. There are some critical differences between the 1997 and 2013 *Constitutions* regarding the judiciary.

First and foremost is the provision on judicial independence. Whilst section 118 of the 1997 *Constitution* and section 97(2) of the 2013 *Constitution* say that the judges are independent of the legislative and executive branches of government, the 2013 *Constitution* adds a further provision that the courts are subject only to the 2013 *Constitution* which they must apply without fear or favour.<sup>85</sup> This begs the question whether anyone can now bring an action to determine the purported abrogation of 1997 *Constitution*. The High Court registry is likely to reject any document which is filed challenging the abrogation because the 2013 *Constitution* contains ouster clauses which prohibit any such challenge.<sup>86</sup>

Under the 1997 *Constitution*, the Chief Justice was appointed by the President on the advice of the Prime Minister following consultation with the Leader of Opposition.<sup>87</sup> Now the Chief Justice is appointed by the President on the advice of the Prime Minister and the Attorney General. The Leader of the Opposition plays no role in the appointment process.<sup>88</sup> The President of the Court of Appeal is similarly appointed under the 2013 *Constitution*.<sup>89</sup> Under the 1997 *Constitution*, all judges of the Supreme Court and all Justices of Appeal, including the President and all Puisne Judges of the High Court, were appointed by the President on the recommendation of the Judicial Services Commission following consultation with the Minister (Attorney-General) and the Sector Standing Committee of the House of Representatives. The Sector Standing Committee was comprised of Government and Opposition Members of Parliament and was responsible for all matters relating to the administration of justice.<sup>90</sup> The 2013 *Constitution* marks a significant departure from the 1997 *Constitution* in that whilst the Judicial Services Commission was

<sup>80</sup> 2013 *Constitution* s 91(5).

<sup>81</sup> Citizens' Constitutional Forum, above n 26.

<sup>82</sup> 1997 *Constitution* s 115.

<sup>83</sup> 1997 *Constitution* s 100.

<sup>84</sup> *Legal Practitioner's Decree 2009*, (Decree No. 16 of 2009); and, 2013 *Constitution* s 96.

<sup>85</sup> 2013 *Constitution* ss 2-3.

<sup>86</sup> *Ibid* ss 173-174.

<sup>87</sup> 1997 *Constitution* s 132 (1).

<sup>88</sup> 2013 *Constitution* s 106 (1).

<sup>89</sup> *Ibid* s 106 (1).

<sup>90</sup> 1997 *Constitution* s 132 (2).

not obliged to accept the views of the Sector Standing Committee, it was legally obligated to consult them. This provided for independent checks and balances and between 1997 and 2006 there was little, if any, public criticism on the process of appointing judges. However, under both constitutions, the final decision on the appointment of judges rests with the President. It is fair to say that the President does not make the appointment on his or her own deliberate judgment under either constitution; the President only acts on advice.<sup>91</sup> Under the 2013 Constitution, whilst the Prime Minister plays a role on the appointment of judges, unless the Prime Minister is also a lawyer, in practice it will be the Attorney-General who will play a bigger role in choosing judges for the bench.

In so far as a judicial appointments body is concerned, there has never been unanimity across the commonwealth jurisdictions on what constitutes an ideal model. Prior to 2006, in England the Lord Chancellor was responsible for all judicial appointments. As part of reforms following the enactment of the *Constitution Reform Act 2005*, the Judicial Appointments Commission is now responsible for selecting judges in England and Wales. This Commission is made up of 45 members: two from the legal profession, five judges, one tribunal member, one lay justice and six lay persons including the Chairperson. This is a relatively large body; best suited for countries the size of England and Wales.

Smaller Commonwealth jurisdictions will find it hard to establish a similar body. In Australia, the Attorney-General is responsible for recommending all judicial appointments. There is a defined process if an appointment is to be made to the Federal Court and the Attorney-General consults widely writing to interested bodies inviting nominations of suitable candidates. These bodies include, but are not limited to, the Chief Justice of the Family and Federal Courts, the Chief Federal Magistrate, the Law Commission of Australia, the Australia Bar Association and their State and Territory counterparts. At the same time, the Attorney-General's department places public notices in national and local media seeking expressions of interest and nominations, and publishes the appointment criteria on its website. The Attorney-General has established standing advisory panels to assist in assessing expressions of interest and nominations. The advisory panel may interview candidates it considers suitable for appointment. The advisory panel subsequently presents the Attorney-General with a report that lists candidates that it has assessed as being highly suitable for appointment. After considering the advisory panel's report, the Attorney-General writes to the Prime Minister seeking his and the Cabinet's approval. If approved by Cabinet, the Attorney-General makes a recommendation to the Governor-General who considers the appointment through the Federal Executive Council.<sup>92</sup> This is a very thorough and transparent process.

Fiji's 1997 Constitution established the Judicial Services Commission.<sup>93</sup> The three-member Commission was headed by the Chief Justice as Chair with the Chair of the Public Service Commission and the President of the Law Society as members. They made recommendations before a process of consultation with the Attorney-General and the Law and Order Sector Standing Committee of Parliament. Whilst there were those who felt that the Sector Standing Committee should not be consulted on judicial appointments, the overall process of consultation ensured transparency and involvement of people's representatives in Parliament. The 2013 Constitution provides for a larger appointments committee than the 1997 Constitution.<sup>94</sup> Along with the Chief Justice as chair, and the

President of the Court of Appeal as member, the Commission is also made up of a senior legal practitioner and a lay person who are appointed by the President on the advice of the Chief Justice following consultation with the Attorney-General. The lawyer who represents the profession is chosen by the Chief Justice and the Attorney-General with no formal input from the Fiji Law Society. The profession, which was previously represented under the 1997 Constitution through its President, is now a voluntary organisation with no legal footing. There is, however, no reason why this body should not have an input into providing a senior member from amongst its peers to sit in on the appointments committee. The Permanent Secretary for Justice is the fifth member. Whilst there is merit in having a lay member on the committee, there does not appear to be any logical explanation for having the Permanent Secretary for Justice as a member. This person holds a public service appointment and ranks alongside peers who run the daily business of government.

The 2013 Constitution is clearly positive for the judiciary. For the first time in Fiji, the Parliament should ensure adequate resources are provided to enable the courts to function and exercise their duties properly.<sup>95</sup> The Judicial Services Commission is now given an expanded role relative to its position under the 1997 Constitution. It now has the responsibility to ensure the efficient functioning of the judiciary.<sup>96</sup> In addition, the Commission is required to provide regular updates and advice to the Attorney-General on matters relating to the judiciary or the administration of justice.<sup>97</sup> The type of matters which the judiciary briefs the Attorney-General are not particularised. The 2013 Constitution has extended the retirement age of the Chief Justice and the President of the Court of Appeal to 75 whilst the High Court judges retire at 70.<sup>98</sup> Under the 1997 Constitution, the retirement age for Chief Justice and President of Court of Appeal was 70 and 65 for High Court judges.<sup>99</sup>

Under the 1997 Constitution, whenever the President was absent or unable to perform duties of Office, the Vice President performed his or her functions. If neither were available, then the Speaker of the House of Representatives performed the President's functions.<sup>100</sup> The 2013 Constitution now provides that in the absence of the President, the Chief Justice will perform his or her functions as there is no provision for the Office of a Vice President.<sup>101</sup> This provision is not new as Fiji had a similar section under the 1970 Constitution.<sup>102</sup>

Under the 2013 Constitution a number of independent institutions/bodies have been included under the Judiciary. These are:

- Independent Legal Services Commission (section 114)
- Fiji Independent Commission against Corruption (section 115)
- Solicitor-General (section 116)
- Director of Public Prosecutions (section 177)
- Legal Aid Commission (section 118)
- Mercy Commission (section 119)

<sup>91</sup> 2013 Constitution s 97(4) and (5).

<sup>92</sup> Ibid s 104 (5).

<sup>93</sup> Ibid s 104 (7).

<sup>94</sup> Ibid s 110 (2).

<sup>95</sup> 1997 Constitution s 137.

<sup>96</sup> Ibid s 88.

<sup>97</sup> 2013 Constitution s 88.

<sup>98</sup> 1970 Constitution s 28.

<sup>91</sup> Ibid s 96 and 2013 Constitution s 82.

<sup>92</sup> Australian Government Attorney General's Department, 'Judicial Appointments: Ensuring a strong, independent and diverse judiciary through a transparent process' (2010).

<sup>93</sup> 1997 Constitution s 131.

<sup>94</sup> Ibid s 132(2).

- Public Service Disciplinary Tribunal (section 120)
- Accountability and Transparency Commission (section 121)

These institutions/bodies do not perform judicial functions and should have been grouped together under a separate chapter, either on a chapter on accountability or perhaps on independent bodies.

Some of these public bodies (Solicitor-General/Director of Public Prosecutions/Prerogative of Mercy Commission) existed under the 1997 *Constitution* whilst others were created between 2009 and 2014 by Decrees and continue in existence now under the 2013 *Constitution* except for the Accountability and Transparency Commission. One common feature of all these institutions is that they are required to provide regular updates to the Attorney-General.<sup>105</sup> Ideally, in keeping with modern constitutions, the Independent Legal Services Commission, Fiji Independent Commission against Corruption, Legal Aid Commission and Mercy Commission should report directly to Parliament in the same way that the Accountability and Transparency Commission, Public Service Commission Disciplinary Commission and Auditor General are required to do.<sup>106</sup>

## 7. CHAPTER 6 – STATE SERVICES

This chapter deals with the establishment of the Public Service Commission and three other disciplined services commissions, namely the Police, Corrections and Military. This chapter, however, also includes the establishment of the Constitutional Offices Commission. It is common for written constitutions to provide how independent commissions are established and what their roles and responsibilities are.

A Constitution is written defining nature of the constitutional settlement and should embody its fundamental values. It should concern the structures of state institution and its relationship to each other. Whilst the 2013 *Constitution* includes provisions on public service values and principles; it has lost an opportunity to go into other matters such as responsiveness, accountability, respect, leadership and human rights for the public servants. In the author's view the appropriate place for putting these is not in the *Constitution* but in the Public Service Act.<sup>105</sup> The Public Service Act is the better forum for listing in greater detail values and principles which should be adhered to by all public servants. It is also easier to enact new legislative provisions rather than trying to amend the *Constitution*.

Under the 1997 *Constitution*, the appointment to the Public Service Commission, Disciplined Services Commission and the Constitutional Offices Commission were made by the President.<sup>106</sup> The relevant minister nominated members who were then looked at by the appropriate Standing Committee of the House of Representatives before the Minister submitted the names to the President. The Sector Standing Committee could either confirm or reject a nomination. If a nomination was rejected, the Minister then made a fresh nomination.<sup>107</sup> This process insulated appointments from political control and ensured that the appointees had a greater degree of freedom, discretion and control in carrying out their constitutional tasks.

Conversely, under the 2013 *Constitution* new arrangements for appointments run the risk of politicisation. Appointment to the Public Service Commission is now made by the President on the advice of the Constitutional Offices Commission.<sup>108</sup> Significantly, the Constitutional Offices Commission is headed by the Prime Minister as Chairperson, with the Attorney-General as a member and two other members appointed by the President on the advice of the Prime Minister. The Leader of Opposition is also a member and nominates one other person to the Commission.<sup>109</sup> It is not unusual to have political figures sitting on independent bodies; however, the composition of the Constitutional Offices Commission is weighted in favour of the Government whose nominees outnumber opposition members by four to two. The 1997 *Constitution* provided for a three member Constitutional Offices Commission, with all appointments made by the President. Since the President was appointed by the Great Council of Chiefs, the process was not controlled by the Government. Under the 2013 *Constitution* the Public Service Commission appoints and removes permanent secretaries with the agreement of the Prime Minister.<sup>110</sup> This new arrangement permits a greater degree of politicisation.

The permanent secretary of each Ministry now has constitutional authority to appoint and remove staff in his or her ministry with the agreement of the Minister.<sup>111</sup> Under the 1997 *Constitution*, all public service appointments, promotions and dismissals were made by the Public Service Commission.<sup>112</sup> The 1997 *Constitution* ensured there was less opportunity for cronyism and nepotism and a greater chance of making appointments on merit. As for Ambassadors, all appointments are now made by the Prime Minister on the advice of the Minister for Foreign Affairs.<sup>113</sup> These appointments were made by the President under the 1997 *Constitution*.<sup>114</sup> Clearly, the Prime Minister now has a far more functional and dominant role in the day to day running of government than his counterpart did under the 1997 *Constitution*.

The 1997 *Constitution* had a limited role for the military compared to the 1990 *Constitution*. The 1990 *Constitution*, which was imposed by the Military, provided that, "it shall be the overall responsibility of the Republic of Fiji Military Forces to ensure at all times the security, defense and well-being of Fiji and all its residents."<sup>115</sup> The 2013 *Constitution* has adopted this overarching responsibility given to the military and has inserted the exact same wording which was in 1990 *Constitution*.<sup>116</sup> This provision allows the military to exercise a supervisory function. This is incompatible with the role of the military in modern constitutions around the world.

## 8. CHAPTER 7 – REVENUE AND EXPENDITURE

The 2013 *Constitution* adopts almost in its entirety the provisions of the 1997 *Constitution* on matters of revenue and expenditure. It however also enlarges the list for standing appropriations. The Commissioners of the Police and Corrections Services and the

<sup>105</sup> 2013 *Constitution* s 125.

<sup>106</sup> *Ibid* s 132.

<sup>107</sup> 2013 *Constitution* s 126.

<sup>108</sup> *Ibid* s 127.

<sup>109</sup> 1997 *Constitution* s 140(6).

<sup>110</sup> 2013 *Constitution* s 128.

<sup>111</sup> 1997 *Constitution* s 149.

<sup>112</sup> 1990 *Constitution* s 94 (3).

<sup>113</sup> 2013 *Constitution* s 131 (2).

<sup>105</sup> 2013 *Constitution* ss 114, 115, 118.

<sup>106</sup> *Ibid* ss 120, 121, 152.

<sup>107</sup> Public Service Act 1999.

<sup>108</sup> 1997 *Constitution* s 143.

<sup>109</sup> *Ibid* s 143.

Commander of the Military Forces who were previously not included are new additions to the list.<sup>117</sup>

## 9. CHAPTER 8 – ACCOUNTABILITY

This chapter provides for a Code of Conduct for public officials, establishes the office of the Auditor General and the Reserve Bank of Fiji and mandates for a new law on access to information.

### A Code of Conduct

The 2013 *Constitution* requires a written law to establish a Code of Conduct for public office holders.<sup>118</sup> The 1997 *Constitution* had a similar provision.<sup>119</sup> The 1997 provision required that such a law be passed “as soon as practicable after the commencement of 1997 *Constitution*” but this was not done.<sup>120</sup> The interim government between December 2006 and September 2014 also missed an opportunity to introduce this. It is not uncommon for leadership codes to be included in constitutions. Both Papua New Guinea<sup>121</sup> and the Solomon Islands<sup>122</sup> have them in their constitutions and a Leadership Code could have been included in the 2013 *Constitution*. Given the experience of the 1997 *Constitution*, the 2013 document constitutes a missed opportunity in this respect. However the current government introduced a Bill in 2016.<sup>123</sup>

### B Freedom of Information

The 2013 *Constitution* provides that a written law should make provision for members of the public to have a right to access official information and documents held by government and its agencies.<sup>124</sup> This is identical to the 1997 provision, except there is no longer any requirement for the legislation to be passed “as soon as practicable.”<sup>125</sup> A bill has been introduced in 2016 (see chapter 2 above – Bill of Rights).

### C Auditor General

This office is one of the central pillars of a functioning democracy. By providing yearly reports on government’s financial statements, the office of the Auditor-General allows proper oversight of government spending. Although the 2013 *Constitution* retains many of the existing features contained in the 1997 *Constitution*, there are significant differences. Under the 1997 *Constitution*, the Auditor-General was appointed by the Constitutional Offices Commission following consultation with relevant Sector Standing Committee of the House of Representatives.<sup>126</sup> The Auditor General is now appointed by the President on the advice of the Constitutional Offices Commission following consultation with the Minister responsible for Finance.<sup>127</sup> Over the years, the Auditor General’s office has been

subject to civil litigation and has come under criticism when performing his or her constitutional functions.<sup>128</sup>

The functional independence of the Auditor General’s Office under the 1997 *Constitution* was challenged by the (then) commander of Fiji Military Forces. Fiji’s highest court, the Supreme Court, ruled that the Auditor General has powers to audit various funds maintained by the Commander of the Military Forces and the Auditor should be given access to all accounts held by the Military.<sup>129</sup> In doing so, the Supreme Court rejected the Military Commander’s somewhat narrow construction of section 167 of the 1997 *Constitution* that the Auditor General’s function was only limited to examining public monies given to the military. The audit here concerned various regimental funds which are for the general welfare of the forces.

This fund has its source in the voluntary annual deduction of one day’s pay from all serving members of the force. In more recent times, the Chief Justice has questioned the office of the Auditor General. When the Auditor General asked for names of judges, their remuneration, recruitment procedure, interview records and vacancy advertisement details, the Chief Justice responded that the Auditor General’s office has misinterpreted the *Constitution* and acted beyond its powers.<sup>130</sup>

Again, in August 2015 when examining the Auditor General’s Annual Report to Parliament the chairperson of Fiji’s Public Accounts Committee asked Ministry of Finance officials for further particulars and clarification about certain figures. The officials were not in a position to provide specific details despite an earlier letter from the Public Accounts Committee to the Ministry of Finance. This specific query was in relation to how funds in the sum of F\$80-100 million was spent as a contingency fund from the Government’s budget.<sup>131</sup> The Auditor General had queried Ministry of Finance that *Head 50* funds were used without acquittals. The Public Accounts Committee of Parliament had wanted detailed clarification on how and where the money was spent. Ministry of Finance officials were unable to provide an adequate explanation.

The 1997 *Constitution* contained a provision that allowed a law to be passed that accounts of specified corporate bodies are not subject to audit by the Auditor General. This provision came in for considerable criticism in parliament by opposition political parties and should have been left out of the 2013 *Constitution*.<sup>132</sup> The 2013 *Constitution* nonetheless chose to retain this provision in its entirety.<sup>133</sup>

### D Reserve Bank of Fiji

The Governor of the Bank is now appointed by the President on advice of the Constitutional Offices Commission and the Commission is required to consult the Minister of Finance.<sup>134</sup> Under the 1997 *Constitution*, the Governor was appointed by the Constitutional Offices Commission although the Commission was again required to consult with the Minister for Finance and the Board of the Reserve Bank of Fiji.<sup>135</sup> Contrary to the 1997 *Constitution*, the 2013 *Constitution* contains specific details on the objects and responsibilities of the

<sup>117</sup> 2013 *Constitution* s 147.

<sup>118</sup> *Ibid* s 149.

<sup>119</sup> 1997 *Constitution* s 156.

<sup>120</sup> *Ibid* s 156(3).

<sup>121</sup> *Constitution of the Independent State of Papua New Guinea*, Part III Division 2, Leadership Code.

<sup>122</sup> *Constitution of Solomon Islands*, Chapter VIII, Leadership Code.

<sup>123</sup> Parliament of Fiji, Code of Conduct Bill 2016 (Bill No. 22 of 2016)

<[http://www.parliament.gov.fj/getattachment/Parliament-Business/Bills/2016-Bills/Bill-No-22-Code-](http://www.parliament.gov.fj/getattachment/Parliament-Business/Bills/2016-Bills/Bill-No-22-Code-of-Conduct-Bill-11.pdf.aspx)

<sup>124</sup> 2013 *Constitution* s 150.

<sup>125</sup> 1997 *Constitution* s 174.

<sup>126</sup> *Ibid* s 168.

<sup>127</sup> *Constitution* s 151.

<sup>128</sup> *Republic of Fiji Military Forces v A.G.* [2004] FJSC13; and, see *Fiji Sun*, ‘Under Fire’ <<http://fijisun.com.fj/2015/08/04/under-fire/>>.

<sup>129</sup> *Republic of Fiji Military Forces v A.G.* [2004] FJSC13.

<sup>130</sup> *Fiji Sun*, ‘Under Fire’ <<http://fijisun.com.fj/2015/08/04/under-fire/>>.

<sup>131</sup> *Fiji Times*, ‘No answers for \$100m question’ <<http://fijitimes.com/story.aspx?tid=316658>>.

<sup>132</sup> 1997 *Constitution* s 167(5).

<sup>133</sup> 2013 *Constitution* s 152(11).

<sup>134</sup> *Ibid* s 153.

<sup>135</sup> 1997 *Constitution* s 146(2).

Reserve Bank. These need not have been put in the *Constitution* since they are adequately covered under the *Reserve Bank of Fiji Act 1985*.<sup>136</sup>

## 10. CHAPTER 9 – EMERGENCY POWERS

Like its predecessor, the 2013 *Constitution* also permits the State to declare a State of Emergency. Under the 1997 *Constitution* however, it was the President who did this on the advice of Cabinet.<sup>137</sup> Under the 2013 *Constitution*, it is the Prime Minister who makes the declaration with the recommendation of the Commissioner of Police and the Commander of the Fiji Military Forces.<sup>138</sup> The 2013 *Constitution* has taken away many of the safeguards which the 1997 *Constitution* provided. Under the 2013 *Constitution*, if a declaration is made when Parliament is sitting, then the Prime Minister must, within 24 hours of making that Declaration, refer the Declaration to Parliament for confirmation. If Parliament is not sitting, then the Speaker must within 48 hours seek confirmation of the Declaration from Members of Parliament, for which a majority is required. If a majority of the Members of Parliament do not confirm, then the Declaration is null and void.<sup>139</sup> The 1997 *Constitution* provided that Parliament had to sanction the proclamation within 5 days.<sup>140</sup> Furthermore, the *Emergency Powers Act 1998* provided for making specific emergency-related regulations. These regulations were to provide, inter alia, that persons who suffer financial loss as a result of action taken during the emergency period should be compensated.<sup>141</sup> The *Emergency Powers Act* continues to apply after the 2013 *Constitution* was promulgated. The 1997 *Constitution* also provided that all emergency laws should be compatible with Fiji's international obligations,<sup>142</sup> by contrast, the 2013 *Constitution* does not contain this provision.

## 11. CHAPTER 10 - IMMUNITY

Since 1990, absolute and unconditional immunity from civil liability and criminal prosecution has been a common feature of Fijian constitutions. The 1990, 1997 and the 2013 *Constitutions* all included specific immunity provisions. Whilst the 1997 *Constitution* extended immunities which were granted under the 1990 *Constitution*, the 2013 *Constitution* has enlarged those provisions. Absolute and unconditional immunity is now granted to any person holding office in the public service or any other public office.<sup>143</sup> Under the 2013 *Constitution*, for the first time the Fijian judiciary is also given immunity.<sup>144</sup> The immunities that were given under the 1997 *Constitution* were a result of wide public consultation. Although Professor Yash Ghai's recommendation was also that immunities feature in the new *Constitution*, it should only be if individuals renounced their past actions in an oath or affirmation of reconciliation and allegiance.<sup>145</sup> The 2013 *Constitution* has

discarded Professor Ghai's approach. The 2013 *Constitution* provides that the immunities granted are entrenched and cannot be reviewed, amended, altered, repealed nor revoked.<sup>146</sup>

## 12. CHAPTER 11 – AMENDMENT OF CONSTITUTION

Most modern constitutions provide an amendment procedure. The procedure is generally flexible which allows for changes to be made over time to meet changing needs of a country and her people. Fiji's 1990 *Constitution* provided for a review clause. Within 7 years the constitution amendment process had started,<sup>147</sup> and the 1997 *Constitution* was the product. The 1997 *Constitution* also allowed for a procedure on how the *Constitution* could be amended. The amendment Bill would require a majority support of at least 53 of the 71 members of the House of Representatives and a prescribed number of Senators of the Upper House before changes could be made.<sup>148</sup> The 2013 *Constitution* does have a two-step provision which provides for amendment. The first process was to allow for transitional amendments by Cabinet before 31 December 2013.

These amendments were intended to rectify inconsistencies or errors in the *Constitution*. They could be done through a Decree following Cabinet approval and certification by the Supreme Court.<sup>149</sup> This *Constitution* was brought into effect on 6 September 2013 and a three-month window for amendments was unrealistic. Unsurprisingly, no amendments were made in that period. A more realistic timeframe would have allowed an opportunity for amendments. Closer to home, the Papua New Guinea Constitution provided for transitional amendments to be made within four years following enactment of their *Constitution*.<sup>150</sup>

The 2013 *Constitution* does provide a procedure for amendment after December 2013. This can be done through an amendment bill which is required to be debated three times in Parliament and voted on twice by at least three quarters of Members of Parliament, separated by at least 30 days.<sup>151</sup> The third reading of the Bill in Parliament will not take place until after the relevant committee of Parliament has reported on that Bill to Parliament. If the Bill is passed by Parliament, the President will then refer the Bill to the Electoral Commission which is required to hold a referendum for all registered voters in Fiji and take a vote on the Bill. The Bill can only be given Presidential assent provided that three quarters of the registered voters have voted for the amendments.<sup>152</sup> The requirement that a majority of members vote in favour of the amendment in Parliament, followed by three quarters of the registered voters consent would be extremely difficult to achieve in any functioning democracy given that the 2013 *Constitution* itself was not put to referendum. Fiji's 2013 *Constitution* is now one of the most, if not the most, difficult constitutions in the world to amend. It is safe to say that in its current form, it will probably never be changed.

<sup>136</sup> Chapter 210.

<sup>137</sup> 1997 *Constitution* s 187.

<sup>138</sup> 2013 *Constitution* s 154.

<sup>139</sup> 2013 *Constitution* s 154.

<sup>140</sup> 1997 *Constitution* s 187 (3) (b).

<sup>141</sup> *Emergency Powers Act 1998* s 5(3)(a).

<sup>142</sup> 1997 *Constitution* s 187 (4).

<sup>143</sup> 2013 *Constitution* s 157.

<sup>144</sup> *Ibid* s 157(D).

<sup>145</sup> Fiji Draft Constitution: (The Explanatory Report 2012) 101.

<sup>146</sup> <http://www.fijiacts.com/uploads/13/7/5/13759434/funstudy\_the\_explanatory\_report\_two-4.pdf>.

<sup>147</sup> 2013 *Constitution* s 158.

<sup>148</sup> 1990 *Constitution* s 161.

<sup>149</sup> 1997 *Constitution* ss 191 and 192.

<sup>150</sup> 2013 *Constitution* s 161.

<sup>151</sup> *Papua New Guinea Constitution*, s 15.

<sup>152</sup> 2013 *Constitution* s 160.

<sup>153</sup> *Ibid* s 160.

### 13. CHAPTER 12 - COMMENCEMENT, INTERPRETATION, REPEALS AND TRANSITIONAL

Parts A and B contain technical provisions and definitions which are taken out of the 1997 *Constitution*. Part C repeals five Decrees which became redundant following promulgation of the 2013 *Constitution* by the President. However, it leaves in its entirety all other Promulgations and Decrees made since 2006.<sup>153</sup> The *Constitution* provides that in the event of inconsistency with 2013 *Constitution*, the Decrees and Promulgations will override conflicting provisions in the *Constitution*. There has been no attempt in the *Constitution* to repeal laws which may be inconsistent with the Bill of Rights Chapter in the *Constitution*. Some examples are the *Public Order Amendment Decree*,<sup>154</sup> *Essential National Industries (Employment) Decree 2011*,<sup>155</sup> *Media Industry Development Decree 2010* and *Media Industry Development (Amendment) Decree 2013*.<sup>156</sup> There are also restrictions on the ability to challenge these Decrees in Court. Although the new Parliament is mandated to amend these Decrees, there is a specific provision that the amendments cannot have retrospective effect over any decision made under either the Decrees or the Promulgations. Furthermore, no one is to receive any compensation for any wrong done to that person between December 2006 and the elections in 2014. Since December 2006, a number of innocent citizens have been subjected to detention, mistreatment or dismissed from office without due process.<sup>157</sup> Many had to endure hardships and there remains no recourse to justice since the 2013 *Constitution* precludes aggrieved litigants from bringing court proceedings.<sup>158</sup>

Some of the Decrees and Promulgations made during December 2006 and September 2014 are inconsistent with the 2013 *Constitution* but since September 2014, when an elected government came into power and Parliament convened, no significant attempt has been made to bring these Decrees in compliance with the 2013 *Constitution*, which allows all these Decrees to remain in force until they are either amended or repealed.

### 14. CONCLUSION

The 1997 *Constitution* was the product of a report by a three member bipartisan Constitutional Review Commission (Reeves Report?). It consulted widely over a 14 month period in Fiji and made 697 recommendations. After its report was handed to the President, it was subsequently tabled in Parliament at a joint sitting of Senate and the House of Representatives. A Parliamentary Committee composed of both Houses and from all political parties was formed to study the report and make recommendations to Parliament. This Committee deliberated for a period of eight months before tabling its report. The report was endorsed by the then Great Council of Chiefs and members of Parliament. A draft Bill was prepared, debated and passed. The 1997 *Constitution* came into effect in July 1997.

The 2013 *Constitution* is fundamentally different from its predecessor. It is the first to eliminate race-based electoral rolls, race-based seat quotas, district-based representation, repeal the unelected Upper Chamber and do away with the role of hereditary chiefs. It is also the first to grant multiple citizenship (effective since 2009 by Decree) and has lowered the voting age to 18. Under the new system, individual regional constituencies have also been abolished in favour of one national constituency. This system is, however, not without criticism. This is a unique provision which allows political parties to maintain their numbers in Parliament and prevents independent candidates or parties not represented in Parliament from contesting a seat at a by-election.

Chapter 2 of the 2013 *Constitution* contains many limitations on the Bill of Rights which render it no more than a set of unenforceable political aspirations. These rights can be taken away through a law passed by Parliament via a simple majority. Perhaps the most troublesome aspect of the 2013 *Constitution* is the provision on amendments. The 2013 *Constitution* makes it very difficult to make any amendments in the foreseeable future. When the 1997 *Constitution* was purportedly abrogated in 2000, a challenge was brought into the Fiji courts. The Fiji Court of Appeal ruled that the attempted abrogation of the 1997 *Constitution* was unconstitutional.<sup>159</sup> Following the Court of Appeal ruling, the then government swiftly restored that *Constitution* and two subsequent general elections were held under it. It remains to be seen whether the legality of the 2013 *Constitution* will ever be challenged in court. The ouster clauses in the 2013 *Constitution* purport to deprive the judiciary from entertaining a review application; hence any challenge in the foreseeable future is highly unlikely.

<sup>153</sup> *Ibid* s 173.

<sup>154</sup> *Public Order Amendment Decree 2012* and *Public Order Amendment Decree 2014*.

<sup>155</sup> *Essential National Industries (Employment) Decree 2011* (Decree No. 35 of 2011).

<sup>156</sup> *Media Industry Development Decree 2010* (Decree No. 20 of 2010); *Media Industry Development (Amendment) Decree 2013* (Decree No. 10 of 2013).

<sup>157</sup> The author of this article was Fiji's Solicitor-General in December 2006 and was dismissed from office without due process for upholding the 1997 *Constitution*. <[https://en.wikipedia.org/wiki/Stuart\\_Huggell](https://en.wikipedia.org/wiki/Stuart_Huggell)>

<sup>158</sup> *2013 Constitution* s 173(4).

<sup>159</sup> *Republic of Fiji Islands v Prasad* [2001] FJCA2.