FIJI IN TRANSITION: Towards a Sustainable Constitutional Democracy
Fiji in Transition: Towards a Sustainable Constitutional Democracy
FIJI IN TRANSITION: TOWARDS A SUSTAINABLE CONSTITUTIONAL DEMOCRACY
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The information provided here is for research purposes regarding the implementation of the Constitution of the Republic of Fiji 2013 and related decrees. These research papers should be seen as being consistent with the following objectives to (i) provide technical information on Constitutional issues and (ii) to conduct research relevant to the practical application of the Constitution in the context of Fiji’s transition to democracy. The views and opinions expressed in these papers do not reflect the views or policies of the CCF, nor does CCF make any representation concerning the information provided.

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FIJI'S CONSTITUTION MAKING PROCESS

**July 2012:**
- Fiji Constitutional Process (Constitution Commission) Decree, 2012 (Decree 57) Promulgated
- Fiji Constitutional Process (Constituent Assembly & Adoption of Constitution) Decree, 2012 (Decree 58)

**December 2012:**
- Constitutional Commission Draft Constitution is Presented to the President of Fiji

**August – October 2012**
Government amends Constituent Assembly Decree to allow President, in consultation with the PM to alter the Commission’s Draft before submitting to the CA

**January 2013**
- Government amends Constituent Assembly Decree to allow President, in consultation with the PM to alter the Commission’s Draft before submitting to the CA

**March 2013:**
- Decree 12, 2013 amends Decree 58, 2012 to abandon the Constituent Assembly.
- Government releases an amended version of the Constitutional Commission Draft Constitution
- Public given two weeks (and then 5 weeks) to make submissions to the Attorney General on the Government Draft Constitution

**September 2013**
- Constitution of the Republic of Fiji 2013 is assented to by the President of Fiji.

**August 2013**
- Government releases the Constitution of the Republic of Fiji 2013
At the time of writing, Fiji has just seen its first elections, and the first sitting of Parliament under its newly introduced Constitution of the Republic of Fiji 2013 (the 2013 Constitution). The Citizens’ Constitutional Forum (CCF) shares in the excitement felt by many Fijians about this new and exciting chapter. This publication attempts to join in that excitement and hope for the future, while recognizing that there is significant work yet to be done in order to enshrine a sustainable constitutional democracy for Fiji.

CCF has worked in the area of constitutional strengthening and debate for more than 15 years. We hope that the substantive analysis of the 2013 Constitution presented here will contribute to a vibrant national discussion on constitutional issues fundamental to Fiji’s transition to sustainable constitutional democracy. CCF intends this book to help kindle an informed, open and progressive national debate on the extent of constitutional dilemmas facing the country. It is directed at moving Fiji towards a stable democracy that avoids the divisions and mistrust that have hindered past transitions.

The publication begins by presenting three discussion papers that provide substantive analysis on technical constitutional issues. The first, on the Transitional Process, sets the scene for the volume by describing international and comparative best practice regarding transitional arrangements for nations attempting to emerge from military-backed rule. While Fiji has its unique historical, cultural, socio-economic and political context, there are common issues of central concern for countries shifting from a military-backed government to civilian rule. This paper assesses the transitional provisions set out in the 2013 Constitution against these international and comparative best practices. It concludes by presenting suggestions for ways in which the 2013 Constitution can better support a successful transition back to civilian rule.

The second paper tackles the constitutional issues surrounding the doctrine of Separation of Powers. It highlights the fact that in countries emerging from highly centralized military rule, appropriate checks and balances on the executive power, including strong oversight powers in the legislature and an independent judiciary, are essential to implement the will of the people. In the absence of adequate checks and balances and the concentration of power in the hands of a few, nations emerging from military-backed rule risk becoming illiberal democracies – that is, governing systems in which elections provide nothing more than a democratic façade to dictatorial government. Such systems are particularly vulnerable to future coups. In light of this danger, the paper highlights the importance of taking steps to amend the 2013 Constitution in order to strengthen Fiji’s democratic process and end the engrained coup culture.
The third Discussion Paper explores the 2013 Constitution’s Bill of Rights. The paper emphasizes that during a period of transition, such as Fiji’s, a strong Bill of Rights is essential to protect a nation’s citizens. Rights of expression and association, rights of persons to participate in political and civil life, rights necessary to ensure that the state does not harm individuals, rights essential to the rule of law, rights to promote an open and democratic society and rights to prevent governmental intrusion on an individual’s private life are all critical to any successful transition to civilian rule. Equally so is the enumeration of limitations on those rights that accord with international best practice and standards. For this reason, this paper explores the troubling omissions and limitations to be found in the 2013 Constitution’s Bill of Rights as well as the provisions that essentially undermine the Constitution’s rights and protections altogether. Key actions for the new Parliament and civil society to rectify this situation are suggested.

The publication then shifts focus from the technical issues found in the 2013 Constitution, to an exploration of how the Fijian public understand the 2013 Constitution in the Constitutional Perceptions Survey. According to international and comparative best practice, constitutional reform should adhere to fundamental international principles of inclusivity, participation, transparency, consensus and national ownership. This helps to legitimise the constitution-making process and the resulting Constitution in the eyes of the public, thereby reducing the risk of instability during the transitional process. The Constitutional Perceptions Survey attempts to explore and document a small portion of Fijian citizens’ thoughts, feelings and opinions about the Constitution and to gauge their sense of ownership over the document. While the results of the Perception Survey are mixed, many participants felt that they would have been more satisfied with the 2013 Constitution if its development had been more consultative and transparent, so that its contents could be seen as reflective of citizen’s wishes. The Perception Survey concludes by presenting some recommendations based on the participants’ comments for how to encourage Fijian citizens to take ownership and pride in their supreme law.

The publication concludes with a Monitoring Report, which attempts to document the key events in the implementation of the 2013 Constitution over the year between its promulgation in September 2013 and the September 2014 elections. According to international and comparative best practice, an environment most conducive to democratization is achieved in a transition where the military-backed government hands over to a caretaker government for a reasonable period before elections are held. This helps to make sure that the incumbent military-backed government does not gain an unfair advantage over any opponents, given their power to arbitrarily control events in the lead up to elections. Given that no such provisions were put in place for Fiji’s transition, it was important to monitor and document the implementation of the transitional requirements of the 2013 Constitution itself. The Monitoring Report outlines these events,
reviews the implementation status of the 2013 Constitution, the challenges that implementation has faced so far and the prospects for timely and comprehensive implementation in the future.

The topics chosen for this publication reflect the major concerns highlighted by CCF’s previous work with the 2013 Constitution, and the issues raised by its comparison with international best practice. The analysis, conclusions and recommendations found here, however, do not necessarily reflect the position of the CCF. CCF recognizes that the analysis found in these papers is not the only way to interpret the 2013 Constitution, that the conclusions drawn may be challenged and that the solutions presented are not necessarily the only way to transition to a stable democracy. Rather, CCF presents these papers and recommendations as a starting point to inspire and create informed discussion and debate. CCF hopes that a national consensus can be reached regarding the steps that still need to be taken to strengthen Fiji’s 2013 Constitution and its democratic governance.

The following key recommendations have been drawn from the papers and reports in this book and are presented here as a starting point for parliamentarians, civil society, public servants and others to begin work:

1. **Amendment of all provisions that infringe the protections set out in the Bill of Rights** or which otherwise undermine democratic participation. As a priority:
   a) Repeal all instances of ‘ouster clauses’ that remove jurisdiction of the courts to hear matters calling into question administrative decisions of the government.
   b) Amend the Public Order Amendment Decree, Media Industry Development Decree, Essential National Services Decree, Crimes Decree and Electoral Decree so that they are consistent with the Bill of Rights.

2. Strengthen the checks and balances between the three arms of government by **reinforcing executive accountability to Parliament** through establishment of Parliamentary committees to review government administration, strong oversight mechanisms and representative questioning by opposition MPs in Parliament.

3. Pressure for the **timely implementation of all constitutionally mandated laws and institutions** that enhance democratic engagement. Particularly:
   a) Ensure tabling of Auditor General’s Reports from 2006.
   b) Introduce legislation that establishes the Accountability & Transparency Commission.
4. **Promote a rights-maximizing judicial interpretation of the Bill of Rights** by encouraging judges to interpret rights to be consistent with international human rights instruments and limit rights only when reasonable and justifiable in a democratic, secular and rights respecting state.

5. In the absence of specific protections for women in the 2013 Constitution, **promote legislation that protects women’s rights**, such as an Anti-Discrimination Act, which includes comprehensive provisions relating to women's rights.

6. Promote a process of dialogue whereby power **relations between the Republic Fiji Military Forces and the elected government are reconfigured** to assert civilian rule over the military.

7. **Develop structured and accessible awareness programmes relating to the contents of the Constitution** through school curriculums and community education initiatives.

8. **Ensure a free and independent media** through reform of legislation restricting the free public debate of political issues and encouraging media institutions to hold elected representatives to account.
Transitional Processes in the 2013 Constitution
EXECUTIVE SUMMARY

As it emerges from an extended period under military rule, Fiji needs a constitution under which democratic culture can thrive and endure. While there are some positive aspects of the 2013 Constitution, an examination of its transitional arrangements reveals numerous inconsistencies with international law, comparative best practice and fundamental democratic principles.

Of particular note, the 2013 Constitution does not follow best practice for ensuring a neutral setting for free and fair elections. There is no requirement for the incumbent military-backed government to transition to a caretaker government or “caretaker mode”. Instead, the government retains broad legislative and executive powers.

The 2013 Constitution also keeps in operation all existing laws and decrees of the interim government passed right up until the first sitting of Parliament. It also prohibits judicial scrutiny of these laws and decrees, and provides that such laws and decrees will override the Constitution where there is any inconsistency. Amongst other matters, this means that the incumbent government has the power to determine the character of political succession and protect its vested interests. It also means that it has the power to constrain the legislative capacity of future parliaments and of elected executives to chart their own course in a manner that is consistent with democratic principles. Even if the incumbent Government does not use these powers, transitional arrangements of this nature are not consistent with robust democracy, and may undermine public confidence in the legitimacy of the 2013 Constitution, and also in any newly-elected government.

The 2013 Constitution also establishes an unusually expansive role for the Republic of Fiji Military Forces (RFMF), which the RFMF perceives as one of supervising the civilian government’s compliance with the 2013 Constitution. This role is contrary to democratic practice, which requires that the military will be subject to control by democratic institutions, and will only assume roles appropriate to the security needs of the country. The 2013 Constitution also contains broad immunity provisions that exceed the permissible scope of amnesties under international law.

Notwithstanding these issues, it is important to remember that transition to democracy is typically achieved over an extended period of time, often spanning decades and involving significant political negotiation. A willing Fijian Parliament, or opposition party MPs, could work to consolidate democratic norms and institutions, including in the four key areas of (i) constitutional implementation; (ii) legislative reform; (iii) assertion of control over the military; and (iv) strengthening of executive accountability.
1. INTRODUCTION – CONSTITUTIONS & TRANSITIONAL PROCESSES

The purpose of this paper is to examine Fiji’s current transitional process from military-backed rule to civilian rule. This examination is important for several reasons. Notably, the modalities assumed by transition, the way in which political actors are organised, and the various political institutions that emerge during the transitional process, make a significant difference in the long-term viability of newly democratised states.

Military rule is typically characterised by a denial of democratic values and institutions. In a transition from military-backed government to civilian rule, the procedural and substantive content of a constitution, as well as its process of implementation and development, play an important role in peaceful transition and democracy-building. In particular, a constitution can deal with the particular needs of a country with little experience of democracy, establishing a framework in which neutral elections are held and democratic freedoms are assured. It can also play a critical preventative role. Constitution-making presents moments of great opportunity to create a common vision of the future of a state, the results of which can have profound and lasting impacts on peace and stability.

The specific transitional process adopted by a country emerging from military rule is dependent on numerous factors – including a country’s unique historical, cultural, socio-economic and political context. Nonetheless, there are common issues that tend to be of central concern for countries transitioning from military-backed government to civilian rule, and a corresponding body of international and comparative best practice to guide constitution-makers in addressing those issues. In Part 3 of this paper, the transitional arrangements set out in the 2013 Constitution will be examined by reference to international and comparative best practice, and with specific regard to Freedom House’s 2014 “Freedom in the World” survey (http://freedomhouse.org/report/freedom-world/2014/fiji-0#.VB-R4qEiMeg) – which measures the current degree of civil liberties and political rights in Fiji.

2. A SHORT HISTORY OF TRANSITIONAL PROVISIONS

The nature of transition from military-backed rule to civilian rule makes a significant difference to the long-term viability of newly democratised states. For this reason, an examination of Fiji’s transitional process following the 1987 coup is instructive, as are the transitional provisions contained in the 1990 and 1997 Constitutions.
1990 Constitution

In the 1987 elections (held under the 1970 Constitution), a coalition led by Prime Minister Timoci Bavadra defeated Ratu Sir Kamisese Mara’s Alliance Party, which had been in power since independence. A month later, the multi-ethnic coalition government was overthrown by a military coup led by Lieutenant Colonel Rabuka. A civilian administration headed by the Governor General (with a Council of Advisors) then governed Fiji through until September 25 1987, when Rabuka carried out a second coup. Rabuka then governed as head of a military government for three months, before handing power back to Ratu Sir Penaia Ganilau as President and Ratu Mara as Prime Minister – returning Fiji to civilian (though not constitutional) interim administration. Under the Ratu Mara administration, a new republican constitution was prepared by a committee of predominantly coup supporters. Fijians were given little real opportunity to participate in the constitution-making process. This Constitution was promulgated in 1990, with elections held under it in 1992. It led to Rabuka becoming Prime Minister as an elected politician rather than a coup-maker.

Under the 1990 Constitution, the role of the military was not delimited, nor made subject to civilian control through democratic institutions. Rather, the military was given the supervisory role of ensuring the “security, defence and wellbeing of Fiji and its peoples” (95). Indeed the actions of members of the disciplinary forces were not subject to the Bill of Rights (save for the right to life, protection from slavery and forced labour and from inhuman and degrading treatment (20)).

The 1990 Constitution also kept in operation existing laws, but required that inconsistent laws be construed with any necessary modifications and qualifications to bring them into conformity with the Constitution (168). It also granted broad immunities from criminal or civil responsibility to the leader of the 1987 coup, all members of the RFMF and any person acting subject to the RFMF’s direction (164) for numerous offences resulting directly or indirectly from the 1987 coup.

1997 Constitution

By its own provision, the 1990 Constitution required review within seven years of its promulgation. In 1997, following the Reeves Commission Report – and the most participatory consultative process in Fiji’s history up to that point – Fiji promulgated a new constitution.

While the 1997 Constitution did not arise in the context of a military to civilian transition, there are several provisions of note. First, the 1997 Constitution – as with the 1990 Constitution – kept in operation existing laws, but required that inconsistent laws be construed with any necessary modifications and qualifications to bring them into conformity with the Constitution (195). It was also open to the courts to consider whether these laws, or parts thereof, were constitutional.

The 1997 Constitution continued the immunities set out in the 1990 Constitution. It also potentially provided the government with the means, via a Prerogative of Mercy Commission, to grant ‘pardons’ for coup or mutiny-related activities (115).
While the role of the RFMF was not expressly delimited, there was provision for civilian control over the military. In particular, Parliament was given the power to make laws with regard to the RFMF and the Commander of the RFMF exercised military executive command subject to ministerial control (112).

The 1997 Constitution also required enactment of code of conduct and freedom of information laws. However, no timetable for adoption was set out in the 1997 Constitution and these laws were never adopted.

3. INTERNATIONAL BEST PRACTICE & THE 2013 CONSTITUTION

Principles of a Constitution-Making Process

According to international and comparative best practice, constitutional reform should adhere to fundamental international principles of inclusivity, participation, transparency, consensus and national ownership.

How, when and by whom countries transitioning from military rule revise their constitution substantially impacts the democratic nature of post-transition states. Where an unelected military-backed government controls the constitution-making process, it is able to determine the character of political succession and protect its vested interests. It may also shape the agenda post-election by enacting legislation which makes a predetermined result more likely – such as by slanting electoral laws, tightening media controls, muzzling the courts and leaving public order regulations readily accessible. This can result in little more than a democratic gloss being placed on existing authoritarian arrangements, and poses a threat to long-term post-transition stability. Indeed, the risk of a future coup is intensified where the legitimacy of a new constitution is questioned, or where its content is flawed.

Adhering to fundamental democratic principles of inclusivity such that all voices – including political opponents, civil society organisations and minorities – are heard and valued in the process; participation – the people are educated about the process and having a genuine opportunity to express their will; transparency – the public being aware of what is happening at each stage of the
process; consensus – based on discussion, negotiation and persuasion; and national ownership – the process developed and led by national actors, ensures an open and accountable framework for achieving consensus on core values of the state. Further, it helps legitimise the constitution-making process and the final document in the eyes of the public, thereby reducing the risk of instability during the transitional process.

The Fijian 2013 Constitution-making process began in March 2012 with the declaration of the ‘non-negotiable’ principles and a deadline for elections by September 2014. The Constitution Commission of Fiji was established and started work in July 2012 with a substantial programme of public consultation. Upon completing the draft Constitution, the process has had three periods. First, the interim government chose not to proceed with the 2012 Constitution Commission draft (the 2012 Ghai Draft Constitution) or the promised Constituent Assembly. Second, in March 2013 the government produced its own draft with limited consultation and against a backdrop of restrictive decrees constraining freedom of expression, the media and trade unions, amongst other things, which limited robust debate of issues. Third, on 22 August 2013 it released a revised version of the new Constitution, without an accompanying explanatory report. The Constitution was promulgated by the President by decree on 6 September, with some further revisions, and elections scheduled under this new Constitution and restrictive decrees for September 2014.

The lack of genuine public engagement in the constitution-making process, as well as its closed, top-down nature, means that the procedure has not adhered to fundamental democratic principles of inclusivity, participation, transparency and consensus. As a result, it is inconsistent with international and comparative best practice, and may not be perceived as legitimate by the Fijian people. This may, in turn, present a threat to post-transition stability in Fiji.

**Transitional Arrangements**

According to international and comparative best practice, a situation that best supports the change to democracy is achieved where the military-backed government hands over to a caretaker government a reasonable period before elections are held.

Where an incumbent military-backed government retains broad legislative and executive powers during a period of transition, it is able to exercise comprehensive control over the transitional process as a whole. In such circumstances, incumbents are likely to gain an unfair advantage over any opponents, making the staging of free and fair elections very difficult. This poses a serious risk to democratization. Indeed, a recent comparison of seven transitions in Latin America and Southern Europe suggests greater authoritarian control of the transition results in higher initial stability, but the quality of the emerging democracy is lower. What is more, incumbent control
also poses a longer-term risk to post-transition stability - a new government may struggle to assert its legitimacy if the general public lacks confidence in the election process.

A constitution’s transitional arrangements – which typically deal with the period from constitutional reform, to elections, to the first sitting of a new parliament -- can provide an important framework through which to achieve a neutral setting for free and fair elections. Constitutions adopted in transitional settings often include provisions that hand over administrative oversight of the democratization process to an interim caretaker government. The goal is to create a body that has the confidence of different sectors and that is independent of the military government. Such provisions seek to balance the need for the military government to peacefully return to the barracks, while providing stability and fairness until a new government is elected by the people.

As an alternative to the separate appointment of a caretaker government, existing governments should assume a “caretaker mode” during transitional periods. Caretaker conventions – such as those that govern transitions between governments in Westminster systems like Australia and New Zealand -- typically restrict caretaker governments from making major legislative or policy decisions, significant appointments, major contracts, international negotiations or involvement in elections.

Transitional provisions also typically seek to deal with decrees and other laws that are in force that are incompatible with the constitution, particularly those provisions inconsistent with free and fair elections. They may do this by repealing inconsistent decrees and laws, or by securing the independence of the judiciary and allowing particular decrees to be challenged in courts on the grounds that they are unconstitutional.

A new constitution also often requires the adoption of new laws and the establishment of new institutions, but difficulties often arise with implementation, as was the case with the failure to adopt code of conduct and freedom of information laws as required under the 1997 Fijian Constitution. Indeed, there is often government reluctance to apply provisions of constitutions that limit their powers or enlarge the freedoms of citizens. Recognising such problems, some modern constitutions provide for implementation of such provisions to occur within a specified time table (e.g. Ghana 1992, South Africa 1996, Kenya 2010) or give the courts powers to fill gaps in the Constitution (as with Papua New Guinea, 1975). Another approach used by the Kenya 2010 Constitution involves creating an implementation commission to ‘monitor, facilitate and oversee the development of the legislation and administration procedures as required to implement the Constitution’.

The 2013 Constitution allowed all office-holders in the incumbent government to remain in office until the first sitting of Parliament and did not restrict the broad legislative and executive powers of the interim government during the transitional period. The military-backed government is not acting in a “caretaker mode”, but rather continuing its legislative program in the lead-up to elections. The Prime Minister not only remained in office until the point when a successor could be elected, but also controlled – either directly or indirectly – the entire transition process up to and after the election. This included control over the appointment of those individuals responsible for ensuring a ‘free and fair’ election. For example, the Prime Minister nominated all five members of the Electoral Commission for appointment by the President (given that the
transitional provisions also specify that the Prime Minister performs the Leader of the Opposition's function in the interim (169(3)).

This arrangement is contrary to the comparative best practice of changing to an interim caretaker government or “caretaker mode”, at least from the time elections are called until a new government is elected. Rather than creating a neutral space for democratic transition, the incumbent government has the power to manipulate elections in its favour, whether or not it uses that power. This may result in a lack of public confidence in the election process, and a new government may struggle to assert its legitimacy. This poses a significant risk to post-transition stability.

The Constitution also keeps in operation all existing laws and decrees of the interim government passed from the 5 December 2006 to the first sitting of Parliament (except for five setting up the military-backed government: 164) (173). Where existing decrees are inconsistent with the new Constitution, they remain in force irrespective of their incompatibility. For example, if a decree on the media violates the right to freedom of expression (17), the restriction will override the freedom. The courts are also specially excluded from determining whether these decrees were made in a valid and legal, and in a constitutional way, or whether they are now inconsistent with the Constitution (170.4). No action or decision taken under such a decree may be challenged in court either. The new Parliament is able to amend decrees, but any amendment cannot (i) have retrospective effect, (ii) ‘nullify any decision made’ under a decree or (iii) grant compensation for anyone affected by the decree. This means that decrees effectively supersede the new Constitution.

It also means that any laws adopted by the interim government during the transitional period will be permanently protected from challenge in the courts. Further, upcoming elections will be conducted under restrictive decrees that are both inconsistent with free and fair elections and irrespective of their incompatibility with constitutional provisions concerning free and fair elections.

This is problematic for several reasons. First, it undermines the legitimacy of the Constitution as the source of the structure, power and limits of government. Second, it is inconsistent with international and comparative best practice. At the very least, transitional arrangements should allow particular provisions of decrees to be challenged in courts on the grounds that they are unconstitutional. Prohibiting such limited challenges is very rare, even in transitional constitutions. Indeed, governmental conformity with the Constitution, as well as the credible and legitimate adjudication of the proper interpretation and application of laws, is fundamental to the rule of law (ie. the basic principle of democracy that all actions taken by the government must conform to its own laws and, ultimately, the Constitution: a rule of laws, not men.). Finally, the various decrees may work to collectively limit the capacity of future governments to act other than in the manner the present government would like. This has implications for the legislative
capacity of future parliaments and the power of an elected executive to chart its own course in a manner that is consistent with democratic principles – and thus the will of the people.

The Constitution also provides for many new laws to be made and new institutions to be established, but does not contain details of how to do this – such as timetables, judicial oversight, or a constitutional implementation body.

Chapter 11 of the 2013 Constitution included provision for Cabinet to amend the Constitution by Decree on or before 31 December 2013, provided such amendment was necessary (i) to give full effect to a provision; or (ii) to rectify any inconsistency or error (161(1)). Transitional amendment clauses of this nature are not entirely uncommon in modern constitutions but this one was unusual for at least two reasons. Firstly, the time period for transitional amendments is quite short. The Papua New Guinean Constitution, by contrast, provides for transitional amendments for a period of four years after the constitution is enacted. Secondly, transitional amendment provisions typically apply for a period commencing from the first sitting of the first Parliament under the constitution. Given that some of the functional problems with respect to the 2013 Constitution may not have become apparent until that time, an extension of the transitional amendment provisions would have allowed for such problems to be amended so that the Constitution could remain functional.

Role of the Military

Systems of constitutional democracy require proper civilian control of the military and careful delineation of its role.

Military intervention is often justified as a necessary response to inefficient and corrupt administration and invented political situations. However, under a system of democracy, it is expected that the military will be subject to control by democratic institutions and will only assume roles appropriate to the security needs of the country. The establishment and maintenance of democratic civilian control of the military is therefore one of the most important indicators of successful democratisation of countries transitioning from military rule.

It is common for constitutions to enumerate and explicitly delimit the role of the military to defence and to assisting the civilian authority in narrowly defined circumstances, such as humanitarian disasters. Consideration might also be given to enumerating certain security organs in the constitution, making others subordinate to legislation, and mandating that officers in the military services remain non-partisan.

Notwithstanding that many constitutions in transitional contexts seek to delimit the role of, and establish civilian control over, the military, the process of transitioning from military-backed government to a “fully-fledged” democracy is almost always gradual, spanning many years. The Chilean transition to democracy, for example, began when a 1980 Constitution – passed under
tight military control – established a schedule for change. From 1981 to 1990, several organic constitutional laws were approved, leading to the final restoration of democracy. After a 1988 plebiscite, the 1980 Constitution was amended to ease provisions for future amendments to the constitution, create more seats in the senate, diminish the role of the National Security Council and equalize the number of civilian and military members.

The 2013 Fijian Constitution provides that the President is Commander-in-Chief of the RFMF, placing the military under ostensible civilian control. However, there is no provision that actually secures Parliament’s ability to conduct proper oversight of the military, nor any provision making military courts subject to normal courts of appeal and thus judicial scrutiny. Instead, the 2013 Constitution includes an unusually expansive statement of the role of the RFMF, similar to the position under the 1990 Constitution. It is given ‘overall responsibility ... to ensure at all times the security, defence and well-being of Fiji and all Fijians’ (131).

This is of particular concern having regard to the RFMF’s 2012 submission to the Constitution Commission, the RFMF stated that it was the:

...there is no provision that actually secures Parliament’s ability to conduct proper oversight of the military, nor any provision making military courts subject to normal courts of appeal and thus judicial scrutiny.

last bastion for law and order in Fiji [and would continue to be] the guidance of the governance of this country, ensuring that peace, prosperity and good governance is practiced and adhered to [and would] not allow any individual, group and organizations or another State to sabotage the efforts of 2006. This new course will continue. The RFMF will ensure it continues, not only to 2014 but beyond.

The RFMF’s stance was recently re-affirmed by Brigadier General Mosese Tikoitoga – Commander of the RFMF – during a March 2014 interview, in which he stated:

[RFMF’s] job is to protect the constitution - coups or no coups - it is all enshrined in the constitution. It’s not the military’s wish to conduct a coup but it’s about ensuring we all abide by the same constitution. If people throw out the current constitution as current political parties are talking about - then they have thrown out the chance of avoiding coups.

While the Commander went on to say that the military, under his leadership will respect the results of the upcoming general elections, statements such as the above indicate that the RFMF perceives itself as the ultimate arbiter of Fiji’s national interest, and therefore outside and above the elected government, rather than responsible to it. That view, combined with the broad role for the RFMF in the new Constitution, undermines a crucial goal for the new Constitution: the establishment and maintenance of democratic civilian control of the military.

Indeed, the notion that the military should have a supervisory function over a civilian government is not only inconsistent with a system of genuine democracy, but also contrary to international and comparative best practice and opposes the rule of law.
As an instructive alternative approach, the 2012 Ghai Draft Constitution sought to emphasise the accountability of the RFMF to the elected civilian government through a National Security Council (NSC) intended to ‘exercise civilian oversight of the security services’ (175). The composition of the NSC included the commanding officers of the three services, as well as the Prime Minister, three Ministers (defence, foreign affairs, and police/public safety), leader of the opposition, and the chair of any relevant parliamentary committee. This arrangement emphasised both the notions of the services as servants of the elected government, and civilian control. It also delimited the role of the RFMF to the protection of the nation against external threats, and involvement in domestic matters only in times of emergency, such as natural disaster or civil unrest (and then only when directed or requested to do so by the NSC or the Commissioner of Police) (19).

**Immunities**

Under International Law, amnesties must not prevent the prosecution of individuals who may be legally responsible for gross human rights violations, and may not restrict the rights of victims of violations of human rights to an effective remedy or reparation; nor may they impede either victims’ or societies’ right to know the truth about such violations.

Transitions from military rule often involve the special challenge of responding to past human rights violations perpetrated by military-backed governments. While numerous transitional justice mechanisms can be adopted in responding to this challenge, in transitions that are negotiated and military-led, perpetrators often demand immunity from criminal prosecution and civil action. Such immunity is typically limited to conduct occurring during a specific period or involving a specified event or circumstance. Immunity provisions also commonly specify a category or categories of beneficiaries, and increasingly specify particular crimes or circumstances for which criminal prosecution or civil actions are barred. Sometimes amnesties are conditional. For example, an amnesty aimed at ending a “coup culture” may provide that benefits bestowed will be forfeited by a beneficiary if they again take part in a coup.

Broad blanket immunities are rare, with the permissible scope of immunities limited under a number of widely ratified international human rights and humanitarian law treaties, including the International Covenant on Civil and Political Rights, the Geneva Conventions and the Convention against Torture. Indeed, broad blanket provisions seldom work in the way intended. The Constitution of Turkey, for example, which was approved by 91.4% of Turks in a 1982 referendum, was amended in 2010 to abolish immunity provisions and allow for persecution of members of the previous regime.

Immunity provisions are generally considered anti-democratic insofar as they undermine the rule of law and reward usurpers for the unconstitutional overthrow of an elected government. They also lack transparency and leave unresolved the political and social problems that are often the cause and effect of military intervention.

For countries emerging from periods of authoritarian rule, the modern constitutional trend is therefore towards the adoption of transitional justice mechanisms, including, among other measures, non-punitive commissions tasked with discovering and revealing past governmental wrongdoings (such as the Truth and Reconciliation Commissions set up under the 1997 South...
African Constitution). This approach considers openness and acknowledgement as essential to achieving both political and social reconciliation and post-transition stability.

Working within the constraints of Decree 57 of 2012 (Fiji Constitutional Process (Constitution Commission) – which demanded the inclusion of broad immunities in the constitution – the 2012 Ghai Draft Constitution incorporated immunity provisions, but made immunity subject to a condition that any person seeking to benefit from the immunity must first swear or affirm the Oath or Affirmation of Reconciliation and Allegiance. The 2012 GDC also prohibited immunities for any future coups (2(4)(b)).

Historically, proposals for reconciliation in Fiji have not reflected international best practice. For example, a program of community reconciliation was previously adopted following the May 2000 coup. It included the establishment of a Ministry for Reconciliation, with the declared aim of restoring ‘peaceful coexistence’ amongst Fiji’s ethnic communities (Ministry of Reconciliation, cited in the Daily Post 2 April 2002). However, the Ministry was criticised for its rhetorical and ceremonial focus, which was not matched by concrete evidence showing that the government was committed to move beyond the ‘politics of race’.

A Reconciliation and Unity Commission was also proposed by the Reconciliation, Tolerance and Unity Bill, which was introduced into Fijian Parliament in May 2005. The proposed Commission was to have powers to conduct inquiries and to facilitate the granting of reparations, compensation and amnesty. However, the most significant (and, indeed, the longest) clause in the Bill was the amnesty provision (21), which allowed those convicted of “politically motivated” offences relating to the 2000 coup to apply for amnesties. In a statement by then Military Commander Frank Bainimarama, the RFMF opposed the Bill – particularly the amnesty provisions. The Bill was not passed, but proved a pressure point in the lead up to the 2006 coup.

Chapter 10 of the 2013 Constitution grants a possibly indeterminate group of people absolute, unconditional and irrevocable immunity for a wide range of acts, covering both the 1987 and 2006 coups. There is no requirement that beneficiaries satisfy preconditions, including those aimed at ensuring full disclosure of what they know about crimes covered by the immunity, on an individual basis. The provisions relating to immunity are unable to be amended in any way (including by repeal) (159). Further, there are no provisions in the 2013 Constitution prohibiting immunity for further coups.

The breadth of the immunity provisions exceeds the permissible scope of amnesties under international law, at least to the extent that they allow some offences to go unpunished even though Fiji has an obligation under international law to ensure they are punished. The immunity provisions in the 2013 Constitution were cited in the 2014 “Freedom in the World” survey as contributing to Fiji’s poor “rule of law” score (6 out of a possible 16).

In addition, the interim government’s failure to follow fundamental democratic principles during the drafting and adoption of the Constitution (see Constitution-Making Process in Part 3) means that it is possible that the imposition of broad and unqualified immunities may be contrary
to popular desires. Even where immunity provisions are popularly approved, the example of Turkey highlights that popular attitudes may change over time. However, as amendments to immunity provisions in the Fiji Constitution are not permitted, the Constitution is unable to change in keeping with changes in Fijian attitudes. This will likely lead to frustrations, which – when coupled with constitutional provisions that make the 2013 Constitution near impossible to amend (161) – increase the likelihood of resorting to extra-legal measures. Further, entrenchment of immunity provisions only encourages potential coup perpetrators in their illegal design.

Other Substantive Constitutional Issues

Separation and Balance of Powers: In countries emerging from highly centralized military rule, appropriate checks on the executive power, including strong legislature oversight powers, and an independent judiciary, are essential to implement the will of the people. In the absence of adequate checks and balances, and the concentration of power in the hands of a few, countries emerging from highly centralized military rule risk becoming illiberal democracies – that is, governing systems in which elections provide nothing more than a democratic façade to dictatorial government. Such systems are particularly vulnerable to future coups d’état. A constitution should therefore clearly empower and delimit the competencies of each branch of the State in accordance with rule of law and separation of powers principles. These principles are more detailed in CCF’s Discussion Paper 2: Separation of Powers in this volume.

Emergency Powers: Similar to the balance of powers, reform of the state of emergency laws with limitations on the circumstances under which the executive can declare a state of emergency and the powers and limitations that arise from it could be expected. Legislative oversight and delineation of non-derogable rights is also essential in this context.

Human Rights: During a period of transition, it is essential that rights of expression and association are protected and promoted. Political parties must be able to spread their election promises and the public must be able to debate these ideas in public spaces and in the media. Broader human rights protections are also important during democratic transition – rights of persons to participate in political and civil life, rights necessary to ensure that the state does not harm individuals, rights essential to the rule of law, rights to promote an open and democratic society and rights to prevent governmental intrusion on an individual’s private life. The constitutional listing of fundamental human rights, as well as provision for institutions that enforce and guarantee those rights, is therefore critical to any successful transition to civilian rule. Equally so is the enumeration of limitations on those rights that agree with international best practice and standards.

Issues relating to Separation of Powers, Human Rights and Free and Fair Elections are the subject of detailed consideration in separate CCF discussion papers in this volume. This paper points out some of the ways in which the constitutional provisions dealing with these issues might hinder democratic transition. Of particular note is the considerable power concentrated in the executive arm of government and the weaknesses in the protection of judicial independence. In addition, the Bill of Rights permits rights limitations that are much broader than international best practice and standards, with the 2014 “Freedom in the World” survey scoring Fiji 30 (out of a possible 60) for civil liberties. These factors may impede the development of a robust democracy.
National Unity, a Common Identity and Diversity: It is often the case that transitioning countries are characterised by instability underpinned by ethnic, religious and linguistic social divisions. Within this context, a constitution can play a nation-building role, providing a focal point for establishing consensus on values and institutions. Nation-building is a challenging task, and made more so in an ethnically diverse country. Many younger democracies that are ethnically diverse (like Nigeria) have secured representation of the diversity of their population in national institutions. This may be achieved through the inclusion of constitutional provisions that, while promoting a common identity, require that diversity be taken into account in appointing Cabinet members, judges and office holders, or that the composition of public services and security services reflect the diverse population.

There is wide acceptance that Fiji’s organisation of politics, state and economy on the basis of ethnic communalism is a fundamental problem underpinning its coup culture. A stable post-transition environment is therefore seemingly dependent on social consensus regarding common values. However, rather than offering a framework through which to achieve this social consensus, the 2013 Constitution instead seems to ignore the issue of ethnic division. It does not acknowledge cultural diversity – indeed, it omits the internationally accepted right to cultural development from an otherwise comprehensive Bill of Rights – and while committed to national unity and a common and equal citizenry, it does not include any provisions that secure the representation of the diversity of the nation in public bodies. This is particularly problematic given an often unequal representation of the Indo-Fijian community in the Fijian public service and the RFMF (see CERD A/58/18 (2003) 25 at para 87). Creative solutions will need to be found through parliamentary discussion and national debate to address these imbalances. On this point, it is important to note that the principle of a common and equal citizenry is not incompatible with the recognition of indigenous rights, provided that such rights are not used to privilege the latter at the expense of other communities. This is because indigenous rights are but one species of human rights – with minority rights and overarching principles of equality and non-discrimination also important tenets of the human rights regime.

In the absence of adequate checks and balances, and the concentration of power in the hands of a few, countries emerging from highly centralized military rule risk becoming illiberal democracies – that is, governing systems in which elections provide nothing more than a democratic façade to dictatorial government. Such systems are particularly vulnerable to future coups d’état.
4. LOOKING TO THE FUTURE – THE ROLE OF THE PARLIAMENT IN DEMOCRATIC CONSOLIDATION IN FIJI

Having examined transitional arrangements for the period leading up to the first sitting of Parliament, the question arises: what are the key actions that a new Parliament can take to increase the likelihood of transition to a liberal democracy? In responding, it is important to acknowledge that numerous flaws in the transitional process resulted in the election of a new Fijian Parliament that is dominated by actors within the incumbent interim government. This may mean that there is little political will to deepen democracy in Fiji. Nonetheless, there are key areas in which a willing Parliament, or opposition party MPs, could work to consolidate democratic norms and institutions.

In exploring these key areas, it is again important to emphasise that post-transition democratic reform is typically achieved over an extended period of time, often spanning decades. In Pakistan, for example, the legislature is still developing its institutional identity five and a half years after its democratic transition from General Pervez Musharraf’s military rule began in February 2008.

In 2010, Pakistan’s National Assembly unanimously passed constitutional amendments, as well as major legislation, to remove some of the constitutional distortions of Musharraf’s military regime. It also improved fundamental rights and laid the foundations for more transparent and accountable governance. Power was also devolved from the centre to the provinces, addressing a longstanding political fault line that had largely contributed to the country’s instability. Further, some of the most prominent parliamentary committees exercised their authority to oversee the executive and to engage the public. A shift towards greater bipartisan cooperation also helped ensure the survival of a fragile political order that faced constant challenges from an interventionist military.

In the 2013 elections, all incumbents at the centre and in all but one province lost their seats, resulting in a further movement away from the legacy of military rule. However, numerous “hangovers” from the era of military-backed rule remain, including, for example, constitutional provisions that prevent parliament from passing laws that violate “Islamic injunctions” and the practice of using statutory regulation orders to override the legislature. However, the process of democratic reform is ongoing.

Constitutional Implementation

The 2013 Constitution provides for many new laws to be adopted and new institutions to be established, without timetables to put them into effect. For example, it requires adoption of laws to govern the conduct of public officials (149) and to allow the public to exercise its right to access information (150), as well as the establishment of an Accountability and Transparency Commission (121), with no requirement as to timing. Citizens will therefore have no way to exercise their right to access government information, or to hold persons in public office to account, until whenever Parliament decides to pass a law in the future. This is particularly
problematic given that the 2014 “Freedom in the World” survey scored Fiji 2 (out of a possible 12) for Functioning of Government, noting problems of official abuse and corruption and poor standards of transparency and accountability.

MPs should pressure for the implementation of all constitutionally mandated laws and institutions that enhance democratic engagement, as a priority.

Legislative Reform

Given the difficult constitutional requirements for amending the 2013 Constitution - a three-quarter majority in Parliament as well as a three-quarter majority of registered voters in a referendum (160) – it is unlikely that further democratic reform will be achieved through constitutional amendment. Nonetheless, legislative reform can be undertaken to achieve some democratic reform. As previously noted, under section 173 of the 2013 Constitution (see Part 3 Transitional Arrangements), existing decrees that are inconsistent with the Constitution will remain in force, irrespective of their incompatibility, until the decrees are amended or repealed and replaced by laws passed by Parliament. Legislative reform of those laws that infringe protections set out in the Bill of Rights, or which otherwise undermine democratic participation, should therefore be prioritised.

Asserting Control of the Military

It is unclear how the RFMF will exercise its supervisory function over the Constitution. Nonetheless, there will likely be an ongoing “political” process in which power relations between the RFMF and the newly-elected government are reconfigured. Within this process, Parliament can seek to enter into any dialogue between the government and military about mechanisms for ongoing engagement. In doing so, it can also look to define institutional roles, functions and mandates in a way that promotes parliamentary supremacy. However, it is important that space must be created for this process; it is unlikely to happen by default. it cannot be assumed that the relationship will be seamless, as the critical issue will be the dynamics of the military as an institution and its relationship to an elected civilian government.

The transformation of civil-military relations in post-transition Chile is also instructive in this regard. Initially, in 1990, the new civilian government emphasized civilian authority over the military, while the armed forces stressed their autonomy from the government. Since then, the government has accepted the armed forces as a “political actor” and the armed forces have accepted some additional restraints. This stable and consensus-based relationship has evolved through the creation of informal mechanisms to resolve central issues related to military autonomy.
Strengthening Executive Accountability to Parliament

While legislative power will be concentrated in Parliament, the 2013 Constitution does not grant it many of the important powers in past constitutions to supervise and check the executive branch. However, Parliament may establish committees to review government administration (s. 70). While there is no constitutional right for MPs to sit in committee to supervise key executive duties like appointments to independent offices or to have a committee chaired by an opposition party MP to audit government finances, committee work offers an important way for opposition parties to examine, question and audit the executive branch. The development of a strong committee system should therefore be a priority for opposition MPs.

Outside of committees, opposition MPs will have the capacity to submit a steady flow of questions to government. How MPs use answers to hold the government to account will arguably be an ongoing measure of the Parliament’s effectiveness. Essential to this form of accountability is a free media. This again reinforces the importance of legislative reform, particularly to strengthen human rights protections and media capacities essential to the conduct of free public debate of political issues.

5. CONCLUSION

This paper has examined the transitional constitutional arrangements in the 2013 Constitution and found that many do not accord with international and comparative best practice and standards. Of particular concern is the control the incumbent government had over the entire transitional process; there was no transition of the interim government to a caretaker government or “caretaker mode” in the lead-up to elections, and there is provision for all decrees and laws made by the interim government to override the Constitution.

The 2013 Constitution also contains broad immunity provisions that exceed the permissible scope of amnesties under international law, and establishes an expanded role for the military as apparent judge of what is in Fiji’s national interest. These transitional arrangements are not consistent with robust democracy, and may undermine public confidence in the legitimacy of the 2013 Constitution and any government elected under it. However, this paper has highlighted the typically protracted and negotiated nature of democratic transition, and suggested (i) constitutional implementation; (ii) legislative reform; (iii) assertion of control over the military; and (iv) strengthening of executive accountability as initial areas of focus for democratic reform.
Separation of Powers in the 2013 Constitution
The 2013 Constitution protects the separation of powers between the legislature (whole parliament), executive (the government) and judiciary (judges and courts). The power of the House of Representatives to make laws has less institutional checks but more constitutional prohibitions. On the one hand, the legislative power of the House is no longer checked by a Senate (directly) or Great Council of the Chiefs (indirectly). On the other hand, the 2013 Constitution limits the House’s power to make laws regarding immunity or to amend the Constitution itself. Most power is concentrated in the executive, especially the offices of the Prime Minister and Attorney-General. Almost all appointments to the judiciary and the ‘independent’ bodies and offices are effectively made by the Prime Minister or Attorney-General. Important checks on the executive in the 1997 Constitution and proposed by the 2012 Ghai Draft Constitution are watered-down, abolished or not included. There is a real prospect of creating an elected tyranny where whichever party holds a majority of seats in parliament will be able to dominate government without meaningful checks from the judiciary and oversight bodies.

The independence and impartiality of the judiciary is essential for an effective democracy. The 2013 Constitution advances this goal by providing for a somewhat independent appointment and removal process for judges. But without appropriate checks on the executive’s power to appoint, remove and otherwise manipulate the judiciary, the formal separation of powers in the 2013 Constitution are not sufficient to foster a robust democracy. Civil society organizations and the citizens of Fiji have an important role to play by (i) educating Fijians about the importance of the separation of powers, (ii) highlighting the shortcomings in the 2013 Constitution and its implementation, (iii) suggesting positive reforms to improve the separation of powers to foster a vibrant democracy, and (iv) monitoring the exercise of government power to ensure that all government offices and institutions are living up to their constitutional duties to check and balance the other branches of government.

While the separation of powers is an important principle, it is only part of a larger story of constitutions and coups in Fiji’s history. The breakdown of separation of powers has not been solely responsible for any of the coups. But each successive coup has weakened this principle and it is for the politicians, citizens, civil society, armed forces and other Fijian groups to rebuild it in the new democratic order.
A SHORT HISTORY OF SEPARATION OF POWERS IN FIJI

Fiji’s history since independence has demonstrated the importance of the separation of powers. In all of the past coups, this important principle failed and the military stepped in to take over from democratically elected governments. The best lessons for Fijians today come not from other countries, but from a deeper look into its own unique story.

British Rule

During British rule in Fiji, there was no meaningful separation of powers. The Governor had almost all the power to make, implement and evaluate laws. A Legislative Council created in 1874 initially consisted of only appointed members, which later included some elected European members and iTaukei members from a shortlist submitted by the Great Council of Chiefs. A very limited Executive Council of four members was created in 1904, though the Governor retained most power. It was not until after the Second World War that the legislature began to include elected members based on three ‘communities’. The iTaukei community, however, only exercised the right to directly elect their representatives in 1963. As a result, very few had time to learn about democracy, the rule of law and the separation of powers before independence in 1970. (The rule of law is simply the principle that all actions taken by the government must conform to its own laws and, ultimately, the Constitution: a rule of laws, not men.)

1987 Coups

After the 1987 election, a coalition led by Timoci Bavadra defeated Ratu Sir Kamisese Mara’s Alliance Party, which had been in power for the 17 years since independence. A month later the multi-ethnic government was overthrown by a military coup led by Lieutenant Colonel Sitiveni Rabuka. The Governor-General then exercised his executive power to form a government of national unity. However, Rabuka aborted this transitional process in a second coup. Three months later a civilian interim administration was established with Ratu Sir Penaia Ganilau as President and Ratu Mara as Prime Minister until elections were held in mid-1992.

2000 Coup

The 1990 Constitution that superseded the first Constitution of 1970 was replaced by a new constitution in 1997 that was based largely on recommendations made by a special commission. The 1997 Constitution divided the legislature into a House of Representatives and Senate. The House of Representatives was composed of members elected from a combination of ethnic rolls and a common voters’ roll. The Senate was composed of members appointed on the advice of the GCC or the Leader of the Opposition. The Senate had only a minor role in checking the legislative powers of the House of Representatives. The President, appointed by the GCC, had limited ceremonial powers. The executive was formed by the majority party or coalition in the House of Representatives. The judiciary was appointed by an independent Judicial Services Commission, while the Chief Justice was appointed by the Prime Minister after consulting the Leader of the
Opposition. The Constitution also introduced a number of open seats which allowed inter-ethnic voting and representation, plus several new rights (education, privacy, fair labour practice, etc) and commissions for human rights and constitutional appointments. In general, this system of separation of powers was similar to many other Westminster parliamentary systems.

In May 1999, the Peoples Coalition, supported mainly by Indo-Fijians, but including significant iTaukei support, won the first elections under the 1997 Constitution. President Ratu Mara dismissed the Chaudhry government and prorogued Parliament (discontinued without dissolving it) for six months. In May 2000 the Chaudhry government was kidnapped in a civilian coup. Mara then assumed executive power, which was formerly exercised by Prime Minister Chaudhry and his Cabinet, only to resign two days later. President Mara’s actions placed all constitutional power in his hands, though in practice there was no recognized authority as the leaders of the coup and the military were at a standoff.

Unlike the 1987 coups, the military did not lead the coup—although some of its members joined the coup leaders. Martial law was declared, the Constitution was abrogated and then an interim government led by Laisena Qarase was appointed. This government eventually negotiated a truce with the coup leaders, promising them immunity, but reneged on its promise once they were disarmed and the country was under military control. In 2001 the Court of Appeal upheld a judgement of the High Court that the 1997 Constitution was not abrogated and that Parliament was merely prorogued for six months. The decision, respected by the military and most political parties, helped to re-establish the authority and independence of the judiciary against the usurpation of power by the military.

In the 2001 election to restore democratic government, Qarase’s new Soqosoqo Duavata ni Lewenivanua (SDL) party won a plurality (not an absolute majority) of seats and formed government. However, the new democratic government did not fully accept the separation of powers. Prime Minister Qarase refused to implement the constitutional requirement to include opposition members in his Cabinet. Thus the executive was dominated by a single party despite express constitutional provisions to prevent this. When this refusal was challenged, the courts ordered Qarase to uphold the Constitution. Qarase still refused, ignoring the judiciary and so exceeding the executive’s constitutional powers. When Qarase finally agreed to appoint opposition members, they refused, which further eroded the democratic ideal that the separation of powers is meant to protect.

2006 Coup

The 2006 coup came like earlier ones, shortly after an election. The SDL won a slim majority of one seat in the House of Representatives. In the months that followed, the military took an increasingly vocal role in criticizing the SDL’s legislative agenda to absolve the leaders of the 2000 coup (Reconciliation, Tolerance and Unity Bill) and grant foreshore property rights to iTaukei groups (Qoliqoli Bill and Indigenous Land Tribunal Bill). Bainimarama kept criticizing the government at public functions, and Qarase responded by declaring he would ask the Supreme Court to clarify the military’s proper constitutional role. In October, Bainimarama reacted by issuing an ultimatum to Qarase to respond to nine demands within three weeks.
When he left for a visit to Iraq, the Prime Minister and President attempted to exercise their constitutional power to remove and replace Bainimarama as head of the military. The military refused to accept this demand by the executive. Qarase eventually accepted some of the military’s demands, including a review of the constitutionality of the three proposed Bills. On 5 December the President signed an order to dissolve Parliament and the military seized effective control of the government. Bainimarama justified the coup as necessary to ensure good governance, anti-corruption and anti-racism. The GCC refused to appoint an interim President, so the military suspended it (and abolished it in 2012) and reinstalled the former President who in turn appointed Bainimarama as Prime Minister of an interim government in January 2007 (replacing Dr Jona Senilagakali who had served for only a month).

Despite its concern over the three SDL Bills, the interim government did not wait for the judiciary to evaluate their constitutionality. In fact, the focus of the judiciary at this time was on consolidation and keeping the wheels of justice moving. In 2008, the High Court held that the President had in fact acted legally in dissolving Parliament and appointing Bainimarama as Prime Minister. In 2009, however, the Court of Appeal found the coup and the interim government to be illegal. The next day the Constitution was abrogated by Presidential decree, the judiciary was deposed, Bainimarama had himself re-appointed as Prime Minister and then imposed martial law.

As early as 2007, the judiciary protested the coup. When six Australian and New Zealand judges resigned in protest, they were replaced by Malaysian judges. This began a trend of appointing judges from Commonwealth countries such as Sri Lanka instead of Australia and New Zealand on short term and relatively highly paid contracts. The public perception of judges’ independence and impartiality was sometimes questioned since they are employed by the executive for very short periods at high salaries with re-appointment dependent on their performance. The Bainimarama Government also reinforced the dominance of the executive by promulgating decrees that denied the courts’ jurisdiction to review administrative decisions by ministers, public servants and statutory bodies. This prohibition was preserved by section 173 of the 2013 Constitution.

2014 Elections

The lead-up to the elections in September began with the Constitution Commission of Fiji. A key question for the Commission was how to ensure the separation of powers. The legislature had only one institution, Parliament, which replaced the House of Representatives after the Senate was abolished. To balance the legislature’s concentrated power, a new National People’s Assembly was proposed to meet to suggest constitutional amendments and elect the President. It was composed of members of the House of Representatives and civil society organizations. The NPA was intended to give the President greater legitimacy to check the legislature, mostly by his or her role in appointing members of the judiciary and independent institutions. The NPA also gave

The public perception of judges’ independence and impartiality was sometimes questioned since they are employed by the executive for very short periods at high salaries with re-appointment dependent on their performance.
more citizens a direct role every few years in the democratic debates on Fiji’s future. The executive was formed similarly as in 1997, except without a requirement for a multi-party Cabinet. The judiciary was appointed by a more independent process to ensure it had more power to check the other two branches. The GCC was reinstated, but had only a consultative role.

On closer examination below, it appears that the 2013 Constitution has not included important checks and balances found in the 1997 Constitution, and chosen not to adopt the novel solutions proposed in the 2012 Ghai Draft Constitution to deal with the failings of the previous constitutions. While it contains some provisions to ensure separation of powers, the 2013 Constitution can be improved to ensure a strong separation of powers necessary to promote a democratic Fiji.

THE SEPARATION OF POWERS

The separation of powers (SOP) has a long tradition in democratic constitutions. Ideally, each branch works with the others within their limited spheres to implement the will of the people. In the worst case, its role is a safeguard against tyranny, when one branch dominates the others, by splitting the powers of government between three branches. In general, each branch of government has its own limited power: the legislature makes laws; the executive implements laws; and the judiciary checks the laws are consistent with the constitution. Since no branch is isolated from the other, a constitution sets up ‘checks and balances’ to promote efficient, effective government. Each branch may check the power of other branches through constitutional mechanisms like appointments and removals of office holders, vetos of laws, etc. Constitutions also seek to balance the powers of each branch to ensure that no one branch can dominate the other two. By separating the powers of government into three different branches, a constitution guards against tyranny and promotes democracy by guarding against the concentration of power in a single office or institution.

The greatest danger of democracy is the tyranny of the majority. In this case, a majority of citizens can dominate the minority and do as they wish. Tyranny simply means the ‘arbitrary or oppressive exercise of power’ by government. Modern constitutions prevent this prospect in a number of ways, like a Bill of Rights that gives all citizens a set of basic rights that the state must uphold against any laws or actions taken by the majority (see Bill of Rights section in this volume). The separation of power is essential to check the majority. The executive and judiciary have their own powers, which
they can use to check a legislature dominated by a majority. In a parliamentary system as in Fiji, for example, the leader of the majority in the House becomes the Prime Minister. Since this combines legislative and executive power in practice, it is especially important to have strong and independent courts with the power to strike down any laws that violate the Constitution, especially the Bill of Rights. In this way, the judicial branch can check a legislature and executive dominated by a single party.

The next sections evaluate how the separation of power applies to the legislature, executive and judicial branches of government in the 2013 Constitution. Each section first describes the powers of a branch, and then analyses whether the checks and balances on that power are sufficient to promote just, reasonable and democratic government under the rule of law.

**Legislature – Making the Laws**

The legislature is the only branch of government that can make laws. Separation of powers is essential to check against the political party or coalition with a majority of seats pursuing short-term gains at the cost of longer-term peace, stability and wealth. The political party in control will often attempt to pass laws that will give it an advantage over competitors in future elections. In Fiji, for example, a party could pass legislation to make it more difficult for its competitors to raise campaign funds or recruit new members. There are many other ways legislation can tilt the election playing field to the party’s advantage: (i) redrawing electoral boundaries, (ii) limits on candidate eligibility, (iii) appointments to the Electoral Commission and Supervisor of Elections, (iv) restrictions on media coverage during election campaigns, (v) political party registration and finance rules, etc. In short, a political party in power will often try to pass laws to support their majority—within the limits of the Constitution.

A political party can also attempt to reward its supporters at the expense of all taxpayers and citizens. A majority party can do this by directing public expenditure to its supporters either directly or indirectly. It can do this directly by contracts, appointments to state-run companies, etc. It can also do this indirectly by changing laws to grant its supporters an advantage over opposition in private enterprise. For example, a party can appoint its supporters to a state-run company, which can in turn award contracts to other supporters.

In a parliamentary system like Fiji’s, it is an increasing worry that the Prime Minister, as executive, will try to use his or her majority in the House, the legislature, to undermine judicial checks by undermining those branches’ independence. This can be done in in a number of ways, the most common of which are to (i) limit financial grants to them and so starve them of money, and (ii) appoint supporters to capture the other branches. Important constitutional provisions to prevent this include guaranteed funding and impartial appointment processes.
Executive checks

It is important to understand that in the Fijian tradition of parliamentary democracy, the legislature and the executive are more fused together than separate. In all Fijian constitutions, the legislature has chosen the Prime Minister, who, along with a Cabinet he or she appoints, exercises most executive power. The President is a largely ceremonial role, although as seen above it has played an important part in past coups. Since the Prime Minister and Cabinet is formed from the majority party, there is unlikely to be many situations when the executive will desire to check the legislature: after all, they are all from the same political party. Still, the executive has a few checks against the legislature under the 2013 Constitution. The most important is not the Prime Minister, but the public service as discussed further along in this section.

Judicial checks

The judiciary must decide whether any law passed by the legislature is consistent with the Constitution. The 2013 Constitution grants this broad authority to the courts (s. 97). The Bill of Rights in particular is an important tool for judges to stop laws that violate the human rights of Fijians. But this key check on legislative power is severely weakened in the 2013 Constitution. The section 6.5.c limitation clause in the Bill of Rights allows any right to be limited if the limitation is (i) necessary and (ii) prescribed by, or by actions taken under the authority of, a law. In the 1997 Constitution, in contrast, rights could usually only be limited if ‘reasonable and justifiable’ in a free and democratic society’. So the 2013 Constitution allows Parliament to pass laws violating rights even if they are neither reasonable nor justifiable in a free and democratic society, and renders the judiciary powerless to keep Parliament in check regarding these laws.

Other checks

The 2013 Constitution provides several other checks on Parliament’s power. First, Parliament must make its meetings open and encourage public participation, although the Speaker can deny this on ‘reasonable and justifiable’ grounds (s. 72.2). Second, the Leader of the Opposition can introduce a resolution to dissolve Parliament and nominate a candidate for President (ss. 62.2 and 84.2). However, these are much reduced powers compared to the 1997 Constitution and have little teeth against a determined majority.

Executive – Implementing the Laws

The executive administers the laws and policies of the legislature. In parliamentary systems like Fiji’s, the executive is formed by the majority party or coalition in the legislature. So many of the dangers described above for the legislature apply to the executive as well. The executive poses other
problems to democracy since it has the power to implement laws. The executive also includes the civil service and statutory bodies and companies. These bodies are responsible for most government spending, contracting, regulating and generally giving or withdrawing government favours.

Without proper constitutional restraints and judicial review, the executive can quickly come to dominate government and stifle any democratic debates or legal checks on its power. This can happen in two ways. First, the legislature can explicitly delegate its law-making power to the executive. For example, the legislature may pass a law granting the executive power to pass regulations, or even act on its own discretion, regarding a particular subject, like mining rights or land allocation. A delegation of power like this frees the executive from almost all the restraints a normal law would place on its exercise of power. Second, in a political party dominated by an individual or elite group, the executive (filled by the party elite) can decide the laws and have the legislature (dominated by its party members) simply pass them. In both these cases, the executive usurps the role of the legislature.

The executive can also dominate the judiciary, like the legislative dangers discussed above, by denying it state resources or appointing supporters to the courts. Another problem is that the executive will simply ignore the letter or spirit of judicial decisions. If a court declares an executive action unconstitutional, for instance, it has no power to enforce its decision since it relies on the executive to implement its order. Instead, it relies on its institutional legitimacy to compel the executive to obey, if only to avoid the threat of the legislature or, ultimately, voters punishing them for violating the principle of the separation of power. It is important to remember that the separation of powers is not an abstract ideal, but a careful balancing of public institutions within a greater political context of citizens, businesses, civil society, foreign governments and others, engaged in an ongoing public exchange of views of how to run the nation.

It is crucial that civil servants are independent so that they administer the laws impartially and without favour to the party in power at any given time. The 2013 Constitution recognises the importance of a professional, uncorrupted, efficient, accountable and transparent public service (s. 123). This is ensured by independent appointments made by the Public Service Commission (ss. 125-6) and disciplined by an independent Public Service Disciplinary Tribunal (s. 120). After a prolonged period of undemocratic rule, it is important that the democratically elected government is supported by an independent civil service that implements the legislature's laws and executive's commands with the professional and impartial values mentioned above. All civil servants should be dedicated to their service and not any outside organization with conflicting interest.
Legislative checks

In a parliamentary system, as seen earlier, the legislature and the executive are partly fused because the leader of the majority party in Parliament becomes the Prime Minister. Yet Parliament still has an important role in checking executive power. First, it provides a public forum for debating and criticizing the actions and policies of the government. As seen above, the 2013 Constitution requires Parliament to be open and participatory, though it does not provide specific mechanisms to achieve this goal and it allows restrictions on very broad grounds. Second, Parliament can remove the Prime Minister and Cabinet on a vote of no confidence (s. 94). However, this power is restricted since a failed vote means that there can be no new vote for six months. Third, Parliament may establish committees to review government administration (s. 70). This is an important way for opposition parties to examine, question and audit the executive branch. But the 2013 Constitution does not include specific references to standing committees like the 1997 Constitution. This means that there is no constitutional right for MPs to sit in committee to supervise key executive duties like appointments to independent offices or to have a committee chaired by an opposition party MP to audit government finances. While legislative power is now concentrated in Parliament, the 2013 Constitution does not grant it many of the important powers in past constitutions to supervise and check the executive branch.

There is one more important role for Parliament under the 2013 Constitution. The Prime Minister, may declare a state of emergency in Fiji on the recommendation of the Commissioner of Police and Commander of the Republic of Fiji Military Forces (s. 154.1). If a declaration is made when Parliament is sitting, then the Prime Minister must refer it to Parliament for confirmation within 24 hours. If Parliament is not sitting, then the Speaker must get confirmation of members of Parliament within 48 hours. If a majority of MPs confirm the declaration, it would continue for a finite period; while if a majority refused, the declaration would have no effect. This is an important check, but it is less than ideal in a parliamentary system since the Prime Minister will usually have the support of his or her party, who form a majority in Parliament. A more balanced solution would give the legislature power to end the state of emergency whenever a majority decided to, as well as allow an appeal to the courts to determine whether the declaration was in fact lawful.

Judicial checks

The judiciary has a crucial role to judge whether the actions and regulations of the executive conform to the Constitution and other laws, as seen above. Under the 2013 Constitution, this power is significantly weakened by section 173. Even if courts have institutional independence and powers to enforce human rights, their jurisdiction has been narrowed since 2009. This means that courts have been prohibited from hearing and deciding on many types of administrative
action taken by the Prime Minister and the public service. After the 2009 crisis, the Bainimarama government began to severely restrict the jurisdiction of the courts. The Administration of Justice Decree 2009 prohibited the courts from questioning the validity of decrees made, or actions taken, by the Bainimarama government since 2006 (ss. 5 and 23). Since the courts were stripped of their power to decide whether laws and government actions were legal, an important judicial check on executive power was removed. Many later decrees included specific ‘ouster’ clauses that prohibited appeals to the courts (for example, Land Use Decree 2010 s 15 and the Media Industry Development Decree 2010 s 83, amongst many others). This meant that all actions taken by the Bainimarama government were shielded from judicial oversight—a core requirement of the separation of powers.

Rights in the 2013 Constitution may be limited by decrees or actions taken under decrees under section 173. Every decree, declaration or promulgation passed from 5 December 2006 to the first sitting of the new Parliament (with a few exceptions) will remain in force ‘in their entirety’—even if they are inconsistent with other provisions of the 2013 Constitution (170.1-2). After the first sitting, Parliament may amend or repeal these decrees, but any amendment may not (i) be retrospective, (ii) nullify past decisions or actions, or (iii) ‘grant any compensation, damages, relief, remedy or reparation to any person affected by these laws’ (170.3). The courts are also specially excluded from determining whether these decrees were made in a valid and legal, and constitutional way, or are now inconsistent with the Constitution, including the Bill of Rights (170.4). No action or decision taken under such a decree may be challenged in court either.

The effect of section 173 is complicated. In general it means that if any decree (or action taken under a decree) violates a person’s rights, it cannot be challenged in the courts—even after the return to democratic government. Given the enormous number of decrees passed since 2006, almost all the laws of Fiji now in existence are decrees and most government actions will be taken under decrees. Until the decrees are amended or repealed and replaced by laws passed by the democratically elected Parliament, the protections in the Bill of Rights will be excluded from a vast majority of government laws or actions.

**Other checks**

The other most important checks on the executive are through the independent offices and bodies in Chapter 5, Part B of the 2013 Constitution. They include the:

- Human Rights and Anti-Discrimination Commission
- Constitutional Offices Commission
- Electoral Commission
- Supervisor of Elections
In different ways, all these offices and institutions check the exercise of executive (and to some extent, legislative and judicial) power. They promote values such as impartial appointments and financial accountability that are essential to support the rule of law. Under the 2013 Constitution, however, the power to appoint the members of these offices and institutions is concentrated in the hands of the Prime Minister, who directly or indirectly influences the appointment of every single one of these independent bodies. This is concerning since it reduces the role under the 1997 Constitution for a more balanced appointment process that gave a greater role to the Leader of the Opposition and other Ministers in Cabinet. Civil society can provide some check on the concentration of power by pressing the Prime Minister to be transparent and give objective criteria for each appointment and then reasons why an individual appointed met those criteria.

**Judiciary – Judging the Laws**

The judiciary’s main task is to judge whether the laws passed by the legislature and actions taken by the executive are consistent with the Constitution and other laws. If not, they must strike down those laws or actions, even those supported by a vast majority of citizens. This important role to override the majority when they violate the Constitution is essential to uphold the rule of law. So any action that exceeds the powers defined in a law or the Constitution is illegal or invalid; in other words, the government cannot do whatever it wants regardless of the Constitution and valid laws.

To ensure the judiciary can perform this important role, the separation of powers calls for special measures to protect this branch of government. First, judicial officers are appointed, not elected. Thus they are accountable to those with authority to appoint or remove them (see below), and not the voters directly. In this way they are protected from popular pressure to disregard any provision of the Constitution or laws that the majority disagrees with at the moment. Instead, they can uphold the Constitution against the popular will of the majority. Second, the process by which they actually make decisions is not open to public scrutiny. They are insulated to some degree
from populist sentiment because their role is to make decisions ‘without fear or favour, affection or ill-will’. To protect their independence, judges who are citizens of Fiji have secure tenure until retirement age (s. 110). However, their decisions are made public and open to a process of appeal. In extreme cases, a judge can be removed for cause (ss. 111-2). In these two ways, judges are provided the institutional safety to make impartial and independent judgments that may go against the desires of the majority of citizens, but are essential to uphold the rule of law.

The judiciary’s great powers are limited in important ways. First, it only has power to annul a law or action if it violates the constitution itself. For the legislature to keep this judicial power in check, it would have to initiate the process to amend the constitution to allow it to pass any law it wants. Amending the constitution usually requires a special majority since it protects the most important values and principles of its drafters—usually based on a desire to promote and protect democracy. In the 2013 Constitution, as discussed below, it is extremely difficult (and sometimes impossible) to amend its provisions. Second, the legislature and executive usually share responsibilities for appointing and removing judges. Thus they can appoint people trusted to uphold the constitution and not partisan political supporters. They can also remove judges who abuse their limited power to annul democratically passed laws.

For the judiciary to effectively check the two other branches and balance their democratic legitimacy, it must be seen as independent and impartial. This is what grants it the legitimacy to perform its special constitutional role in the separation of powers. Attacks on these two principles endanger the balance between the three branches by threatening to remove the judiciary’s important role in compelling the legislature and executive to exercise their democratic powers within the constraints of the constitution.

**Legislative checks**

The key check of the legislature on the judiciary is the power to amend the constitution. If a court rejects a law as unconstitutional, the legislature may respond by amending the constitution to in effect democratically override the judiciary. Under the 2013 Constitution, however, the amendment power is limited in two important ways. First, some parts of the Constitution cannot be amended. The Chapter 10 immunity provisions ‘shall not be reviewed, amended, altered, repealed or revoked’ regarding military and police actions taken from 1987 to 1990, 2000 to 2006, and December 2006 until the first sitting of the elected Parliament. Second, any other amendment to the 2013 Constitution requires it be approved by three-quarters of the Members of Parliament, followed by a referendum approved by three-quarters of voters. In practice, this makes it nearly impossible to amend the 2013 Constitution and denies Parliament its most effective check on the judicial branch.
Executive checks

To ensure that the judiciary is independent and impartial, it is crucial that no single person dominates the appointment process. Yet it is also important that the legislature and executive have some control over the appointment and removal of judges since they have the legitimacy of a democratic mandate. The ideal compromise between independence and accountability should meet two key criteria. First, the executive should appoint the Chief Justice on non-partisan grounds after hearing and taking into account the views of all members of Parliament. Second, the judiciary should otherwise be appointed by an independent body and permitted to control its own internal processes to prevent interference by other branches of government.

The 2013 Constitution grants this important power to appoint the Chief Justice and President of the Court of Appeal to one person, the Prime Minister (s. 106). He or she must only consult the Attorney-General, who is also appointed by the Prime Minister (and then the President must appoint whoever the Prime Minister chooses). This is an unwise concentration of power in the hands of one individual. It allows one person in the executive to control the judiciary or, just as worrisome in a democracy, be perceived to do so by citizens who come to distrust judges. There is no role for the Leader of the Opposition to promote the perception and reality that the Chief Justice is a non-partisan appointment made without fear or favour. That is why the 1997 and 2012 Ghai Draft Constitutions provide for two or more office holders to choose the Chief Justice. In the 1997 Constitution, for example, the Chief Justice is appointed by the President on advice of the Prime Minister after consulting the Leader of the Opposition. While this does not ensure a non-partisan appointment, it at least provides a requirement for dialogue between parties before appointing the head of the judiciary.

The separation of powers, as discussed above, requires the judiciary to be impartial and independent. The main problem with the 2013 Constitution is that the Prime Minister and Attorney-General have almost total control to appoint, remove and set the salaries of the other members of the judiciary, as well as the independent bodies including the Judicial Services Commission. Further, only judges that are Fijian citizens are granted tenure until retirement age (s. 110). However, to appoint judges from other Commonwealth countries is common practice in Fiji. It is concerning that these appointments are conducted by the executive, often for short periods at high salaries. This arrangement creates the perception, if not reality, that re-appointment is dependent on how favourable decisions are to the executive.
Unlike the 1997 and Ghai Draft Constitutions, almost all these powers are vested in these two executive offices. This does not mean that judges are controlled by the executive. But civil society should be alert to any future attempts by the executive to use these powers to instil fear or promise favours to judges.

**Other checks**

The Judicial Service Commission in the 2013 Constitution provides for a process of independent appointment for judges and other legal officials in the judiciary (s. 103). This is an important body since it protects against the executive appointing all judges directly, and so dominating the judiciary. However, the Commission is not as independent as it was under the 1997 Constitution. Under the 2013 Constitution, its members include the Chief Justice and President of the Court of Appeal (both appointed by the Prime Minister), the Permanent Secretary responsible for justice, and two members, one legal and one lay, appointed by the Chief Justice after consulting the Attorney-General. Under the 1997 Constitution, its members included the Chief Justice (appointed by the Prime Minister after consulting the Leader of the Opposition), the chairman of the Public Service Commission, and the President of the Fiji Law Society (s. 131). The change from 1997 to 2013 is to remove independent representation for the legal profession, as well as give a greater role to officials appointed directly or indirectly solely by the Prime Minister.
Fiji in Transition: Towards a Sustainable Constitutional Democracy
The Bill of Rights in the 2013 Constitution
EXECUTIVE SUMMARY

The Bill of Rights in the 2013 Constitution includes all the rights of previous constitutions and several new ones. New socio-economic rights promote Fijians’ access to water, housing, transportation and other day-to-day necessities. And, again for the first time, it includes the land rights of the owners and tenants within the Bill of Rights. These are all significant steps forward toward returning Fiji to a rights-respecting democracy. Compared to neighbouring island nations and larger neighbours like New Zealand and Papua New Guinea, the Bill of Rights is an impressive collection of human rights.

The protections in the Bill of Rights, however, are weakened by omissions and limitations. First, no right specifically protects women. Second, the Bill of Rights has removed the text from the 1997 Constitution that permits limitations to rights only if they are necessary in a free and democratic society. Third, there is a general limitation in section 6.5.c that allows a law to limit any right if it is ‘necessary’. This is an unusual restriction on rights and not found in the 1997 Constitution or those of comparable countries. Finally, the provisions on decrees and immunity effectively prohibit the courts from hearing any alleged rights violations made from 2006. The ‘ouster clauses’ in those decrees are a particular problem and must be removed by legislative amendment or revocation.

For iTaukei, Rotuman and Banaban land rights, the Bill of Rights offers only limited protection. While land rights are protected, the substance of the right is almost empty. The government can override the right easily, especially under the recent decrees on iTaukei land use. The text of the Constitution will make it difficult for an independent and impartial court to restrict a government that wants to override these land rights. In short, the Bill of Rights offers only a weak formal protection for iTaukei, Rotuman and Banaban land rights.

Civil society organizations can play an important role in protecting and promoting human rights. There are four immediate actions they can take. First, encourage Parliament to amend decrees to remove rights restrictions—especially the ‘ouster clauses’ that prohibit courts from hearing rights violations committed under decrees. Second, expand the human rights monitoring role for CSOs by direct action and by working with the new Parliament. Third, promote judicial interpretations of the Constitution that maximize the protections offered by the Bill of Rights. Lastly, work to extend rights protection to women and other vulnerable groups are not protected in the Bill of Rights.
A. THE HISTORY OF RIGHTS IN FIJI

Throughout the colonial period, no written constitution provided for the rule of law. All laws were in Acts or regulations subject, ultimately, to the will of the Governor or, after independence, Parliament. Nevertheless, important rights were included in laws. The most evident were the laws protecting iTaukei and other land rights. The privileging of land over other human rights continues to shape attitudes towards rights in Fijian politics. All Fijian constitutions have included some, though not all, of the human rights protected by international law. But the question of land rights remains the most contentious one.

1970 Constitution

Chapter 2 provided for the ‘Protection of Fundamental Rights and Freedoms of the Individual’. Like most constitutions of this era, the only rights included were political and civil rights. There were also serious limitations. The right to life, for example, allowed capital punishment for certain crimes, as well as limiting its application in ‘reasonable and justifiable’ cases causing death such as (i) self-defence or defence of property, (ii) to lawfully arrest someone, (iii) to suppress a riot or mutiny, or (iv) to prevent a criminal offence. Any person could challenge a violation of a protected right in the Supreme Court. However, members of the Fijian disciplined forces were denied the protection of all rights except for rights to life, slavery and forced labour, and inhuman treatment (s. 18.3).

The 1970 Constitution also provided special protection for iTaukei land rights in section 68.1. No bill could amend one of the following Acts unless approved by (i) three-quarters of the members of Parliament and (ii) six of the eight members of the Senate appointed on the advice of the Bose Levu Vakaturaga (BLV):

- Fijian Affairs Act
- Fijian Development Fund Act
- Native Lands Act
- Native Land Trust Act
- Rotuma Act
- Rotuma Lands Act
- Banaban Land Act
- Banaban Settlement Act
and also the
- Agricultural Landlord and Tenant Act

1990 Constitution

The 1990 Constitution largely copied the chapter on rights in the 1970 Constitution. The right to discrimination was qualified to allow affirmative action to improve the conditions of those ‘disadvantaged’ because of race, sex, place of origin, political opinions, colour, religion or creed (ss. 16 & 18). It also contained a new provision to allow the government to enact specific
laws violating any of the protected rights if it promoted or safeguarded ‘the economic, social, educational, cultural, traditional and other interests of the Fijian and Rotuman people’ (s. 21.1). The types of laws the government could enact included laws to (i) reserve scholarships, training or other government facilities, (ii) grant trade or business licenses, and (iii) other actions to advance the interests of ‘Fijian and Rotuman people’.

To alter the special land legislation listed above, a bill would have to be passed by a majority of each House, plus 18 of the now 24 BLV nominees to the Senate. Alterations to the Agricultural Landlord and Tenant Act still required three-quarters approval in the House of Representatives. The Constitution also provided for the application of ‘Fijian customary law’ by a special court, though this law had to be consistent with the protected rights and not ‘repugnant to the general principles of humanity’ (ss. 100 & 122). For the first time, special immunity provisions were included to make the coup leader, the disciplined forces and any person acting under their orders immune from civil or criminal prosecution for offences committed during and after the coup (s. 164). This meant that any violations of protected rights would not be punished.

1997 Constitution

The 1997 Constitution made major changes to the constitutional protection and enforcement of human rights in Fiji. The Bill of Rights included all the rights protected in previous constitutions, plus new rights protecting labour, the secret ballot and education.

The Constitution also gave more powers to the courts to interpret rights. First, an individual could now apply to the High Court before an anticipated violation of their rights. In interpreting the rights, the courts (i) had to promote a ‘democratic society based on freedom and equality’ and (ii) could consider relevant international law. The Constitution also created a Human Rights Commission responsible for educating the public about their rights—including international conventions and bodies that promoted human rights—and recommending ways the government could better protect and promote human rights (s. 42.2).

The special provision for ‘Fijian and Rotuman’ affirmative action was removed and replaced with a section on ‘social justice and affirmative action’. Parliament could now take steps to provide all those ‘disadvantaged’ with ‘effective equality of access’ to (i) education and training, (ii) land and housing, and (iii) participation in commerce and civil service (s. 44.1). Any such law had to meet strict criteria by showing how it would achieve these goals. The Constitution still protected
the eight Acts protecting the land rights of ‘Fijians, Rotumans and Banabans’ and they could only be amended after a bill was passed by each House and supported by 9 of 14 members of the Senate appointed on advice of the BLV (s. 185). The Agricultural Landlord and Tenant Act required two-thirds support in each house, plus 9 of 14 BLV senators. In a new section, the Constitution required Parliament to provide for customary law along ‘traditional Fijian processes,’ as well as to provide for royalties from minerals to the owners of land or those with customary fishing rights (s. 186).

2012 Ghai Draft Constitution

The Ghai Draft Constitution (GDC) would have introduced several new rights, including children’s and socio-economic rights. It also would have only permitted limitations on rights that were ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom,’ which is a slightly stronger protection than in the 1997 Constitution (s. 48.1) (see Annex II). The rights included special protection for (i) those with disabilities, (ii) women, men and families, (iii) the elderly, and (iv) cultural, religious and linguistic communities (s. 43-7). The rights would have bound all government institutions and offices, as well as ordinary individuals. The courts were to interpret rights to promote a democratic society and in doing so (ii) must consider relevant international law, and (ii) could consider laws from other ‘open and democratic societies’ (s. 51.1). Customary law had to be consistent with other rights. It also provided for a Fiji Human Rights Commission (s. 52).

The greatest change in the Ghai Draft Constitution was regarding land rights. In short, a new institution, the National Consultative Land Forum, was created to manage land disputes. For the other land laws, they could be amended by a simple majority once a local government system was in place (Schedule 6, s. 12.8):
2013 Constitution

The 2013 Constitution includes a Bill of Rights that draws from both the 1997 Constitution and GDC, including several new rights for land owners and tenants, which will be discussed in detail below. The Bill of Rights does not include any rights specifically to protect women.

B. HUMAN RIGHTS AND THE 2013 FIJIAN CONSTITUTION

Fiji’s Bill of Rights in Comparative Perspective

The Bill of Rights includes all the most important civil and political rights in international law and other progressive constitutions, like that of Canada and South Africa. The Bill of Rights also contains important new socio-economic rights, like access to water and housing, and indigenous rights, like the iTaukei land protections. If one looked just at the list of rights, the Fijian Bill of Rights is one of the most comprehensive in the world (for a detailed comparison with past constitutions, see Annex I). It protects:

1. Many of the international human rights found in the Universal Declaration of Human Rights, other instruments and customary international law;
2. More rights than comparable countries like Papua New Guinea, Tonga, Samoa or even New Zealand;
3. The same rights as the 1997 Constitution, plus new socio-economic rights;
4. Almost as many rights as the Ghai Draft.

However, the Bill of Rights has two weaknesses compared to other constitutions. First, it does not include important rights to protect (i) women (including reproductive rights), or (ii) sexual orientation and gender identity. (There is however a general non-discrimination provision in section 26.3.a.) The Bill of Rights and the Constitution in general does not make any special provision for women, which means the state has no duty to improve the position of women or protect their unique rights.

Second, the Bill of Rights allows the government to limit any of these rights for almost any reason. While the list of rights is impressive, the limitation clauses make them hollow. The interpretation of the limitation clause, discussed below, is the job of the courts. If they are independent and impartial, they may interpret the limitations narrowly to make it harder for the government to limit rights. Still, the text in the Constitution remains much broader than the limitations acceptable in (i) international law, (ii) other progressive bills of rights and (iii) previous Fijian constitutions. The table in Annex II compares the text of the general limitations in different constitutions. It is clear that the 2013 Constitution of Fiji makes it far easier to limit human rights than in other progressive constitutions and that these limitations are not justified in a free and democratic society.
**Individual versus Communal Rights**

A right is a claim by one person against another, which creates a related duty. For example, the right to life is a claim of a person against the government, who then has a related duty not to arbitrarily deprive them life. Most civil and political rights are claims to stop others from interfering with a person's liberty to act. The right to assembly, for instance, is a claim by an individual to meet up with others in public and creates a duty of the government not to prevent this action.

Rights are not absolute. First, they often conflict with other rights. A right to free speech may conflict with a right to religion when the former incites hatred against the latter. Second, the right of an individual should not always prevail over the will of the majority. Sometimes the government may curtail an individual's right to achieve some greater good for everyone—like limiting freedom of assembly during a natural disaster or expropriating property to create a national park. Lastly, rights can sometimes require a progressive, not absolute, duty. The right to adequate housing, for example, is limited by the capacity and resources of the government. It is not a right of each person to a house, but a right to compel the government to justify, in the courts, its plan and progress towards providing housing for its citizens.

There is also an important distinction between an individual right and a communal right. Individual rights, described in the two previous paragraphs, are enjoyed by all human beings. Section 1 of the 2013 Constitution lists some of the usual justifications for why individuals have rights: to protect their dignity, equality and freedom as autonomous human beings. If individual rights are universal (enjoyed by all humans because they are human), communal rights are particular (enjoyed by specific groups). Communal rights pick out a special characteristic of a group, like religion or ethnicity, as the basis for granting special privileges to its members that are not enjoyed by other citizens. It is important to point out that communal rights are different from individual rights relating to a particular category of humans. The disabled and women are not historical groups per se, but rather human beings with special natural attributes that have in the past and present been used to discriminate against them. Communal rights, in contrast, are usually the result of a unique historical status that preserved special privileges for that group. When individual rights conflict with communal rights, it contrasts the universal rights of all human beings with the particular rights of a historically-recognized group. How that tension is resolved will depend on the structure of a country's constitution.

**The Separation of Powers**

The judiciary has the most important role in upholding the Bill of Rights. The principle of the separation of powers calls for special measures to protect the independence and impartiality of the judiciary from the legislative and executive branches of government. The 2013 Constitution provides some important protections for judges. To protect their independence, for example,
judges have secure tenure for fixed periods (s. 110). A judge can be removed for cause in extreme cases (s. 111-2). But these provisions are not sufficient since the 2013 Constitution gives the Prime Minister and Attorney-General unprecedented powers to appoint judges and determine their salaries—two essential criteria of judicial independence and impartiality.

The Prime Minister may appoint the Chief Justice and President of the Court of Appeal (s. 106). He or she must only consult the Attorney-General, who is also appointed by the Prime Minister (and then the President must appoint whoever the Prime Minister chooses). This is an unwise concentration of power in the hands of one individual. It allows one person in the executive to control the judiciary or, just as worrisome in a democracy, be perceived to do so by citizens who come to distrust judges. There is no role for the Leader of the Opposition that in the past promoted the perception that the Chief Justice was a non-partisan appointment made without fear or favour. The 1997 and 2012 Ghai Draft Constitutions provided for two or more office holders to choose the Chief Justice. In the 1997 Constitution, for example, the Chief Justice is appointed by the President on advice of the Prime Minister after consulting the Leader of the Opposition.

While this does not ensure a non-partisan appointment, it at least provides a requirement for dialogue between parties before appointing the head of the judiciary. All this does not mean that judges are or will be controlled by the executive. But judges will find it more difficult to uphold liberal interpretations of the Bill of Rights against a government who appointed them, and controls their salaries and contract extensions.

Human Rights and Anti-Discrimination Commission

The Human Rights and Anti-Discrimination Commission (HRADC) is an independent body responsible for promoting, educating on and monitoring rights (ss. 42 & 45). It must also recommend how the government can better protect rights and comply with its international obligations. The Commission has a special responsibility to investigate alleged human rights abuses, or more general human rights concerns, and apply to the courts for redress. The Constitution provides for its independent funding and internal control, and appointment by the Constitutional Offices Commission. With these broad duties and independence, the Commission has the potential to be an important body to protect and promote human rights in Fiji. However, there are two main problems with the Commission at the moment.

First, the HRADC does not appear to be fulfilling its constitutional mandate. According to its website, the Commission has published only two reports, in 2011 and 2012, and the last Rights Quarterly was published in December 2009. The website also fails to provide any crucial information. The commissioners are not named; in fact, it appears that none have been appointed since 2009. Nor are there annual reports or other evidence of sufficient funding, which is required...
by Decree 11 of 2009 (s. 44). In short, the HRADC does not appear to be functioning properly—at least not as envisioned in the 2013 Constitution.

Second, the HRADC currently operates under Decree 11 of 2009. Until it is repealed or amended, it overrides section 42 of the 2013 Constitution. This is a specific problem for the Commission because the Decree limits its ability to protect human rights. The Commission must protect and promote human rights, but the Decree defines ‘human rights’ as ‘rights embodied in those United Nations Covenants and Conventions on Human Rights which are ratified by the State of Fiji, and the rights and freedoms as may be prescribed by the President by Decree’ (s. 1). This definition excludes those rights in the Bill of Rights of the 2013 Constitution; and the President has also not prescribed any rights by decree. Even if the Commission was functioning, the Decree would need to be amended to include all human rights in the Bill of Rights and elsewhere in the Constitution.

The Decree has several other problems that must be addressed. For example, the Decree allows the President to appoint three commissioners after consulting with the Prime Minister, but the Constitution provides for five commissioners appointed by the President on the advice of the Constitutional Offices Commission. Since section 173 allows decrees to override other parts of the Constitution, this means that the Decree overrides section 45 in the Constitution until it is repealed or amended. Not only will the Commission continue to consist of only three members appointed by the President, it is also limited in its powers and responsibilities to those listed in the Decree. While the Constitution might provide an effective framework, it will have no effect until Decree 11 of 2009 is repealed or amended.

C. UNDERSTANDING THE BILL OF RIGHTS

This section is a step-by-step guide to understanding your rights under the 2013 Constitution. It takes you through each stage in interpreting and enforcing any right in the Bill of Rights. The next section will put this guide in action to analyse the iTaukei, Rotuman and Banaban lands rights in section 28.

1. Who has rights?

The protections in the Bill of Rights are granted to ‘every person,’ which means any individual and, possibly, corporations or other legal organizations. Any person in Fiji will enjoy these rights, as well as Fijians abroad in some cases (s. 6.8). There are three exceptions. First, political rights are granted only to citizens (s. 23.1). Second, special land rights are granted only to the customary owners of the land, and other land owners, including leasehold tenants (ss. 28-30). Third, only children enjoy the rights of children (s. 41).
2. Who do you have rights against?

The Bill of Rights binds both the government and individuals. First, it binds all three branches of government—the legislative, executive and judicial—plus ‘every person performing the functions of a public office’ (s. 6.1). This means all public office holders and any member of an institution mentioned in the Constitution, like the civil service, must uphold the Bill of Rights. Second, it binds all ‘natural or legal persons’—this means individuals, corporations and other organizations created by law—though only after considering the nature of the right and its restraint or duty. For example, an individual may not discriminate against another person, but he or she will not have to ensure their access to adequate food.

3. What are your rights?

The Preamble and Chapter 1 (‘The State’) set out important principles of the 2013 Constitution. The Preamble recognises the unique indigenous status of the iTaukei and Rotuman people, as well as the descendants of indentured labourers, immigrants and settlers. It also declares the principles of common citizenship, constitutional supremacy, human rights and justice. Chapter 1 sets out the values of the Fijian Republic, which includes the ‘non-negotiable’ principles that began the constitution-making process in 2012 (s. 1). It then declares the Constitution the supreme law, upheld by the citizens and government, and enforced by the judiciary. It adds that the courts must interpret the Constitution to ‘promote the spirit, purpose and objects of this Constitution as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom.’ (s.3.1). Finally, it declares Fiji a secular state and defines Fijian citizenship. Since the principles and values in the Preamble and Chapter 1 are not in the Bill of Rights, however, it is unclear whether the courts can enforce them on their own. Instead, they might only serve as principles to help the courts interpret other parts of the Constitution.

The Bill of Rights sets out a long list of rights. It includes all the rights found in previous constitutions, as well as some new ones. However, there is no right to dignity, or special rights for women or the elderly as provided in the Ghai Draft Constitution. The rights in the 2013 Constitution can be divided into three main groups: political-civil rights, socio-economic rights, and the new rights regarding land ownership.

The first group protect the right of persons to participate in the political and civil life of the state. The basic rights are those to life, personal liberty and freedom from slavery, servitude, forced labour and human trafficking, and from cruel and degrading treatment, all of which ensure the state cannot harm individuals unless under exceptional circumstances (ss. 8-11). Next there are the rights essential for the rule of law: freedom from unreasonable search and seizure, rights of arrested persons, access to courts, and executive and administrative justice (ss. 12-16). This ensures that the laws, especially criminal law, limit an individual’s liberty only after following a fair process. To promote an open and democratic society, there are also rights protecting a person’s ability to speak, act and associate in public: freedoms of speech, expression and publication, assembly and association, movement, political rights and a right to access to information (ss. 17-19, 21, 23, 25). There are related rights to protect individuals from the government intruding on their private and religious lives (ss. 22, 24), organized labour and property rights (ss. 20, 27) and right to equal and non-discriminating treatment (s. 26).
The second group protect the social and economic rights of persons. Fijians have rights to education (s. 31) and, for the first time, economic participation, work and a minimum wage (ss. 32-3), reasonable access to transportation (s. 34), housing and sanitation (s. 35), adequate food and water (s. 36), social security (s. 37), health, and protection from arbitrary evictions (s. 38). There are also rights for the environment (s. 40), children (s. 41) and the disabled (s. 42). This is an enormous change for Fiji, which makes its Bill of Rights one of the most comprehensive in the world for socio-economic rights.

The third group protect communal and individual land rights. The rights of the owners of iTaukei, Rotuman and Banaban lands are protected, as well as those of other owners, including tenants (ss. 28-9). These rights will be discussed in the next section.

4. Who can protect your rights?

The 2013 Constitution gives the responsibility for protecting rights to a number of bodies. In general, the government of Fiji has a duty to ‘respect, protect, promote and fulfil’ the Bill of Rights (s. 6.2). This duty informs all other constitutional powers, from a duty to implement ‘reasonable measures’ to give people access to transportation, to ensuring the independence and impartiality of the judiciary and independent institutions. Individuals and groups can also make complaints of rights violations (real or potential) to various government bodies: select committees of Parliament, the public service, the HRADC and the other independent commissions and tribunals. However, the most important institution to protect rights remains the judiciary.

5. How do courts interpret and enforce rights?

Any person may apply to the High Court for redress if they believe their rights (or the rights of a detained person) have been contravened (s. 44.1). It is unclear exactly how the courts will interpret their right-protecting role under the new 2013 Constitution, but their likely steps are as follows.

Was a right violated?

If a person does believe their rights have been contravened, it is their responsibility to apply to the High Court (s. 44.3). Alternatively, the High Court can hear a case from a lower court if a possible rights violation comes up. In any rights case before the courts, the Attorney-General may intervene on behalf of the state (s. 44.7-9).

A person will then have to prove that the right in question was violated by a law or action of the government or its agent. Proving a violation is quite simple in some cases and much harder in others. As a general rule, violations of civil and political rights are easier to show than those of socio-economic rights. For example, if the state imprisons a person without a trial, it is a clear violation of their right to access courts. If the state builds only a single communal pump in a mountain village, does that violate residents’ right to adequate water? Since Fijian courts have never interpreted socio-economic rights before, it is too early to know how they will do so.
When interpreting rights, the Constitution largely reproduced the provisions of the 1997 Constitution. Courts must ‘promote the values that underlie a democratic society based on human dignity [a new addition in 2013], equality and freedom’ (s. 7.1). If a law limits a right, then the courts must, if they can, interpret the law more strictly to make it consistent with the Bill of Rights (s. 7.3). All of this means that a right must be understood in the context of other rights and the rest of the Constitution. A right of freedom of assembly, for example, is not simply a right to get together in public. It is rather part of a set of rights to allow persons to come together as citizens in public to express their political views by collective action necessary to ensure a democratic society.

How do international human rights influence the Bill of Rights?

When interpreting the Bill of Rights, courts ‘may, if relevant, consider international law’ (s. 7.1). This is a vague section and it remains to be seen how far judges will draw on international human rights law to interpret specific constitutional rights. In South Africa, where judges ‘must’ consider international law, they have drawn on international legal instruments to develop a broader conception of rights in their constitution. Fijian judges can also use these human rights norms to interpret the Bill of Rights. For example, section 41, the rights of children, can be interpreted in light of the UN Convention on the Rights of the Child. Courts can interpret the right ‘to basic nutrition, clothing, shelter, sanitation and health care’ in its broadest sense by looking at how this specific right is described in the Convention and explained by UN bodies and international law academics. In short, international law can be used as an interpretive tool to give the widest, deepest possible meaning to the Bill of Rights.

Important sources of international law include (i) the Universal Declaration of Human Rights (1948), (ii) the International Covenant on Civil and Political Rights (1966), including the usual rights associated with civic and political freedom such as freedom of speech and association, and (iii) the International Covenant on Economic, Social and Cultural Rights (1966), including progressive rights such as social security, health and an adequate living. Other important sources of law that Fijian judges can draw on include:

1. Conventions, including:
   a. Convention on the Rights of the Child
   b. Convention on the Elimination of All Forms of Discrimination Against Women
   c. Convention on the Rights of Persons with Disabilities

2. Declarations, including:
   a. Universal Declaration on Cultural Diversity
   b. Declaration on Sexual Orientation and Gender Identity

3. Customary international law, including a prohibition on torture

The land rights of iTaukei, Rotumans and, possibly, Banabans are also protected by two key international law instruments:

1. the binding ILO Convention No. 169 [ILO 169]
2. the non-binding UN Declaration on the Rights of Indigenous Peoples
(There is also the common law doctrine of ‘aboriginal title,’ recently adopted by Fijian courts in the *Kanakana* case, which might have implications for land, self-government and natural resource management.) Indigenous rights protected in these two instruments include self-determination, self-government, non-discrimination, culture and language, and land. The Fiji government ratified ILO 169 on 3 March 1998 and must now report on whether its national laws conform to the Convention, as well as its practical impact on indigenous peoples. However, the government appears to have only submitted two reports (2003 and 2006) and not responded to requests for its overdue reports.

**Does the right have a specific limitation?**

No right is absolute: they all have specific limitations built into them. The right to life, for example, declares that ‘Every person has the right to life,’ but then continues ‘and a person must not be arbitrarily deprived of life’ (s. 8). In other words, there is the right (‘right to life’) and the specific limitations (‘unless non-arbitrarily deprived’). The Bill of Rights has introduced several new limitations—specifically those limiting labour rights—that were not included in the 1997 Constitution. It has also removed that requirement that the government must justify any specific limitation on the grounds that it is ‘reasonable and justifiable in a free and democratic society’. This means that any restriction on a right is now permitted so long as it falls under a specific limitation.

The Bill of Rights follows a general structure in creating rights: first, the right is defined, and, second, specific limitations are listed. This short case study breaks down the right to freedom of association.

**Right** – ‘Every person has the right to freedom of association’

The right to freedom of association is clear: a right to gather in public or combine in an organization, usually for a political purpose. The section then lists seven limitations on this right.

**Limits** – A law may limit the right:

a) ‘in the interests of national security, public safety, public order, public morality, public health or the orderly conduct of elections’

Under (a) the right may be limited if its exercise threatens the public space in various ways.

b) ‘for the purpose of protecting the rights and freedoms of others’

Under (b) the right may be limited if it conflicts with other rights. This is a common provision since no right is absolute and the courts must interpret it to coexist with the rights of other persons.

c) ‘for the purpose of imposing restrictions on the holders of public offices’

Under (c) the right may be limited for public office holders since exercising their right might conflict with their public roles and duties. For example, judges may not be allowed to protest outside Parliament because they have a special role in remaining impartial and independent.
d) for the purposes of regulating trade unions, or any federation, congress, council or affiliation of trade unions, or any federation, congress, council or affiliation of employers’

Under (d) the right may be limited for persons wishing to join, form or strike with a trade union. This is uncommon since it runs counter to international human rights instruments that protect workers’ rights, especially the right to assemble.

e) ‘for the purposes of regulating collective bargaining processes, providing mechanisms for the resolution of employment disputes and grievances, and regulating strikes and lockouts’

Under (e) the right may be limited in the same way as for (d). Again, this appears to contradict the labour rights enshrined in the international legal instruments.

f) ‘for the purposes of regulating essential services and industries, in the overall interests of the Fijian economy and the citizens of Fiji.’

Under (f) the right may be limited if they threaten Fiji’s economy or citizens by shutting down key services and industries. These could include the airlines, sugar cane harvesting, mines, ports, etc. This is potentially a broad limitation.

**Does the right have a general limitation?**

All rights in the Bill of Rights are subject to a general limitation. This is the most important restriction on rights in the Constitution and the section is reproduced in full:

6 (5) The rights and freedoms set out in this Chapter apply according to their tenor and may be limited by—

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

This is a new section that allows Parliament directly or indirectly to limit any right in the Constitution so long as it is ‘necessary’ and done by a law. In other words, any ordinary law (or action taken under such a law) can limit any right if it is ‘necessary’ to do so. In the 1997 Constitution, in contrast, specific rights could only be limited if ‘reasonable and justifiable in a free and democratic society’ and only to the extent required to achieve their goal...
The limitation in the 2013 Constitution is much broader: *any restriction that is ‘necessary’.*

The interpretation of ‘necessary’ is important here as it is the only qualification. Courts will have to determine whether ‘necessary’ (i) means simply whatever the government believes or (ii) is restricted by the Preamble and sections 1 to 4. Interpreted narrowly, a court might interpret ‘necessary’ in its plain meaning as ‘all things required to achieve the end of the goal stated’. This would allow the legislature greater power to override rights. Interpreted broadly, a court might hold that ‘necessary’ means any limitation that is necessary *so long as it is consistent with* the founding values of Fiji (s. 1) and religious liberty (s. 4). This would offer greater protection of the right and make it more difficult for government to limit them.

**Does a decree limit the right?**

Rights in the 2013 Constitution may also be limited by decrees or actions taken under decrees under section 173. Every decree, declaration or promulgation passed from 5 December 2006 to the first sitting of the new Parliament (with a few exceptions) will remain in force ‘in their entirety’—even if they are inconsistent with other provisions of the 2013 Constitution (s. 170.1-2). After the first sitting, Parliament may amend or repeal these decrees, but any amendment may not (i) be retrospective, (ii) nullify past decisions or actions, or (iii) ‘grant any compensation, damages, relief, remedy or reparation to any person affected by these laws’ (s. 170.3). The courts are also specially excluded from determining whether these decrees were made in a valid and legal, and constitutional way, or are now inconsistent with the Constitution, including the Bill of Rights (s. 170.4). No action or decision taken under such a decree may be challenged in court either.

Given the enormous number of decrees passed since 2006, almost all the laws of Fiji now in existence are decrees and most government actions will be taken under decrees. Until the decrees are amended or repealed and replaced by laws passed by the democratically elected Parliament, the protections in the Bill of Rights will be excluded from a vast majority of government laws or actions.

There is a related problem of ‘ouster clauses’ in many decrees, which prohibit the courts from hearing cases of alleged violations committed under a decree. For example, section 11 of the Scrap Metal Trade Decree (22/2011) prohibits courts from having ‘the jurisdiction to accept, hear, determine, or in any other way entertain any challenge at law’ any decision made under the Decree. This is different from the point above since the ‘ouster clause’ prohibits courts from even adjudicating decisions or actions taken under a decree. Many decrees contain a similar clause, effectively prohibiting courts from performing their role in the separation of powers as a check on executive power.
Do the immunity provisions limit the right?

Chapter 10 of the 2013 Constitution provides an extensive list of immunities for those who executed the 2006 coup and then operated under the Bainimarama government. Parliament is prohibited from amending this chapter (s. 158.1) and the courts are prohibited from hearing or deciding any challenge to these provisions (s. 158.2). What is most striking about the immunity provisions is that they did not end with the promulgation of the 2013 Constitution, but with the sitting of the first Parliament after democratic elections. This meant the current government had immunity from any violations of human rights committed up to the first Parliament. If there was a rights violation that escapes the limitations above, the courts are still prevented from hearing it since it falls under the immunity provision.

6. What are the remedies for violations of rights?

The High Court may make any order it sees fit to remedy a violation of a right (ss. 44.3, 97, 103). This is a broad judicial power that can include (i) invalidating certain provisions of a law that violate a right, (ii) ordering compensation for a violation or, (iii) in the case of socio-economic rights, possibly even requiring the state to take active steps towards realizing a right. A court can decline to hear a case if an ‘adequate alternative remedy’ is available, like mediation through the HRADC (s. 44. 4).

7. What happens in a state of emergency?

If a state of emergency is declared in Fiji, a law passed at this time may limit most rights in the Bill of Rights so long as (i) ‘the limitation is strictly necessary and required by the emergency’ and (ii) consistent with Fiji’s international obligations regarding states of emergency (s. 43.1). However, no law may limit the following rights:

- right to life (s. 8)
- freedom from slavery, servitude, forced labour and human trafficking (s. 10)
- freedom from cruel and degrading treatment (s. 11)
- rights of arrested, detained and accused persons (ss. 13-4)
- access to courts (s. 15)
- executive and administrative justice (s. 16)
- freedom of religion, conscience and belief (s. 22)
- right to equality and freedom from discrimination (s. 26)

If a person is detained under a state of emergency, the right to liberty provides special measures to ensure that they are given reasons for their detention, a chance to communicate with someone, access to a lawyer, etc (s. 9.3).

The Prime Minister may only declare a state of emergency ‘if there are reasonable grounds to believe that— (a) the security and safety of all or part of Fiji is threatened; and (b) it is necessary to declare a state of emergency to deal effectively with the threatening circumstances.’ (s. 154) This
seems to imply that a declaration of emergency may be challenged in the courts on the grounds that it is *unreasonable* since (a) security and safety is not threatened or (b) a declaration is not necessary to deal with the threat. Either way, a state of emergency will end after 24 hours until confirmed by a majority of members in the sitting Parliament (or 48 hours if Parliament is not sitting). If a majority agree to extend the emergency, it continues for another month, which may be extended again by a majority vote every month thereafter.

**D. APPLICATION OF THE BILL OF RIGHTS: LAND**

This part will analyse section 28 of the 2013 Constitution. The protection of iTaukei, Rotuman and Banaban lands is a communal, not individual right. So this analysis will vary somewhat from how civil, political and socio-economic rights are interpreted and enforced by the courts. Since the right applies equally to iTaukei, Rotuman and Banaban communities, this case study will refer to iTaukei with the understanding that the exact same analysis holds for the other two communities.

1. **Who has land rights under section 28?**

Unlike most other rights in the Bill of Rights, section 28 land rights are only granted to the ‘customary owners of that land’. The Constitution does not define this term, so the courts will likely have to look to legislation for a definition. This is currently defined in the laws (as amended by decree) that were formerly protected in section 185.1 of the 1997 Constitution. Since these laws are no longer protected in the 2013 Constitution, the term ‘customary owners of that land’ can be amended by a simple Act of Parliament that might alter the definition of the term to include more or less people within the iTaukei, Rotuman or Banaban groups. In short, only those Fijians that the court decides are the ‘customary owners’ will enjoy the protection of indigenous lands. Any ‘customary owner’ may apply to the High Court for redress if they believe their communal right to land has been contravened (s. 44.1).

2. **Was a right violated?**

A ‘customary owner’ will have to apply to the High Court and prove that their right in question was violated by a law or action of the government or its agent. Section 28 states:

1) The ownership of all iTaukei [Rotuman/Banaban] land shall remain with the customary owners of that land and iTaukei [Rotuman/Banaban] land shall not be permanently alienated, whether by sale, grant, transfer or exchange to any person, except to the State in accordance with section 27.

2) All iTaukei [Rotuman/Banaban] land acquired by the State for a public purpose after the commencement of this Constitution under section 27 or under any written law shall revert to the customary owners if the land is no longer required by the State.
The following analysis will break down the right to consider how the courts may interpret it.

First, the government may not alienate every aspect of ownership, which ultimately rests with the ‘customary owners’. Ownership here means a bundle of property rights held by the ‘customary owners’ relating to a portion of land. Second, no ownership right may be permanently alienated except to the State. This may imply two things: (i) ownership rights can be temporarily alienated by sale, grant, transfer or transfer to any person, and (ii) ownership rights can be permanently alienated to the State under the procedure in section 27.

Third, any iTaukei land acquired by the State under section 27 after the Constitution commenced or by a written law, must return to the ‘customary owners’ if it is ‘no longer required’. Any iTaukei land acquired by the State before September 2013 or by any written law—whether by sale, grant, transfer or exchange—does not need to revert to the ‘customary owners’. All iTaukei land acquired under section 27 or by a written law reverts only when the State decides it is no longer required. Since the State lives forever (even through coups), iTaukei land may be taken for an indefinite period of time so long as the State believes it is still required. It is also important to note that the State does not need to follow the strict procedure under section 27. Instead, a majority in Parliament can simply pass a law alienating iTaukei land for as long as is required (it does not even have to be for a public purpose).

When interpreting section 28, courts must ‘promote the values that underlie a democratic society based on human dignity, equality and freedom’ and may also consider relevant international law (s. 7.1). First, the court will have to interpret the land rights of customary owners within a constitutional order based on democracy and human dignity. These two values will often conflict with land rights, which are special communal rights of the iTaukei group against the democratic majority and are exceptions to individual rights grounded in human dignity. In this context, courts might make a more restrictive reading of section 28.

Second, courts can consider relevant international law, which means ILO 169 and the UN Declaration on the Rights of Indigenous Peoples. Fiji is a signatory to ILO 169 and did not vote against INDRIP (in fact, it did not vote at all). Courts can use the detailed provision of these instruments to give a wide and deep interpretation to the meaning of iTaukei land rights under the 2013 Constitution. A detailed examination of how these two instruments related to iTaukei land rights in Fiji can be found in a memo written for the Constitution Commission and now part of its public archive.

If a law limits section 28, then the courts must, if they can, either interpret the law more strictly to make it consistent with the Bill of Rights (s. 7.3). For example, if a forestry conservation law allows temporary alienation of lands surrounding the habitat of an endangered bird, this might allow any iTaukei lands within that area to be alienated. The courts might interpret this law more strictly so that it allows temporary alienation of lands except for iTaukei lands without the ‘customary owners’ consent.
3. Does the right have a specific limitation?

Section 28 has specific limitations on the general right of iTaukei land ownership as discussed above. These limitations permit both permanent and temporary alienation of ownership rights in certain cases.

4. Does the right have a general limitation?

Land rights ‘apply according to their tenor’ but may also be limited by section 6.5.c. In the case of section 28, however, this limitation is not such a problem because the right itself already contains a significant internal limitation (allowing indefinite alienation of land by ‘any written law’). It is possible that the state could attempt to pass a law under section 6.5.c that was ‘necessary’ to permanently alienate iTaukei land. In this case, a court should take a broader interpretation of ‘necessary’ to include the special communal nature of land rights as recognized in international law. Any law overriding section 28 would be ‘necessary’ only if it was essential to promote a founding value of the Constitution (s. 1) or, possibly, religious liberty (s. 4). However, the 1997 Constitution only allowed limitations on rights if they were ‘reasonable and justifiable in a free and democratic society’ and only to the extent required to achieve their goal. The 2013 Constitution allowed any limitation that was ‘necessary’. Courts might interpret this as a deliberate drafting choice to allow the State greater discretion as to when to limit a right. At the moment, however, it is uncertain whether courts will interpret limitations on rights strictly or broadly.

5. Does a decree limit the right?

Under section 173, lands rights may be limited by any decree, declaration or promulgation passed from 5 December 2006 to the first sitting of the new Parliament (with a few exceptions). So the decrees affecting iTaukei lands (for example, Decrees 20, 21, 22 and 23 of 2012) modify the rights in section 28. If any provision permits the alienation of iTaukei lands, it will continue to do so until the newly elected Parliament amends or repeals these decrees. However, no such act may (i) be retrospective, (ii) nullify past decisions or actions, or (iii) ‘grant any compensation, damages, relief, remedy or reparation to any person affected by these laws’ (s. 170.3). The courts are also excluded from determining whether these decrees were made in a valid and legal, and constitutional way, or are now inconsistent with the Constitution, including the Bill of Rights (s. 170.4). In short, if any action regarding iTaukei lands was made from 2006 until the first sitting of Parliament, the 2013 Constitution forbids any court challenge or legislative redress for these actions.

It is important to note that under the Land Use Decree (36/2010), the Prime Minister has sole discretion to designate land for a lease term of 99 years (ss. 6 & 10). The Decree also contains an ‘ouster clause’ that means a decision to lease iTaukei land cannot be challenged in the courts (s. 15). In short, the Prime Minister can decided to designate any iTaukei land for a lease of 99 years and his decision cannot be challenged in court as a violation under section 28.
6. Do the immunity provisions limit the right?

The immunity provisions in Chapter 10 effectively shields the government from any violations of human rights committed up to the first Parliament—including harms arising out of violating section 28 land rights.

7. Conclusion: are my land rights protected under the 2013 Constitution?

Banaban, Rotuman and iTaukei land rights are protected under the Bill of Rights in the 2013 Constitution. The problem is that this protection is very weak. Section 28 provides little real protection for land rights other than provide that the land must, eventually, return to its owners. But under the Land Use Decree and related decrees, which trump section 28, the Prime Minister can effectively lease iTaukei land for 99 years. This land can also be appropriated by the government under section 27 of the Constitution for as long as is necessary, which might be forever since there is no internal time limit.

E. RECOMMENDATIONS FOR HUMAN RIGHTS ADVOCATES

There are at least four strategies for civil society and Parliamentarians to use to ensure that human rights under the 2013 Constitution are protected to their fullest extent.

Amend Decrees to Remove Rights Restrictions

The existing decrees can be amended to remove any rights restrictions and allow the judiciary to interpret them against the Constitution. The first priority could be to remove the ‘ouster clauses’ that prohibit the courts from hearing cases of alleged violations committed under them. It is possible for Parliament to pass a law that would remove all ‘ouster clauses’ in all decrees. This would allow the courts to fulfil their role as a check against the executive, including judging whether the government, acting under a decree, violated the rights protected in the 2013 Constitution.

The second priority could be to survey all the existing decrees to see if and how they are inconsistent with the rights and principles of the 2013 Constitution. Does a decree limit the Bill of Rights? Does it restrict democracy, including the freedom of CSOs to protect human rights? Does it violate the separation of power by excluding the courts from reviewing action taken under it? The Ghai Draft Constitution would have included a special
law that would have amended all decrees that were inconsistent with its rights provisions. The Commission’s analysis of government decrees is a useful tool for preparing a detailed advocacy plan for the new Parliament to amend all decrees to make them consistent with a culture of human rights.

**Expand Rights Monitoring Role for CSOs**

CSOs have an important duty in monitoring the government to ensure it acts consistently with human rights, especially those in the Bill of Rights. Unfortunately, many decrees restrict rights such as freedom of expression or assembly that are essential for CSOs to fulfil their role. The first priority is to amend the decrees, as discussed above, by removing ‘ouster clauses’ and generally removing any restrictions on human rights. The second priority is to test the new rights by exercising the freedoms in the Bill of Rights. CSOs have already exercised their rights, such as free speech and assembly, in the past despite restrictions. They can continue to do so by finding new ways to test the limits of rights under the new 2013 Constitution.

Another important element is to restore the HRADC as an effective body to protect human rights. This requires (i) amending Decree 11 of 2009 as described in the section on the HRADC above, (ii) advocating for respected individuals to be appointed as commissioners, (iii) ensuring the government fulfils its duty to provide sufficient funding and resources, and (iv) work with the Commission to help them fulfil their duties under the 2013 Constitution.

**Promote a Rights-Maximizing Judicial Interpretation of the Bill of Rights**

Civil society can work to educate judges, lawyers, policy makers and human rights advocates on how to best interpret the 2013 Constitution to maximize protection for human rights. The section of this paper on understanding the Bill of Rights showed how courts can best interpret the Bill of Rights to give the widest scope to its protections. For example, courts can give a broad and full content to rights by interpreting them to be consistent with international human rights instruments. Courts can also interpret ‘necessary’ restrictions under section 6.5 to mean only those necessary in a democratic, secular and rights respecting state. By educating judges, lawyers and human rights advocates about a positive human rights interpretation, CCF can contribute to making the best out of the 2013 Constitution and its Bill of Rights.

**Extend Rights Protection to Women**

The 2013 Constitution does not include specific rights for women. This can be remedied in two ways. First, and more difficult, the Constitution can be amended to include a specific right to protect women. Any amendment will be extremely difficult, so this might not be a realistic option at the moment. The second solution is to promote a special law, such as a Women’s Right Act, that Parliament could pass to protect the rights of women. Neither Australia nor New Zealand have constitutional bills of rights, but they do have special laws that protect some rights (the Racial Discrimination Act and Human Rights Act, respectively). While not as powerful as a constitutional right, a right in a statute can still be an important tool to protect human rights.
Understanding the 2013 Constitution: A Perceptions Survey
EXECUTIVE SUMMARY

On September 6, 2013, Fiji promulgated its fourth Constitution following the military backed government’s rejection of an earlier draft by international constitutional consultant Professor Yash Ghai and a change to the consultation process. The 2013 Constitution provided Fiji’s transitional roadmap to the 17 September, 2014 general elections and beyond. It was translated into Fiji’s main vernaculars and braille and was widely disseminated in communities around the country.

The 2013 Constitution met swift criticism for its formulation process and limiting provisions from political parties, a select group of Fijian chiefs and Non-Government Organisations (NGOs). The main point of contention was that the Constitution was assented to with minimal public consultation, an exercise deemed necessary to ensure a sense of ownership that will last the test of time. These competing claims have the potential to heavily influence public discourse, including voting behaviour during the September 17 general elections and into the post-election period.

This survey is premised on the Citizens’ Constitutional Forum’s (CCF) interest in exploring and documenting citizen’s perceptions and sense of ownership of the Constitution. The results can be used as a snapshot of views and opinions of people at this time in Fiji’s history to inform work on citizenship education, good governance and sustainable democracy. The survey involved 275 participants in ten locations throughout Fiji using one-on-one interviews based on a structured questionnaire. The interviews allowed participants to freely share their views on the 2013 Constitution, specifically on their (i) involvement in the Constitution consultation processes (ii) understanding of certain aspects of the Constitution (Rule of Law, Bill of Rights, Immunity Clause and “Claw Back Clause”) (iii) understanding of the role of the security forces and (iv) thoughts on how citizens can make the 2013 Constitution work.

The survey found that the majority of participants were not involved in either the 2012 or 2013 Constitution consultation processes. In 2012, 16% (n=43) participated in the Constitution Commission’s consultation led by Professor Yash Ghai with only 5% (n=13) doing so in the Government led process in 2013. Only 2% (n=6), participated in both the processes. Reasons for people’s non-participation varied from conscious political decisions to political apathy. Despite the government’s position that the two processes were continuous the majority of participants viewed them as different.

Reasons for people’s non-participation varied from conscious political decisions to political apathy. Despite the government’s position that the two processes were continuous the majority of participants viewed them as different.

The survey found the 2012 process was identified as inclusive while the 2013 process was deemed undemocratic. Thirty eight percent (n=104) felt that they did not know enough about the two processes to identify if they were the same or different. On the whole this demonstrates the challenge that lies in meaningfully including people in discussions about issues that affect their lives.
The survey found that the majority of participants (75%, n=207) felt they knew something about the Constitution. However, this knowledge was not derived from reading the Constitution as 64% (n=176) of participants indicated that they had not read it and 17% (n=46) indicating that they had only partly read it. Reasons for not reading or partly reading the Constitution varied. These include not having a copy of the Constitution, disinterest in politics and perceptions about its ‘illegal’ status and the legal language it contained. For these participants the media, friends and family members became the source of their Constitution related information. The 18% (n=49) of participants who stated they had read the Constitution appeared to have more positive reactions to it, particularly towards sections they identified with, for example equal citizenship and the protection of iTaukei land. According to this group, the main challenge lies in the implementation of the Constitution.

Participant’s knowledge of the different aspects of the Constitution the survey addressed was varied. Some indicated a sound understanding of the Bill of Rights (47%, n=130) and the Rule of Law (47%, n=130). However, a high percentage of people did not understand the Immunity Clause and the “Claw Back Clause”; 78% (n=213) and 92% (n=248) respectively. These clauses are both significant and controversial aspects of the Constitution, whose understanding and implementation have the potential to determine the nature of Fiji’s transition to democracy.

The non-negotiable provisions of the Constitution such as the reduction of the voting age, the size of parliament and a single constituency also received mixed reactions. The majority (67%, n=183) agreed that reducing the voting age to 18 years was good, in general recognizing young people’s maturity. However, many participants who either supported or did not support the reduction of the voting age, raised questions about the motive for this decision and the lack of accompanying civic and voter education. The introduction of a national constituency recorded the following responses; good (38%, n=103), don’t know (32%, n=89) and not good (20%, n=55). The relative smallness of Fiji as a country and the freedom to choose any candidate irrespective of ethnicity were common responses in support of a national constituency. Those who expressed concern highlighted that people in different geographical areas experienced different issues and that the constituency change was part of Government propaganda.

The reduction of the size of parliament was well received by the participants. Forty-three percent (n=119) supported this provision because it reduced costs and would increase parliamentary effectiveness. A smaller percentage (12%, n=32) expressed dissatisfaction with the reduction in the size of parliament. These individuals felt that Fiji’s diversity should be reflected in a larger parliament.

The 2013 Constitution articulates the different roles of the military and the police. More than half (53%, n=146) of the survey participants are aware of this difference. However, 40% (n=109) of the participants feel that the police and the military have the same roles and complement each other. Since 2006, the military has become increasingly involved in civilian matters, influencing participants to perceive that the roles of the police and military have changed. The majority saw
this as taking place through the militarization of the Government and the public service, and the military encroaching on the role of the police while others saw the military as supplementing an under-resourced Police Force. Given these concerns, the civilian and political roles and functions of the military need to be re-evaluated; it is something the stability of post-election Fiji hinges on.

On the whole the survey participants (40%, n=109) were optimistic that the Constitution would take Fiji forward. These comments were linked to infrastructural developments undertaken by the Government and the emphasis on racial equality manifested through the adoption of a 'common' name. Opinions are divided regarding whether the 2013 Constitution will take Fiji forward with thirty-nine percent (n=107) saying they were unsure and 14% (n=39) being pessimistic about the Constitution taking Fiji forward. Reasons for participant's pessimism are rooted in their perceptions that the Constitutional process was non-participatory, it did not protect the interests of the iTaukei and that it contained limitations on rights. It was apparent from the study that those who had read the Constitution were able to understand its provisions and see its flaws. Despite this 67% (n=183) of the participants were optimistic that they could make the Constitution work. Suggestions by the survey participants inform the recommendations of the report. These include:

a. The development of structured and accessible awareness programmes about the contents of the Constitution. Certain provisions need to be demystified for those who are not familiar with legal language.

b. Strengthening the media's role in supporting Constitutional education and discussions. Media impartiality should be encouraged in this process.

c. Conducting Constitutional awareness and dialogue within and across communities. Different ethnic communities need to confront their historical realities and relationships in any discussion of the Constitution.

d. Dialogue with those who do not support the Constitution should be encouraged. It is important that people are aware that the Constitution can be amended legally through parliamentary procedures.

e. Constitutional awareness in the school civic education curriculum.

f. Supporting in-depth research into people’s perceptions and experiences of the Constitution. Many participants found the research process educational and empowering. Research offers them the opportunity to reflect on issues that are important to their lives.

g. Convening a national assembly representing Fiji’s different communities to discuss issues of national significance which, in the absence of local constituencies, can serve as a bridge between the people and parliament.
1.0 INTRODUCTION

On September 6, 2013, the Fiji Government ushered in its fourth Constitution since gaining independence in 1970. On the occasion of the promulgation of the 2013 Constitution, the Prime Minister, Voreqe Bainimarama asserted that “for the first time, Fiji meets the test of a genuine democracy that upholds the legal and moral basis of a common and equal citizenry without losing individuality or culture” (Fiji Government Online, 2013). The Prime Minister also proclaimed that the 2013 Constitution laid the foundation for Fiji’s return to parliamentary democracy following the September 2014 general elections.

Historically, Fiji’s political instability, largely the result of the first coup in 1987, has resulted in a situation in which Constitutions have been abrogated because they do not legitimise usurpers. The 1997 Constitution is a case in point, abrogated in 2009 following the Fiji Court of Appeal’s judgement about the unconstitutional status of the Voreqe Bainimarama led Government (Constitutional Commission, 2012). Fiji was then governed without a Constitution until September 2013 when a new Constitution was assented to by the President, Ratu Epeli Nailatikau.

Constitutions and the constitution making process are important elements for societies transitioning from military backed rule to parliamentary democracy. They offer the opportunity for citizens to “create a common vision of the future of a state, the results of which can have profound and lasting impacts on peace and stability” (CCF, This Volume: Transitional Processes). The Fiji Constitution making process commenced in early 2012 with this vision in mind, as echoed in the words of the Prime Minister that, “we can study together, we can live together as Fijians. We are one nation. And I ask every Fijian to keep this in mind…as we embark upon the Constitutional formulation process…that will be relevant to a new and modern Fiji” (Fiji Government Online, 2012). A feature of this exercise was the inclusion of non-negotiable ‘democratic’ values and principles.

Despite this optimism, the Constitutional development process was surrounded with much controversy and the 2013 Constitution receiving much criticism (CCF, 2013; Fraenkel, 2014). The perceived lack of, or absence of, a consultative process appeared to be the main reason for discontent with the Constitution. As a result Fiji’s Constitution risks “…neither [being] owned nor seen as legitimate by the people of Fiji” (CCF, 2013:10). The predicament that lies with the hope in the 2013 Constitution and reservations about its limitations has been a constant topic of conversation both locally and internationally. The Citizens’ Constitutional Forum (CCF) recognizes the need to document these conversations, to capture people’s perceptions and their sense of ownership of the 2013 Constitution. As a result the CCF, through its constitution monitoring project, commissioned this perceptions study to better understand the thoughts of Fiji citizens on the 2013 Constitution and its processes and to identify what needs to be done to ensure that it takes Fiji forward.

This research is influenced by CCF’s work in communities that focuses on the Constitution, human rights, good governance and democracy. The focus of CCF on ‘Empowering citizens through education on good governance and human rights’ (Pillar 1), ‘Facilitating a sustainable democracy through active citizenship’ (Pillar 2) and ‘Advocating for a Constitution that guarantees
human rights and democracy’ (Pillar 4) provide the rationale behind this research and the areas covered by it.

The Perceptions Survey had the following objectives:

i. to determine the level and nature of people’s involvement in the 2012 and 2013 Constitution consultation processes

ii. to identify people’s understanding and perceptions of certain aspects of the Constitution

iii. to determine the understanding people have of the role of the security forces

iv. to present the thoughts of citizens on the implementation of the 2013 Constitution.

This research, and its objectives, is a direct result of CCF’s vision for:

*A nation where Fiji’s citizens live together in equality, justice and peace, respecting the rule of law, under a Constitution that guarantees democracy and human rights.*

The Perceptions Survey is conceptualized around the ideas that Constitutional development must include meaningful participation and inclusivity. These reflect international constitution making best practices that make sure citizens have the right to be informed and to contribute meaningfully to the constitutional development processes. It is argued that adherence to these standards legitimises the constitution making process and leads to wider acceptance of the constitutional document and its future success.

This study was conducted in 10 areas around Fiji and involved 275 participants. The results of the survey present a snapshot of the thoughts of ordinary Fijian citizens about the constitution making process and some of the provisions of the 2013 Constitution. The main findings suggest that participants made distinctions between the 2012 process that led to a draft constitution which was rejected by the government and the 2013 consultation process that was considered less participatory compared to the 2012 exercise. In general, participants are hopeful that the Constitution will take Fiji forward despite its shortcomings. The Constitution, for many, is tied to the stability and security, identity and relationships between Fiji’s different communities and groups. A concerted effort will need to be devoted to ensure that the different sectors are aware of the provisions of the Constitution that affect their lives as well as how they can contribute to making it work.

The report is divided into three main sections: the road to the 2013 Constitution, the research methodology and the results. The results section is further divided into four parts, covering the different aspects of the survey. The next section of the report provides a brief overview of the sequence of events that led to the 2013 Constitution, beginning with the Constitution consultation process.
2.0 THE ROAD TO THE 2013 CONSTITUTION

2.1 The Consultation Process

The road leading to the adoption of the 2013 Constitution was facilitated by decrees and can be divided into two major phases. The first phase was guided by the Fiji Constitutional Process (Constitutional Commission) Decree 2012 (Decree 57 of 2012) and the Fiji Constitutional Process (Constituent Assembly and Adoption of Constitution) Decree 2012 (Decree 58 of 2012). In short, Decree 57 established and outlined the mandate of the Constitutional Commission whilst Decree 58 stipulated the formation and role of a Constituent Assembly, whose role was to debate the draft Constitution and the accompanying explanatory report, culminating in the adoption of the Constitution. The second phase can be identified by the government’s denouncement of the Constitution Commission’s draft Constitution and subsequent processes thereafter facilitated by amendments to Decree 58 which resulted in the draft and promulgation of the 2013 Constitution.

The work of the Constitution Commission commenced in March 2012, with the mandate to develop a draft Constitution reflective of people’s aspirations and the creation of true democracy, which also included ‘non-negotiable’ principles and values. The Constitution Commission carried out its role with zeal, contributing to public awareness of the constitution consultation process and the importance of constitutions to nation building as a whole. They travelled widely to consult and received submissions from Fijians throughout the country. The Commission’s draft Constitution reflected the more than 7000 submissions received from individuals and organizations.

This draft was discarded by the Government and the Constituent Assembly that was to debate the draft was subsequently rescinded by the Government (CCF, 2013). Instead the Government amended Decree 58 twice to facilitate work on its own draft version of the Constitution and made the ‘people’ of Fiji the Constituent Assembly (Fiji Government Online).

After presenting its draft Constitution in March 2013, the Government allocated two weeks for public submissions and feedback. The deadline was later extended to May 2013. In total, 1093 written submissions were received, much lower compared to those received by the Constitutional Commission. None of these submissions were made public, in contrast to the Constitutional Commission which published the majority of submissions it received on its website (CCF, 2013).

2.2 The Content of the Constitution

Following the assenting of the Constitution in September 2013, the Government swiftly publicized and disseminated copies. This was intended to ensure that citizens were informed of  

1 The non-negotiable principles and values are: a common and equal citizenry; a secular state; the removal of systematic corruption; an independent judiciary; elimination of discrimination; good and transparent governance; social justice; one person, one vote, one value; the elimination of ethnic voting; proportional representation and the voting age of 18 years (Fiji Government, 2012)  
2 Decree 58 was first amended on January 10, 2013 allowing the President, in consultation with the Prime Minister, to make changes to the Constitutional Commissions draft before forwarding it to the Constituent Assembly (Radio Australia, 2013a). The second amendment was made on March 21, 2013 to introduce the government’s draft Constitution (Radio Australia, 2013b)  
its contents, which according to the Prime Minister, “enshrines principles that are at the heart of all great liberal democracies – an independent judiciary, a secular state and a wide range of civil, political and socio-economic rights” (Fiji Government Online, 2013). The Constitution was made available in the vernaculars4 including a braille version for the visually impaired.5 The Fiji Ministry of Information reported that the Constitution was well received in communities where it was distributed. Sentiments of this nature were expressed by village elders, “we are grateful to the Bainimarama Government for providing us with the copies of the new Constitution in the iTaukei language….it protects the rights of every Fijian and it also recognizes the rights of children, senior citizens and persons with disabilities.”6 While positive sentiments like these appeared plentiful, the Constitution was not promulgated without criticism.

The 2013 Constitution was criticised for its formulation process and limiting provisions (CCF, 2013). The lack of meaningful participation and transparent decision making during the process of drafting the Constitution raised questions about how representative the contents were of the people’s wishes. The Constitution drew criticism from individuals7, Non-Government Organisations (NGOs), political parties8 and particular groups within the Fijian chiefly structure.9 Aspects of the ‘non-negotiable’ principles and other provisions of the Constitution which include, but are not limited to, the Bill of Rights, matters pertaining to land and the new electoral system are concerning for critics of the Constitution. The main argument is that there was minimal public consultation, an exercise that is necessary to ensure that the Constitution supports a sustainable democracy.

2.3 The Implementation of the Constitution

The 2013 Constitution was assented to with much optimism by the Government. On this occasion it was hailed as meeting acceptable international standards. The Constitution was drafted with inbuilt provisions of “super-majorities in both Parliament and a referendum” that safeguards it from amendments (CCF, 2013:9). Political parties’ response to this and other controversial provisions suggest that the Constitution is being implemented with a heavy handed approach. The statements by major political parties such as the Fiji Labour Party (FLP) and the Social Democratic Liberal Party (SODELPA) that they would amend the Constitution if they are elected into government10 directly challenges the implementation of the Constitution in the aftermath of the September 2014 general elections. Constitutions will work with the cooperation of citizens and their goodwill to protect it. Whether this will happen in the case of Fiji remains to be seen. Listening to people’s perceptions about the 2013 Constitution may offer an insight into how it could be made to work and how support for “constitutionally mandated laws and institutions that enhance democratic engagement” (CCF, This Volume: Transitional Processes) can be encouraged.

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3.0 CARRYING OUT THE PERCEPTIONS SURVEY: METHODOLOGY

A perceptions survey is a research approach that engages participants in order to learn their thoughts, feelings and opinions about an issue, phenomenon or programme. To support the focus of this study, the CCF used a structured questionnaire in an interview format conducted by three research assistants. The structured questionnaire (see Appendix 1) asked participants about their involvement in the 2012 and 2013 constitution making processes; their understanding of the contents of the Constitution; as well as their thoughts on the implementation of the 2013 Constitution. Research assistants gained oral consent (see Appendix 2) from participants prior to the interviews. The survey’s emphasis on confidentiality offered many participants the confidence to be involved.11

Delivering the questionnaire in an interview format allowed the research assistants to explain questions and clarify responses when necessary. The decision to use a structured questionnaire guaranteed that all respondents were asked the same questions while the interview format allowed them enough freedom to ask questions of the research assistants and offer additional thoughts. Using the interview format and allowing for one-on-one dialogue let people to share their experiences easily and in their own words. This process offered a more personal approach to collecting information on an issue that most people felt they were excluded from or that they did not understand well enough during the constitution consultation processes.12

Throughout this report the ‘voices’ of the survey participants are expressed in various forms. Long and short quotations, as well as text boxes containing larger quotes, have been used to maintain authenticity and allow the speakers the freedom to share their experiences in their own words. The identities of participants have been protected by using pseudonyms. Figures and tables are included to provide a more general sense of participant responses. Where percentages are used, the actual number is also provided. For instance 23% (n=64) of participants were from Labasa, ‘n’ (number) tells us that there were 64 participants from Labasa. This allows us to avoid misleading statements and allows the reader to keep the numbers and comments in perspective.

3.1 Locations Visited

The research team covered ten locations: Ba, Korovou, Labasa, Levuka, Nadave, Navua, Nayavu, Savusavu, Suva and Taveuni. These locations were chosen by CCF on the basis of their on-going work in these areas, however no constitutional education work had been conducted in the areas prior to the Perceptions Survey. Funding constraints also limited the number and spread of locations that could be included. The ten locations were identified in consultation with CCF’s education team, provincial offices and community coordinators. Ultimately, communities that were interested in, and had requested, CCF workshops were included in the research. While this

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11 “Once we stressed the confidentiality aspect of the answers, that CCF was an independent human rights organization, that they could be anonymous in their responses and could stop the interview where they felt they needed, to – there was much more interaction and trust and clarity.” (Field Researcher 1)

12 According to Field Researcher 1, “A few [participants] felt the nature of the topic (Constitution 2013) was slightly remote from them, but once we explained that they, as individuals, were the focus of it - the people - and it was something that governed them, they found themselves talking in no time.”
was done to counter funding and resource limitations, and for ease of access into communities, researching only communities with existing links to CCF could be seen to present a bias. From the study, however, it is evident that these communities have minimal knowledge on the Constitution, thus putting to rest concerns about CCF’s influence on participant’s understanding of the Constitution in the study locations.

The research team travelled with the CCF education team who were conducting constitutional workshops in the various locations. For the most part the research team interviewed the participants in the constitutional workshops prior to the workshop being held. Where this was not possible, interviews were scheduled with individuals not involved in the workshops through organisations that worked in the area. These organisations would approach individuals regarding the research on behalf of CCF.

Figure 1 shows the number of participants by gender and location. One hundred and sixty-two males, 103 females and ten transgender individuals participated in this survey. The majority of the participants (23%, n=64) came from Labasa, the other locations averaged around 20 to 30 participants. The reason for the inflated number of participants from Labasa is linked to the longer period of time (from Saturday to Saturday) that the researchers had in this location and that all three research assistants were on hand to share the work load. Levuka recorded the lowest number of participants (16%, n=6) due largely to the town being the first location for the interviews and only having two research assistants available over a four day period to conduct interviews. The research assistant’s reflective experiences of field work ensured that the team was better prepared for every subsequent field visit. For example, many interviews had to be
conducted when participants were free, usually after work hours, often after dinner time and during *yaqona* sessions. The research assistants also visited individuals in their homes during the afternoons and late evenings, working around the times when people were available and willing to gather and talk freely.

The constraints in the conduct of this research leading to a sometimes uneven geographical spread of participants should be kept in mind when analysing the results of this survey.

### 3.2 Research Participants

While the locations for this survey were targeted, the age, gender, and ethnicity of participants were not. A direct result of targeting the specific locations (predominantly iTaukei communities) meant that the survey included greater numbers of iTaukei respondents (64%, n=175). A consequence of this was that 75% (n=207) of the respondents were Christians. Indo-Fijians contributed to 26% (n=71) of the sample. Part-Europeans, Banabans, Chinese and Rotumans were categorised as ‘Others’ and made up 10% (n=27) of the sample. Eighteen to 35 year olds accounted for half of the survey participants (50%, n=138), 37% (n=103) were between the ages of 36 and 55 years. The sample also included a small percentage of people over the age of 56 years (9%, n=25) and 1% (n=2) under the age of 18 years.\footnote{3% (n=7) of the respondents did not wish to indicate their age.}

![Figure 2: Participant occupation by industry](image-url)

The majority of the participants had a level of education of either secondary school (48%, n=132) or tertiary (36%, n=100). Only 2% (n=6) participants indicated receiving vocational training and 9% (n=24) identified attaining only primary education. Figure 2 shows participants...
by occupation. The most common occupations were farmers (18%, n=49) and those involved in domestic duties (16%, n=43). This is fairly reflective of the mostly rural locations that were included in the research. Students also comprised a sizable portion (15%, n=41), unsurprising due to the large number of 18 to 35 year olds who participated.

The uneven spread of age, gender and ethnicity of participants due to logistical and funding constraints should be kept in mind when analysing the results of this survey.

4.0 THE RESULTS

4.1 Have you read the 2013 Constitution?

Prior to delving into the more substantive questions of the research, participants were asked about the degree to which they had read or engaged with the 2013 Constitution. While not everyone who participated in the research had read the Constitution, many people were able to get information regarding the Constitution in other ways: “I have never read the Constitution but I always follow the discussion in the media about the Constitution”\textsuperscript{14}, “I have not had access to it. All I have heard about it is in the media”\textsuperscript{15} and “I’ve just heard about it from people.”\textsuperscript{16} Whilst the media was informative about the Constitution, restrictions on the media and self-censorship since the last coup in 2006 has resulted in an often uncritical presentation of the Constitution. Participants’ knowledge of the Constitution derived from the media may therefore be partial.

![Figure 3: Participants who have read the 2013 Constitution by level of education](image)

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<td>Tertiary</td>
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\textsuperscript{14} 28 years old, male, iTaukei, Suva  
\textsuperscript{15} 35 years old, male, Others, Suva  
\textsuperscript{16} 26 years old, male, Indo-Fijian, Navua
The majority of the participants had not read the 2013 Constitution (64%, n=176). Only 17% (n=46) of the participants had partly read the 2013 Constitution and 18% (n=49) answered yes to having read the Constitution. Figure 3 indicates that participants with tertiary or secondary school level of education were generally those who had read the Constitution. This is consistent with the qualitative responses where participants suggest that the document was difficult to read and understand: “it’s too technical, but I understand the rights part”\(^{17}\), “I do not have any thoughts on it, being someone that doesn’t understand legal language”\(^{18}\), “not really sure what it meant, because the vocabulary was hard to understand”\(^{19}\), “it is too small, it is written in a way that is too complicated and I am not interested in reading complicated statements like that”\(^{20}\) and “it’s too thick. I do not understand it.”\(^{21}\)

Other reasons participants gave for not having read the Constitution included not having access to a hardcopy of the Constitution booklet, “there is no Constitution booklet on the island”\(^{22}\), “I work late most of the time and copies were not distributed to us. We have heard about it but have not seen it”\(^{23}\), “I do not know where to get a copy”\(^{24}\) and not having had time to read the Constitution.

Participants also expressed not being interested: “I have the blue booklet at home but not interested in reading it”\(^{25}\), “no copy, but I’m not interested anyway”\(^{26}\), “not interested in it, I have more important things to focus on”\(^{27}\), “I have not read it but just heard it on the radio and television, I heard it but I do not care about it”\(^{28}\), “I’m not interested in political stuff”\(^{29}\), “I don’t really associate with politics, I hate politicians”\(^{30}\) and “it does not concern me.”\(^{31}\) Disinterest in the Constitution also reflects the lack of understanding that people have of the purpose of the Constitution and how its contents impact their lives. These comments are also indicative of the perceptions of people towards politics and politicians, an unpredictable political environment and how these negative associations have deterred them from engaging with the Constitution.

There were also participants who refused to read the 2013 Constitution based on their views of how legal and inclusive the process was: “I’m not reading it because it was done by an illegal Government”\(^{32}\), “people’s submissions are not there, it was just a draft and it has been thrown out and this is enforced on the people of Fiji”\(^{33}\) and “I think it is biased because we did not contribute to it.”\(^{34}\) Even with media coverage, community workshops and discussions about the Constitution, the fact that many participants have not read the Constitution raises questions about their ability to comment on this issue.

17 18 years old, female, iTaukei, Korovou
18 25 years old, male, iTaukei, Suva
19 20 years old, female, Indo-Fijian, Nadave
20 23 years old, female, iTaukei, Nadave
21 28 years old, female, iTaukei, Nadave
22 40 years old, transgender, iTaukei, Taveuni
23 38 years old, male, Indo-Fijian, Navua
24 45 years old, male, Indo-Fijian, Ba
25 28 years old, male, iTaukei, Suva
26 40 years old, female, iTaukei, Korovou
27 18 years old, female, Indo-Fijian, Korovou
28 23 years old, male, iTaukei, Levuka
29 26 years old, male, Others, Levuka
30 27 years old, male, iTaukei, Suva
31 24 years old, male, Others, Suva
32 32 years old, male, iTaukei, Savusavu
33 64 years old, male, Indo-Fijian, Ba
34 21 years old, transgender, iTaukei, Nadave
In this study it was evident that participants who were dissatisfied with the situation offered more explanation and insight into their dissatisfaction compared to participants who were satisfied. Participants who read the Constitution and felt that it was generally a good Constitution were less likely to explain why they felt this way. It is useful to keep this mind to maintain perspective when reading the comments of participants, which at some points, may seem increasingly negative.

“Anyone that is there [in Government], they should represent the country. If the country is good, everyone will be good. When the 1997 Constitution was drafted a lot of educated people were there in the Reeves Commission. There was a lot of consultations, if some clauses were wrong, they should have taken them out but not throw the Constitution away like that. This Constitution will not take the country forward. People do not know much of this Constitution. People in big chairs, they do not know much of the Constitution. Taking the country forward, everyone should feel that this country is theirs. They should feel that they are secure here and their children as well. At the moment, people feel that they are not secure here.”

(Jagdish*, 47 years old, Male, Indo-Fijian, Canecutter, Ba)

*The name used here is a pseudonym

4.2 The Constitutional Making Processes

“I didn’t take part because I didn’t know how to give in a submission.”

The constitutional making process can be divided into two phases. The first phase began in 2012 and involved the work of a five member Constitutional Commission chaired by Yash Ghai, an internationally renowned constitutional scholar from Kenya. Other members of the commission included locals Taufa Vakatale, Peni Moore and Satendra Nandan and South African, Christina Murray. In responding to the government’s call for a fully participatory process, the commission consulted widely, following a period of civic education from May to August 2012. By December 2012, a draft Constitution was formulated from the over 7000 submissions received from individuals and organizations both locally and from the diaspora. A test of the participatory nature of the constitution consultation process and people’s willingness to be involved can be ascertained, as seen in the next section, by asking members of the public if they made submissions or were part of the process of developing and making group submissions.

4.2.1 The 2012 Constitutional Making Process

Only 43 participants (16%) of the 275 survey participants took part in the 2012 constitution making process. Those who took part in this process were mostly between the ages of 18-35 years old (7%, n=19) and 36-55 years old (6%, n=18). The main reasons that people gave for participating in the 2012 process was due to their personal interest in the process and because

31 years old, female, iTaukei, Nayavu
they viewed their participation as part of their civic duty: “it is the future of our nation and our well-being”36, “because it is my right as a citizen”37, “we are living in this country, we were born here, we want to see that there is a good position for everybody so that this country can move forward”38 and “the belief that as a young person, if I take part and submit my thoughts, my voice and my thoughts will be taken into account.”39

Survey participants identified three common reasons for not taking part in the Constitution consultation process. Firstly, some were unaware that the consultations were taking place. Secondly, many were uninterested in the process. Thirdly, individuals who were working (either formally or informally) and students who were attending classes during the day missed out on participating in the process as the consultations were held during the day: “I feel the processes were in place [for people to take part] but maybe the timeframe for people to access the process making was not very inclusive but the content [of the 2013 Constitution] is pretty much as is the will of the people.”40

The draft Constitution prepared by the Fiji Constitutional Commission (FCC) was rescinded by the Government shortly after it was formally accepted. According to the President, Ratu Epeli Nailatikau 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).41 Following this, the Government was mandated to develop its own draft and encouraged to incorporate the worthy aspects from the ‘Ghai Draft’. The Government process involved the development of a draft Constitution and public submissions on the draft. In total 1093 written submissions were received. These submissions were not made public. The final version of the Constitution released in August 2013 appeared to have responded to internal criticisms “particularly [in regard to the] protection of indigenous land rights and the concentration of powers” (Fraenkel, 2014). The 2013 Constitution assented to by the President in September 2013 was the result of a tightly controlled Government process with little input from the members of the public.

36 53 years old, male, Indo-Fijian, Ba
37 25 years old, male, Others, Nadave
38 64 years old, male, Indo-Fijian, Ba
39 25 years old, male, iTaukei, Suva
40 35 years old, male, Others, Suva
4.2.2 The 2013 Constitutional Making Process

Even fewer research participants took part in the 2013 process (5%, n=13) compared to the 2012 process (16%, n=43) (see Figure 4). The ages of the individuals who took part in the 2013 process were quite evenly spread across three age categories: 18-35 years (2%, n=5), 36-55 years (2%, n=4) and 56+ years (1%, n=3). Those who did not participate in the process offered three main reasons. Firstly, they did not feel that they had adequate information on the 2013 process: “I wasn’t aware of the places where consultations were being held. There were a lot of limitations to accessibility” and “I didn’t take part because the consultation process wasn’t clear, for example the date, time and venue.” Participants were unaware of how to prepare a submission, the venues for submissions and many were unaware of why they needed to take part if they had already participated in the 2012 process.

Secondly, participants questioned the legitimacy of those carrying out the 2013 process: “I feel that the one I took part in [2012] was democratic and the other was not very legal or democratic. Despite the fact that the team went to other communities to get consultations, I still feel that the process was wrong”, “I know that it was led by an unelected government” and “I didn’t take part in 2013 because we already had our submissions [in 2012] and that person was independent. If the person who did the draft was independent, why should the Government come in?” These individuals refused to participate based on their understanding of the ‘legality’ and fairness of the 2013 process.

Figure 4: Participation in the 2012 and 2013 processes by location

42 27 years old, female, iTaukei, Suva
43 59 years old, male, iTaukei, Nayavu
44 25 years old, male, iTaukei, Suva
45 56 years old, female, iTaukei, Suva
46 64 years old, male, Indo-Fijian, Ba
Thirdly, many participants felt disrespected and discouraged by the outcome of the 2012 process: “when I heard that it was burnt, I felt frustrated because it was a waste of time, money and effort…The youths, we gave our views and thoughts in the 2012 one and we thought that it is going to be heard but it did not”\(^{47}\), “it was a waste of time for everyone who took part because the Government just got rid of it. I feel that it was very unfair to the public. We were consulted in the first process, the second felt as if it was imposed and people were not consulted”\(^{48}\) and “I did not participate [in 2013] because it was of no use. They had already made their decision.”\(^{49}\) These emotions coupled with the questions of whether the 2013 process was legal and credible deterred individuals from participating.

### 4.2.3 Comparing the Two Processes

“In 2012 there were submissions. In 2013 I remember that it was harsh in a way that they brushed aside the one that was submitted by the nation and they just went against the will of the nation by doing something that is on their own agenda.”\(^ {50}\)

When describing the differences between the 2012 and 2013 processes, the most common themes and words were “inclusive” and “democratic” and “not inclusive” and “undemocratic.” Of the 124 participants who explained their views on the differences between these two processes, 25% (n=31) felt that the 2012 process was inclusive of citizens and the voices of citizens, 4% (n=5) felt that the 2012 process was a democratic process. Seventeen percent (n=21) of these participants felt that the 2013 process was not inclusive and 11% (n=14) felt that it was undemocratic. These comments make it easy to see why 32% (n=87) of participants saw the 2012 and 2013 Constitution processes as separate. This standpoint is somewhat different to the Fiji Government’s position, that views the two processes as a continuous one. In the words of the Prime Minister,\(^ {51}\) “the Government’s legal team will amend the Ghai Draft to ensure that the draft Constitution presented to the Constituent Assembly\(^ {52}\) is one that is positive; addresses fundamental issues of good governance; will result in an enduring Constitution and guarantees true democracy.”

Only 13% (n=36) of the individuals in the study felt that the 2012 and 2013 processes were continuous. These individuals suggested that the process was continuous because, ‘they are still talking about the same thing’ and ‘it led to the same document, the 2013 Constitution.’ A large number of participants (38%, n=104) felt that they did not know enough about the two processes to differentiate between them or identify if they were separate or continuous.

\(^{47}\) 27 years old, female, Others, Suva
\(^{48}\) 26 years old, female, Others, Suva
\(^{49}\) 30 years old, male, iTaukei, Navua
\(^{50}\) 28 years old, female, iTaukei, Nadave
\(^{52}\) The Constituent Assembly was not convened as a direct result of the amendment to Decree 58
Only six research participants (2%) took part in both the 2012 and 2013 processes. These participants gave the following reasons for taking part in both:

“"In 2012 I took part because I wanted the 1997 Constitution to be abolished because some of the laws were not accommodating for us people living in the villages. In 2013, while attending the Constitution National Consultation we were informed that some of our submissions were not allowed. We asked why it was not allowed but our questions were not answered so we submitted again."”

“I took part in both because I supported what they were saying in both.”

“"Because this Government is doing good things compared to previous governments."”

“I did not want this Constitution to be racial. This Constitution was very clear but Mr Ghai tried to force a religion, Methodist, to be the religion of Fiji.”

“I wanted the Constitution to be a success. I took part again in 2013 because it was even more consultation, more chances to take part in the consultation process.”

“I was seeing that this Constitution could lead us to be a Muslim country which can lead us to be terrorists. I was objecting a lot on Fiji becoming a secular state. There are a lot of things that this Government is depriving us from for example iTaukei affairs. They really want to demolish the iTaukei rights that’s why took part all the time.”

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53 32 years old, male, iTaukei, Levuka
54 53 years old, female, iTaukei, Labasa
55 46 years old, male, iTaukei, Labasa
56 Age not specified, male, Indo-Fijian, Ba
57 56 years old, male, Indo-Fijian, Labasa
58 51 years old, male, iTaukei, Nayavu
“I’ve read bits and pieces of it [2013 Constitution]. It is actually a pretty good, especially your Bill of Rights provision. That's pretty good. It has a lot of things that was not provided from the 1997 Constitution. This one is not a bad Constitution. My only problem is that it was not imposed by us but it was imposed on us. It was imposed by the Regime. The Yash Ghai process there was a lot of wide consultation. They went around. I think that they attempted to be fair as they could with minimum interference from the Regime. I made a quick submission via email. All I know was that the Ghai people brought in their Constitution. These people [Government] decided that they did not like it and they threw it out and they said we will provide you with a new Constitution. And then they produced a new Constitution. My submission was that regarding the qualification of judicial officers and basically what I asked, they included in the draft Constitution, and then it was burnt. It is very important for any functional society to have a judiciary that is independent and impartial at work and that is willing to stand up to other arms of government, even if it is a military government. Before the Ghai process, Government said that the citizens of Fiji are going to have a new Constitution, so this is your time to have your say. And I did have my say, so did other people. Many thousands of people that had their say and views that were taken into account by the Ghai group, obviously the people with power did not agree with it. Ask the people – so having taken part in the first one, the people's process, why should I take part in the second one? Just to legitimize the second process? No, I don't think so! I think it [2013 Constitution] will take Fiji forward to the next elections. Because if we do not accept it, there will be Military dictatorship for another five to six years. We will all keep quiet, we accept it, we give it lip service the way Government gives our rights lip service and maybe we will go to elections.”

*Roshni*, 40-50 years, Female, Indo-Fijian, Lawyer, Suva.

* The name used here is a pseudonym

PART 2: THE CONTENTS OF THE CONSTITUTION

4.3 The Constitution and its Provisions

“I feel good about it [the 2013 Constitution] and we want it to be the final Constitution for this country. We have a very good Government at the moment and people are doing what needs to be done. That is why we see Fiji is going forward. People should unite, be one and move forward.”

The 2013 Constitution contained non-negotiable principles and values which according to the Prime Minister Voreqe Bainimarama reflects characteristics of a genuine democracy. It abolished voting on ethnic lines with the intention of creating a common national identity. The Constitution received mixed reactions both locally and internationally but the test of its ‘acceptance’ lies in people’s understanding of the Constitutional content and the commitment in the new Parliament to ensure that constitutionally mandated laws and institutions are

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59 45 years old, male, Indo-Fijian, Ba
implemented (CCF, This Volume: Transitional Processes). This is critical, particularly when some aspects of the Constitution appear to limit and infringe upon the very principles upon which it was purported to be established. The CCF was particularly interested in four specific areas of the Constitution: the Rule of Law, the Bill of Rights, the “Claw Back Clause” and the Immunity Clause as these areas are directly linked to CCF’s work.

4.3.1 What is a Constitution?

Seventy-five percent (n=207) of the participants felt that they understood what a Constitution is. The most common descriptions were: law, guidelines, rules and regulations. Of the 207 participants who felt that they understood what a Constitution is 65% (n=135) identified the Constitution as a “law” (a law that governs the country and the government, a high law or supreme law). Their responses included, “it is a law made for the iTaukei”61, “the Constitution is the laws set by Government to guide and govern the people”62 and “the highest law of Fiji.”63 Fifteen percent (n=31) felt that the Constitution was “rules and regulations.” A smaller number (5%, n=11) saw the Constitution as a “guideline”, “it’s a guidelines for people and the government”64 and “the Constitution is similar to guidelines.”65 Overall, only 84% (n=173) of the 207 participants who felt they understood the Constitution were able to correctly describe what it was. Incorrect descriptions from those who felt they understood the Constitution included, “in my point of view, information you can get to vote for a new leader”66, “a set of foreign laws and you have to abide by it”67 and “a Government manifesto to save the country.”68 These results indicate a misunderstanding of what a Constitution is and highlight the reality that many people think they understand these basic concepts but do not.

4.3.2 What do you know about Fiji’s Constitution?

“Having this Constitution and one man, one vote, one value is the greatest thing that the Government has done. When you talk about the rules of law, Government has to put down rules into place so that the people will follow it. This is for the people to live peacefully with security and harmony. Thank you Government.”69

The majority of participants (58%, n=158) felt that they did not know anything about Fiji’s Constitution. Only 36% (n=100) felt that they had some knowledge, however their responses were varied and contrasting. These comments included all Fijians being protected under the Constitution, this Constitution having more rights than before, including a common identity and being a Constitution for the iTaukei only. When considering the most common responses of the 100 participants who felt they had some knowledge about Fiji’s Constitution, 27% (n=27) said they knew it was a Constitution that was constantly changing, 11% (n=11) felt that it provided equality for all races, 7% (n=7) thought that it recognised individual rights and 3% (n=3) felt that it was good for development.
“This Constitution has embraced all the people because when this Constitution was formulated it has gone through a number of processes and people have been invited to be part of it to be contributed to what should be in the Constitution. It is a Constitution that has been endorsed by the majority of people in Fiji.”

Generally, survey participants appear to have a narrow understanding of the Constitution whilst others were more knowledgeable on some parts of the Constitution than others. The following section presents the findings about participant’s knowledge in relation to specific aspects of the Constitution. These include the

- Rule of Law
- the Bill of Rights
- the “Claw Back Clause”
- the Immunity Clause
- the reduction of the voting age
- the reduced size of parliament
- voting under one constituency
- the role of the military and the police.

### 4.3.3 What is the Rule Of Law?

According to the United Nations Secretary General Report (2004:4), the Rule of Law refers to:

a principle of governance in which all persons, institutions and entities, public and private, including the State itself are accountable to laws that are publically promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well measures to ensure adherence to the principle of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

Almost equal portions of participants felt that they either understood (47%, n=130) or did not understand (50%, n=138) the Rule of Law (see Figure 5). The most common responses from the 130 participants who answered yes to understanding the Rule of Law were that the Rule of Law is a law (35%, n=45), “the name itself explains it, it is the law that has to be followed.” Other responses included the Rule of Law as something that protects people (15%, n=20), it is a set of

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70 60 years old, male, Indo-Fijian, Savusavu
71 18 years old, male, iTaukei, Ba
rules (14%, n=18) and it is the same as the Constitution (11%, n=14). Of the 130 individuals who felt that they understood the Rule of Law, only 77% (n=100) were able to correctly define or describe the Rule of Law. The majority of those who described the Rule of Law incorrectly indicated that the Rule of Law is the Constitution; that they are the same.

4.3.4 What is the Bill Of Rights?

A Bill of Rights is a central pillar of democratic societies that recognizes and protects the civil and legal rights of its citizens. The 2013 Constitution, in addition to civil, political and legal rights, for the first time provides socio-economic rights. At the same time the Constitution has been identified to omit “the rights of women, cultural or linguistic rights and iTaukei customary rights” (CCF, 2013). When asked about their understanding of the Bill of Rights, more participants feel that they do not understand the Bill of Rights (55%, n=154) compared to those who feel they do understand the Bill of Rights (43%, n=117) (see Figure 6). One respondent asked, “is it [the Bill of Rights] to do with money?”

Of the 117 participants who answered yes to understanding the Bill of Rights, 89% (n=104) explained the Bill of Rights as ‘our rights’ in particular our individual and human rights, “those are rights given to an individual living in a nation…rights to an attorney, basic right to life, right to proper services by government” and “it is a set of rights which discussed about equality of any race or any kind, everything is there.” A total of 85% (n=100) of the 117 individuals who felt they understood the Bill of Rights were able to correctly describe the Bill of Rights.

Participants had a better understanding of the Rule of Law and the Bill of Rights compared to the more specific clauses in the Constitution such as the “Claw Back Clause” and the Immunity Clause.

4.3.5 The “Claw Back Clause” and the Immunity Clause

The 2013 Constitution contains two clauses that appear to undermine the transition to a sustainable democracy. Firstly, the “Claw Back Clause”, which refers to section 6.5c of the 2013 Constitution which allows any right in the Bill of Rights to be limited if the limitation is (i) necessary; and (ii) prescribed by, or by actions taken under the authority of, a law. This is an extremely low threshold,

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72 41 years old, male, Indo-Fijian, Navua
73 27 years old, male, iTaukei, Nadave
74 29 years old, male, Indo-Fijian, Ba
particularly compared to the requirement that any limitation be ‘reasonable and justifiable in a free and democratic society’, the approach taken in the 1997 Constitution and in many other modern constitutions. This clause is seen to undermine “the whole purpose and architecture of the Bill of Rights” (CCF, 2013). Secondly, the Immunity Clause grants blanket immunity to public officers involved in the Government from December 5, 2006 to the first sitting of the legally elected Parliament (Republic of Fiji, 2013).

The survey found that the majority of participants (92%, n=248) feel that they do not understand the “Claw Back Clause” and only 4% (n=17) indicated that they understood the clause (see Figure 7). Of the 17 who answered yes to this question only eight provided descriptions. Five people (29%) stated that the “Claw Back Clause” was a limit to individual rights, two people (12%) felt that the “Claw Back Clause” was about giving up your land and one person (6%) felt that it was about “reversing something.” Similar results were received in relation to participants understanding of the Immunity Clause.

The majority of respondents (78%, n=213) felt that they did not understand the Immunity Clause (see Figure 8). When comparing the two clauses, the results suggest that more people understand the Immunity Clause (20%, n=56) compared to the “Claw Back Clause” (4%, n=17). The two most common responses of the 56 participants who answered yes to understanding the Immunity Clause were that the Immunity Clause was about pardoning the coup perpetrators and that it was about pardoning criminals in general.

“I think the people who had done something wrong in the past with the view that they should help the country, they should be pardoned and let us move forward. The present constitution, one man, one vote takes care of that.”

75 Age not give, male, Indo-Fijian, Ba

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75 Age not give, male, Indo-Fijian, Ba
Sixty-four percent (n=36) stated that the clause was about pardoning coup perpetrators: “it is about forgiving each other especially those who took part in the coup” and “those that bring down the Government they will get some kind of immunity just to get rid of that offence or something like that. I felt that most of the time when we have coups in Fiji Government provided immunity to those people and it is common as far as this law is concerned.”

In contrast another participant stated that, “it is unfair, in comparing it to those who took part in 2000 coup, they are now all in prison. It is the same. 2000 coup and 2006 coup, they are both coups.”

Views on how people feel about the granting of immunity to coup perpetrators is mixed. There are those who believe that it is unfair and coup perpetrators need to be punished, but there is also a group that feels that they ought to be pardoned so Fiji can move forward, “I think that in order for us to move forward, we cannot keep looking back. So the clause is important for the development of the nation.”

Eleven percent (n=6) thought that the Immunity Clause was about pardoning criminals generally, “it is to do with prisoners, like for them to come back to the community. They are given immunity to come back to the community” and linking the Immunity Clause to the Yellow Ribbon Programme, which is a ‘second chance’ or community rehabilitation programme of the Fiji Corrections Service.

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76 70 years old, male, iTaukei, Taveuni
77 53 years old, male, Indo-Fijian, Ba
78 28 years old, male, iTaukei, Suva
79 35 years old, male, Others, Suva
80 33 years old, female, Others, Ba
81 http://www.corrections.org.fj/pages.cfm/yellow-ribbon/
Figure 9 presents a comparison of participants who said they understood the Rule of Law, Bill of Rights, “Claw Back Clause” and Immunity Clause. These results coupled with the qualitative responses suggest that participant understanding about certain basic components of the Constitution varies. Participants were more aware of the Rule of Law and the Bill of Rights compared to the Immunity and “Claw Back Clause”.

4.3.6 Reduction of the Voting Age

“Sometime back when submissions were taken for the 1997 Constitution, I had submitted that the voting age should be reduced to 18 because at the age of 18 every citizen can contribute to the development of the nation, they pay taxes and have the right to vote.”

A non-negotiable element of the Constitution was the reduction of the voting age to 18 years. When asked about their thoughts of the reduction of the voting age from 21 years to 18 years 67% (n=183) of the respondents indicated that this was a “good” change (see Figure 10).

The responses of the 183 participants who viewed the reduction in the voting age favourably can be categorised into four main statements: (i) 18 year olds have the right to vote (18%, n=17), (ii) 18 year olds are mature enough (27%, n=49), (iii) it allows more young people to get involved and (30%, n=54) (iv) it allows more people to participate (28%, n=52). The participants that felt that 18 year olds have the right to vote were drawing comparisons with the rights that 18 year olds have in other areas of their lives. The general opinion was that if 18 year olds can work, drive and...
have a family, the right to vote should be extended to them: “they are allowed to drive so they can take part in the decision making as well”83 and “at 18 years, the people are married, they have left school and they have the level to work.”84 Twenty-seven percent (n=49) of participants felt that 18 year olds are generally mature enough to take part in voting and decision making.

Many felt that the reduction in the voting age was good because it allowed young people to get involved. This allowed them to become more politically aware and gave them the opportunity to present their ideas: “it’s a good idea because more young people are getting a chance to vote for who they want to lead them in the next four years, they are able to take part because they are the ones who are going to be in the workforce and they are the ones who are going to pay tax, so they have the right to vote”85, “I am happy for that because you are giving an 18 or 19 year old the opportunity to choose their Government because the decisions made by Government affect them as well”86 and “it is a great opportunity for young people to be involved in the decision making of the Government and also for their future.”87

While agreeing that the reduction of the voting age was “good” some participants were sceptical of this move. Twenty-eight percent (n=52) thought that the reduction in the voting age was good, but that it was only done to ‘allow more people to take part’ in the elections: “I think it is to increase the number of voters and to increase votes for the parties.”88 These individuals questioned the motives behind the decision to reduce the voting age.

Others pointed out that while theoretically the reduction in the voting age was a favourable decision, there were not enough mechanisms in place to educate young voters: “as much as I agree, I also disagree in the sense that Government reduced the age but there was no training to empower youths, at 18 you’re still living with your parents”89, “at 18, a lot of them do not know the meaning of voting unless awareness is conducted for them”90 and “it should be put in the curriculum for kids to understand. In overseas countries, classes 1 and 2, they know the Constitution because it is in their curriculum, 18 year olds in Fiji I am sure 100 percent have not read the Constitution.”91 While the point regarding voter education is raised here in relation to the reduction of the voting age, it is also a point that emerges more generally throughout this study where people are asking for more education and awareness on voting, the electoral system and the Constitution.

The qualitative responses of those in the 36 to 55 year category who indicate that the reduction is “not good” (10%, n=20) cite the immaturity of 18 year olds as the reason: “I think 18 years of age is not matured enough”92, “I think 18 years old is not very good because 18 years they are not matured. It should be 21 years old”93 and “I think 21 years is the best age for people to vote. Like 18 years, they still rely on other people; they cannot make their own decisions.”94

83 26 years old, male, iTaukei, Labasa
84 56 years old, male, Indo-Fijians, Labasa
85 21 years old, female, Indo-Fijian, Suva
86 21 years old, male, Others, Nadave
87 29 years old, male, Others, Nadave
88 46 years old, female, iTaukei, Labasa
89 27 years old, male, iTaukei, Nadave
90 55 years old, female, iTaukei, Suva
91 55 years old, female, Others, Ba
92 39 years old, female, iTaukei, Labasa
93 Age not given, male, Indo-Fijian, Ba
94 42 years old, female, iTaukei, Labasa
“Fiji is not ready for this. I think 21 is a better age to vote. At 18, we cannot compare ourselves with overseas countries. 18 year olds overseas are independent and they class themselves as adults. In Fiji’s context young people at 18 are still very dependent on their parents and they still do not know what they are going to do in life.”

Similarly, 8% (n=21) of the 18-35 years old in this study answered that the reduction of the voting age is “not good.” Their answers were consistent with the older respondents: “18 years is still too young, they are still in their teens and they follow what people want them to do. They do not really understand what they have to do” (27 year old), “it is not good. 18 year old thinking is still like a child. They cannot make their own decisions. The age should be 21 or 25 years” (24 year old) and “it’s not good. At 18 we don’t learn politics in school in detail, there’s also more peer pressure” (18 year old).

The general response given to the reduction of the voting age being unfavourable is that participants are sceptical of the reasons behind the reduction: “it is just to increase the number, those 18 year olds are not mature enough,” “18 year olds are not mature enough and are susceptible to vote buying,” “they just want to increase the number of people to vote” and “maybe they think there is not enough people to vote so it is being brought down to those that are 18 years to vote. They are not matured enough to understand the importance of voting unless they are educated.” Many participants assume that the reduction is a ploy by the current Government to secure the votes of the young voters. Many of these views were also identified by young people in the CCF’s study on young people’s democratic participation in Fiji.

4.3.7 Voting under One Constituency

In an attempt to eliminate ethnic voting the Constitution introduced a national constituency. Under this system each registered voter chooses any candidate at the elections. However, such a system does not guarantee that people will not vote along ethnic lines. This system has also been criticised because it will be a costly exercise to organize a by-election should a seat be vacated by an independent member of parliament (CCF, 2013).

The two most common responses to participant views on voting under one constituency were that the change were “good” (38%, n=103) and that they “don’t know” (32%, n=89) (see Figure 11). Participants who felt that the change was good suggested that: “in a small country like us, we should have a smaller system,” “these people have the chance to be responsible for the whole country,” “we have the freedom of choosing a leader freely,” and “it is good because it will take away racism.”

<table>
<thead>
<tr>
<th>Age</th>
<th>Gender</th>
<th>Ethnicity</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>28</td>
<td>female</td>
<td>iTaukei</td>
<td>Nadave</td>
</tr>
<tr>
<td>27</td>
<td>female</td>
<td>Others</td>
<td>Savusavu</td>
</tr>
<tr>
<td>24</td>
<td>male</td>
<td>iTaukei</td>
<td>Nadave</td>
</tr>
<tr>
<td>18</td>
<td>female</td>
<td>iTaukei</td>
<td>Korovou</td>
</tr>
<tr>
<td>98</td>
<td>male</td>
<td>iTaukei</td>
<td>Savusavu</td>
</tr>
<tr>
<td>39</td>
<td>male</td>
<td>iTaukei</td>
<td>Labasa</td>
</tr>
<tr>
<td>52</td>
<td>male</td>
<td>iTaukei</td>
<td>Savusavu</td>
</tr>
<tr>
<td>42</td>
<td>male</td>
<td>iTaukei</td>
<td>Navua</td>
</tr>
<tr>
<td>30</td>
<td>male</td>
<td>iTaukei</td>
<td>Navua</td>
</tr>
<tr>
<td>36</td>
<td>male</td>
<td>Indo-Fijian</td>
<td>Labasa</td>
</tr>
<tr>
<td>32</td>
<td>male</td>
<td>Indo-Fijian</td>
<td>Labasa</td>
</tr>
<tr>
<td>19</td>
<td>male</td>
<td>iTaukei</td>
<td>Suva</td>
</tr>
</tbody>
</table>
Those who indicated that voting under one constituency was “not good” are concerned about their representation in parliament: “candidates are not real representatives of citizens”\textsuperscript{108}, “party mandates won’t be clear. Voters won’t be clear with candidates standing for elections”\textsuperscript{109}, “we have the Central Division and we have a lot of people that live out in the rural areas so our needs and issues are different. One constituency does not give them a fair representation in their community”\textsuperscript{110} and “only a candidate for that constituency will be there to serve that constituency”\textsuperscript{111}. One participant also suggested that change was simply, “a propaganda decision to suit the current government.”\textsuperscript{112} There is a general lack of understanding about how this new system will work and participants remain sceptical of whether the elected individuals will be able to represent them adequately.

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\textsuperscript{107} Age not given, female, iTauke, Levuka
\textsuperscript{108} 50 years old, male, iTaukei, Korovou
\textsuperscript{109} 21 years old, female, iTaukei, Labasa
\textsuperscript{110} 28 years old, female, iTaukei, Nadave
\textsuperscript{111} 53 years old, male, Indo-Fijian, Ba
\textsuperscript{112} 49 years old, male, iTaukei, Labasa
4.3.8 The Reduced Size of Parliament

“If they are able to serve the country well, well and good and on the other hand there is more savings as well. Decisions will be much faster.”

The new parliament comprises 50 members in a single ‘house’. This is a reduction from the 71 member parliament in the 1997 Constitution and there is no Senate. Figure 12 presents the responses of participants on the reduction of the size of parliament.

![Figure 12: Thoughts on the reduced size of parliament](image)

Forty-three percent (n=119) of participants felt that the reduction in parliament size was “good” citing two specific reasons. Firstly, because of the perceived reduction of costs by having fewer people in parliament: “it saves costs for government”\(^{114}\), “good, it saves money and less corruption”\(^{115}\), “its good cost cutting. Fiji is also a small country and 71 members was a lot”\(^{116}\) and “I think for a small developing nation, we cannot afford to have that many people sitting in Parliament, which the tax payers are paying for, so I think that’s a great decision.”\(^{117}\) The second reason was the perception that fewer parliamentarians would result in effective and timely decision making: “it will lessen the debate in Parliament and decisions will be made more easily”\(^{118}\), “it is good. With a big group, there is a lot of talk and disagreement and with that small group, it will be easy to control”\(^{119}\) and “with less people in Government it will be more coordinated.”\(^{120}\)

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113 30 years old, male, iTaukei, Navua
114 50 years old, male, iTaukei, Korovou
115 53 years old, male, Indo-Fijian, Labasa
116 27 years old, male, Indo-Fijian, Labasa
117 35 years old, male, Others, Suva
118 19 years old, male, iTaukei, Suva
119 42 years old, female, iTaukei, Labasa
120 21 years old, female, Indo-Fijian, Suva
The 12% (n=32) who indicated that the reduction was “not good” were concerned about how a smaller number of parliamentarians would adequately represent the people of Fiji: “I don’t agree with it because it does not truly represent the interests of the people”\textsuperscript{121}, “with 50 members I do not think they will look after the country very well. We have our villages, districts and provinces, we should have our own representatives”\textsuperscript{122} and “with the 71 members they did not reach the community, now with the 50 members we do not know whether they can reach the community or not.”\textsuperscript{123} As with the previous questions, the “don’t know” response was quite high. Thirty-two percent of the participants (n=89) felt that they did not know enough about what the reduction in parliament size meant to be able to form an opinion.

4.3.9 The Roles of the Military and Police

The roles of the military and the police are described in Chapter 6 of the 2013 Constitution. The military is entrusted with the role of ensuring the security, defence and well-being of Fiji and its citizens at all times. This expansive role is viewed by certain sections of the community as deliberate and ensures that the military continues to occupy a central place in the governance of the country. Comments made by the head of the Fiji military Brigadier General Mose Koro Tikoitoga like “our job is to protect the Constitution”\textsuperscript{124} reflects this view. The police, on the other hand, are entrusted with the maintenance of law and order, the protection of life and property and the enforcement of laws they are mandated to uphold.\textsuperscript{125} When asked if the roles of the military and police were the same or different, slightly more participants thought that they were different (see Figure 13).

\textsuperscript{121} 23 years old, male, iTaukei, Suva
\textsuperscript{122} 50 years old, female, iTaukei, Suva
\textsuperscript{123} 52 years old, female, iTaukei, Navua
\textsuperscript{124} http://www.islandsbusiness.com/2014/4/cover-story/new-Constitution-is-the-key-says-fijis-new-militar/
\textsuperscript{125} http://www.police.gov.fj/index.php/component/content/article/15-home/203-overview
Just over half of the participants (53%, n=146) felt that the police and military had different roles. Table 1 presents the differences in roles that these participants identified.

<table>
<thead>
<tr>
<th>Role of the Police</th>
<th>Role of the Military</th>
</tr>
</thead>
<tbody>
<tr>
<td>Day to day running of the country (34%, n=50)</td>
<td>National security (55%, n=81)</td>
</tr>
<tr>
<td>Maintaining law and order (39%, n=57)</td>
<td>Peacekeeping (14%, n=21)</td>
</tr>
<tr>
<td>Protect people (11%, n=16)</td>
<td>Take over from the police (14%, n=20)</td>
</tr>
<tr>
<td>Use guns (6%, n=9)</td>
<td>Protect the Government (6%, n=9)</td>
</tr>
</tbody>
</table>

Table 1: Roles of the Police and Military

126 47 years old, male, Indo-Fijian, Ba

Figure 13: Do the Military and Police have the same roles?

“If the police are not doing their work, the military will come in. Why are we putting so much money in the Police if they cannot police the country? They recruit every year but they still need the assistance of the army. Why are we paying them if they cannot do their work? The military is to look after the country from invaders, terrorists and all that. The local people – that is the job of the Police.”
Forty percent (n=109) felt that the police and the military had the same roles, these included maintaining law and order throughout the country and being ready to “serve the people.” Participants viewed the role of the military as one that complemented the work of the police: “when the police cannot do their work, the military does it,” “sometimes when the problem is not solved by the police, the people turn to the military” and “first of all the police are going to take care of us because whatever happens, it will be reported to them. The military comes after them, if anything goes wrong then the military will come.” The ambivalent feeling participants have of the military is based on people’s trust of the military on the one hand and their fear on the other (Boege et al, 2013). Whilst the military has been implicated in Fiji’s coups, its law enforcement role became more prominent since 2006.

4.3.10 Changes in the Role of the Military

Participants were also asked if they thought the role of the military had changed. Figure 14 shows their responses. Half of the participants (51%, n=140) indicated “yes” that the role of the military has changed.

Figure 14: Has the role of the Military changed?

“The military are supposed to protect the citizens of this country but now they are the ones that are beating them up.”

127 37 years old, male, Indo-Fijian, Labasa
128 38 years old, male, Indo-Fijian, Ba
129 38 years old, male, Indo-Fijian, Navua
130 41 years old, male, Indo-Fijian, Ba
131 54 years old, female, iTaukei, Labasa
Table 2 presents the changes in the role of the military as identified by the 140 participants who feel that the role of the military has changed.

<table>
<thead>
<tr>
<th>Changes in the role of the Military</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Military has taken over the role of the police</td>
<td>16% (n=23)</td>
</tr>
<tr>
<td>Military now dominates Government</td>
<td>9% (n=13)</td>
</tr>
<tr>
<td>Military now dominates public office</td>
<td>8% (n=11)</td>
</tr>
<tr>
<td>Military is now more active in patrolling the streets</td>
<td>4% (n=6)</td>
</tr>
<tr>
<td>Military is now more approachable</td>
<td>3% (n=4)</td>
</tr>
</tbody>
</table>

**Table 2: Changes in the role of the Military**

Participants were asked how they felt about these changes in the role of the military. The most common sentiments of participants are encompassed by these responses: “it’s unfair”\(^{132}\), “it is not good”\(^{133}\), “these changes are not healthy for the nation”\(^{134}\), “it is intimidating, it makes people scared. You see military personnel wherever you go, sitting in Government offices, so it’s scary”\(^{135}\) and “I feel scared for my own safety as a trans-woman and as an LGBT gay person here in Fiji.”\(^{136}\)

The changing role of the military is perceived by participants to be significant on civilian and public life. In Fiji’s transition to democracy, the military’s role will require ongoing dialogue to ensure that people’s concerns are addressed. The military will need to win back people’s trust about its ‘role’ in a democratic society.

“I have gone through the 2013 Constitution and the people’s submissions are not there and this Constitution has been enforced on the people of Fiji. We are living in this country, we were born here, we want to see that there are good things so that this country can move forward. In 2012 I was very happy. The discussions during the submission time were in a very friendly way, it was a very open discussion and that was good. I didn’t take part in the 2013 one because I had already made my submission and that person was independent. If the person who did the draft [2012 Ghai Commission] why should the Government come in? I didn’t participate in 2013 because the Attorney-General has already made the Constitution, it was not made by the people. After they [Government] completed the process of making the Constitution then they came to explain to the people but it was of no use because we did not contribute to that. But Ghai was asking for our views because they made any draft, that is the difference.”

*(Semisi*, 57 years old, iTaukei, Male, Farmer, Taveuni)*

* The name used here is a pseudonym

\(^{132}\) 29 years old, female, iTaukei, Taveuni
\(^{133}\) 27 years old, female, Others, Savusavu
\(^{134}\) 34 years old, male, iTaukei, Labasa
\(^{135}\) 26 years old, female, Others, Suva
\(^{136}\) 32 years old, transgender, Others, Nadave
4.4 Implementing the Constitution

The 2013 Constitution is Fiji’s fourth Constitution, how do you feel about this?:

- Fiji is still progressing, that’s why the Constitution needs to change, it is good.
- I feel that the Constitution should change every four years, but I’m not sure whether it is right to keep changing it.
- I’m embarrassed a bit.
- It’s good, change the Constitution every 10 years.
- It is a shame that we keep on changing it, we are not abiding by it.
- By now we should have gotten it right. So we have had four times to perfect the Constitution. By now I would expect that we have ironed out all the things and the things that people wanted to include or exclude from it.
- This one is good because it’s the people’s voice.
- It’s good – previous laws were biased and unfair so it needed to change.
- So much money is spent on the constitution making process and they keep on abrogating it.
- It is a bad sign. There is a lot of corruption in Fiji and the different races cannot work together as one group of people. Those who are born with chiefly status should lead the country and not those that appointed themselves through pen and paper to be chiefs.
- I feel worried because we might choose a new Government which is going to make another Constitution and then there will be another coup.
- It’s good that it changes it keeps up with changes of people’s lifestyles and perceptions of government.
- It’s a positive move, it indicates changes with time.
- Fiji is very young and to have four Constitutions now since independence, that is not good.
- It should not be changed all the time.
- It is unnecessary.
- Not a good thing, previous Constitutions were not respected.
- It’s good, changes are aligned to changes with the time and era, we need more changes to the Constitution for the better.
“When there is a coup, there is a new Constitution”

Fiji’s Constitution begins with the phrase “We the people of Fiji…hereby establish this Constitution for the Republic of Fiji”. According to the CCF (2013) and Fraenkel (2014), such an expression is often used to reflect a meaningful constitutional consultation process. The test of the permanence of the Constitution lies in how citizens approach it; either through goodwill and cooperation or resistance.

When asked if the 2013 Constitution would take Fiji forward 40% (n=109) of the participants indicated “Yes”. Participants offered these comments: “I have seen so many changes especially in the villages, developments have been done and the voices of people are being heard especially in rural areas”

“with the previous governments, we did not change, but with this Government there has been change we can see that they are trying to make our lives better” and “the Constitution has provisions for rapid development.” Their positive outlook was based on the development taking place in the country, which has been linked to the Government and therefore to the Constitution.

“The 1997 Constitution recognised iTaukei as Fijian and other races were labelled which created tension and discrimination. This new Constitution promotes equality which enables teamwork and unity which is very important to take Fiji forward.”

The participants also viewed the national identity provision in the Constitution as a positive element in taking the country forward: “people have become one, we have a national identity as all being Fijians”

“it will take us forward because it is not racial, people are very happy. Everybody is equal, the farmers are working very hard and everyone is working very hard and people are coming here to invest”

and “before it was almost racist and it keeps changing. The current Constitution brings unity despite the background and race.” Others simply stated that they felt the Constitution would take Fiji forward, but this was based on being “hopeful” in their views.

“I would like to request the Government of the day or the Government that is going to come after the elections to have a special team so that we can have people educated so that the Constitution can be effective and reliable as well.”

Interestingly, an almost equal number of participants (39%, n=107) indicated being unsure of the Constitution compared to those who felt that the Constitution would take Fiji forward (see Figure 15). This situation is also reflective of the relatively small group of research participants who had actually read (18%, n=49) or partly read (17%, n=46) the 2013 Constitution.

137 55 years old, female, Others, Ba
138 42 years old, female, iTaukei, Labasa
139 46 years old, male, iTaukei, Labasa
140 19 years old, female, iTaukei, Korovou
141 32 years old, male, iTaukei, Levuka
142 32 years old, male, Indo-Fijian, Korovou
143 Age not given, male, Indo-Fijian, Ba
144 26 years old, male, Others, Levuka
145 52 years old, female, iTaukei, Korovou
146 53 years old, male, Indo-Fijian, Ba
When only considering the 18% (n=49) of participants who have read the Constitution, 34%, (n=17) felt that the 2013 Constitution had the ability to take Fiji forward. This may indicate that those who have had the ability to read the Constitution and understand its provisions see its flaws, where as those who have only come to understand the Constitution through the media and statements by the Government have an overly positive perception.

“If the Bainimarama Government continues, they will continue with this Constitution and it will take Fiji forward. But I strongly believe that after the elections if a new Government is formed, there will be a lot of changes in the Constitution, amendments and all.”

Participants who felt that 2013 Constitution would not take Fiji forward (14%, n=39) did so for a wider variety of reasons. Some felt that the Constitution would not take Fiji forward because the citizens of the country did not contribute to it, “I haven’t read the Constitution but I have been hearing from friends that most of the citizens do not really agree with the Constitution” and “this Constitution will not take Fiji forward because it is not by the people. The Ghai Constitution was by the people.”

Others felt that there was not enough protection of iTaukei interests (in direct contrast to those who felt that the Constitution would take Fiji forward because iTaukei interests were included): “there is no GCC and the protection of iTaukei land is not there” and “they have undermined the

147 28 years old, male, iTaukei, Suva
148 27 years old, female, Others, Savusavu
149 32 years old, transgender, Others, Nadave
150 54 years old, female, iTaukei, Labasa
interest of the i\textsuperscript{t}aukei land and resources.”\textsuperscript{151} Participants also made the point that it was not the Constitution, but the people, that would take the country forward. Ultimately these individuals felt that people did not know enough about the Constitution: “there was not much education on this Constitution”\textsuperscript{152} and “I cannot understand it, I don’t know.”\textsuperscript{153} Other participants viewed the limitation of rights in the Constitution as a concern: “no, this Constitution won’t take Fiji forward because of the limitation of rights in it”\textsuperscript{154} and “because of all the laws and decrees that are being created.”\textsuperscript{155} These concerns include but are not limited to the “Claw Back Clause”.

Figure 16: Can Fijians, as a group, make this Constitution work?

Participants were also asked if they felt that Fijians as a group could make this Constitution work. Figure 16 presents their responses. The majority of the participants (67%, n=183) felt optimistic that Fijians as a group could make the 2013 Constitution work. A lot of this optimism about working as a group stems from the common identity that the Constitution offers: “now I am treating everyone as Fiji Citizens, we respect all the religions and cultures”\textsuperscript{156} and “we’re different people but this Constitution will unite everyone, I feel it’s good.”\textsuperscript{157} When asked how Fijians could make the Constitution work, the most common responses was to become aware of the Constitution and to work together: “we can make it work by involving people in discussion. Villagers, workmates, cross sections of communities need to take part and participate”\textsuperscript{158}, “people

\begin{tabular}{|c|c|c|c|}
\hline
Responses & Percentages  \\
\hline
Yes & 80  \\
No & 70  \\
Dn’t Know & 60  \\
Did Not Answer & 50  \\
\hline
\end{tabular}

\textsuperscript{151} 40 years old, female, iTaukei, Korovou
\textsuperscript{152} 40 years old, transgender, iTaukei, Taveuni
\textsuperscript{153} 37 years old, female, iTaukei, Taveuni
\textsuperscript{154} 28 years old, female, iTaukei, Taveuni
\textsuperscript{155} 26 years old, male, Others, Nadave
\textsuperscript{156} 27 years old, male, Indo-Fijian, Ba
\textsuperscript{157} 50 years old, male, iTaukei, Nayavu
\textsuperscript{158} 39 years old, male, iTaukei, Labasa
need to be aware of the Constitution”\textsuperscript{159}, “by working together and understanding each other”\textsuperscript{160}, “we can make it work by working together, especially the iTaukei, they need to accept other races”\textsuperscript{161} and “by being a team player, just like in rugby.”\textsuperscript{162}

A much smaller percentage (10%, n=28) felt that Fijians could not work together due primarily to racial issues: “Fiji is only for iTaukei not other races, so they cannot make this Constitution work”\textsuperscript{163}, “it will he hard, though we are united by one name, we have different cultures, religions, etc”\textsuperscript{164}, “different people means different views we can’t make it work”\textsuperscript{165} and “maybe if we were all Christian, otherwise no.”\textsuperscript{166} These comments demonstrate that efforts toward a common identity do not, in the short term, eliminate ethnic tensions.

Participants were also asked if they would personally commit to making this Constitution work. Sixty-nine percent (n=190) of the participants indicated that they would personally contribute to trying to make the 2013 Constitution work. When only considering the 18% (n=49) of participants who have read the Constitution, 73% (n=36) said that they were willing to personally contribute to making the Constitution work. These individuals felt they could do this by: “following what is in the Constitution as it is the supreme law of the land”\textsuperscript{167}, “by reading it and sharing it with others”\textsuperscript{168}, “just minding my own business and doing what I have been told”\textsuperscript{169}, “follow the Constitution and do whatever is required of us to do”\textsuperscript{170} and “by taking part in voting, following the rule of law and agreeing to disagree.”\textsuperscript{171}

Sixteen percent (n=44) of the total participants said that they would not personally contribute to making the 2013 Constitution work. Their reasons included: “I have not read the Constitution”\textsuperscript{172}, “I don’t believe in it”\textsuperscript{173}, “I don’t support the 2013 Constitution”\textsuperscript{174}, “because I am not in favour of this Constitution. They came around seeking the views of the people but when the Constitution was finalised, we can see that whatever is there is for their own good”\textsuperscript{175}, “this is an illegal document that was made by an illegal government”\textsuperscript{176}, “no because I need to first get knowledge about the Constitution itself”\textsuperscript{177}, “indigenous people are not fully protected”\textsuperscript{178} and “because I don’t understand anything about the Constitution.”\textsuperscript{179} Reactions to 2013 Constitution reflect both its strengths and limitations as perceived by the people. Given that the Constitution is tied to the
stability, security and identity of Fiji’s different communities, efforts will be required to ensure that it is well understood and that citizens effectively contribute to making it work.

“This Constitution will give one man, one vote, one value is the greatest thing any Constitution can have. One person had the right to all the things that anyone else has. This does not discriminate one citizen from the other. Previously, especially the indigenous Fijians they have thought they have a right to certain things which others did not have. Over here [in the 2013 Constitution], it allows the intellectuals to put their views. When racism has been taken away whether our Fijian brothers can take it because there are so many rights under the old Constitution which has been taken away. How far will they cooperate win this one is a great factor. Can the Government convince the Fijians to work as a unit rather than a divided group? Can our Fijian brothers and sisters respect the new Constitution, help the Government to achieve what it has put for us? It is the greatest thing that all people will have a kind of brotherhood and tries to see that everyone has the same right…. It’s a great policy for the Government. Nothing should stop the Government to implement what they have here…. My Fijian brothers, their rights and whatever they have enjoyed before it will take sometimes for them to come back that it is a different world but I think once they realise that it is one man, one value and one vote. The Constitution will need changes as it progresses because if you do not change, whatever you put there you are stagnant. You have to see the need of the country, change the Constitution so that it goes forward rather than just staying there…. I wish Bainimarama a long life.”

Deo*, age not given, male, Indo-Fijian, cane farmer, Ba.

* The name used here is a pseudonym

5.0 CONCLUDING COMMENTARY

The 2013 Fiji Constitution was aimed at facilitating the transition to the September 2014 elections and the establishment of parliamentary democracy thereafter. Whilst the Constitution offers guiding principles to achieving this, it has come under intense scrutiny because of its failure to align itself with transitional procedures and Constitutional provisions that are consistent with model democracies. These concerns are believed to have had some level of influence on voting behaviour in the general elections and are expected to continue into the period of on-going democratic transition, post-elections.

This Perceptions Survey, while limited in scope and distribution, allowed the CCF to offer the communities they work with a chance to share their perceptions of the Constitution. The survey was undertaken against the backdrop of constraints on media freedom and a culture of both self-censorship and political enthusiasm as Fiji prepared for the September 17 general elections. Where the report may fall short on statistical significance it should be seen to provide a snapshot
of what was the understanding of ordinary citizens about the constitutional making processes, the 2013 Constitution and the implementation of the Constitution. In attempting to capture these perceptions the CCF prioritised its role of representing the communities they engage with. Given the lack of avenues available for citizens to share their frustrations, this research unintentionally became a way for some participants to ‘vent’, as a result some comments may appear ‘negative’. On the whole, regardless of participant’s hesitations about the process by which the 2013 Constitution came about, many believe that the 2013 Constitution can take Fiji forward.

The survey found that the majority of the participants know about the Constitution, however, many were not involved in either of the constitutions’ consultation processes. Reasons for non-involvement varied from conscious political decisions to reasons of political apathy. Despite its wide dissemination, many participants have not read the Constitution. Those that have read the Constitution appear to display superficial levels of understanding. Others rely on the media, family and friends to support their knowledge of the Constitution. These sources of constitutional knowledge will need to be viewed critically given their partiality.

Participants’ knowledge of the aspects of the Constitution that the survey was interested in varied. The Bill of Rights and Rule of Law appeared to be well understood, however, the Immunity and “Claw Back” clauses were least understood. Any constitutional awareness will need to support an understanding of these provisions as they have implications on the exercise of people’s rights and freedoms. The non-negotiable provisions of the Constitution like the reduction of the voting age, a common name and a single constituency also received mixed reactions.

The survey identified that the military and police had different roles, however, more participants were of the view that the role of military had changed, at times encroaching on the role of the police and others saw it as supplementing the under-resourced Police Force. Historically, the military has been implicated in all of Fiji’s coups. It is therefore prudent to assume that it has a responsibility in ending Fiji’s coup culture. In doing so the military’s role in Fiji’s transitional democracy requires ongoing dialogue. This will ensure that the expansive role the military enjoys in the 2013 Constitution is reconfigured to include some element of accountability to an elected Government and ensure that people’s apprehensions about the military’s involvement in future instabilities are put to rest.

The participants are of the view or are hopeful that the Constitution will take Fiji forward. As the survey shows, this will require more than just reading and understanding the Constitution. The Constitution for many is tied to the stability and security, identity and relationships between Fiji’s different communities and groups. A concerted effort will need to be devoted to making certain the different sectors are aware of the provisions of the Constitution that affect their lives as well as how they can contribute to making it work. Similarly, the mechanism or process within the 2013 Constitution (Section 160) that makes possible constitutional amendments needs to be understood. Some political parties mentioned that they would make legal changes to the Constitution if elected into power. It is also important that NGOs like the CCF contribute to
educational programmes that create awareness with ordinary citizens that the Constitution can be changed only through parliamentary procedures.

In summary, the participants appreciated that the Constitution will not please everyone. Many echoed that they would have been satisfied had the Constitution development process been consultative and its contents reflective of the people’s wishes. This suggests the need to make sure that issues of national importance are debated and consented to by citizens. The challenge for the different actors charged with promoting the Constitution is to ensure that it evolves and in time becomes a document that citizens can embrace and use to guide the version of democracy that they see for Fiji. To help that process, the following recommendations are presented based on the survey participants’ comments and perceptions:

a. Develop structured and accessible awareness programmes about the contents of the Constitution. Certain provisions need to be demystified for those who are not familiar with legal jargon.

b. Strengthen the media’s role in supporting Constitutional education and discussions. Media freedom and impartiality should be encouraged in this process.

c. Conduct Constitutional awareness and dialogue within and across communities. Different ethnic communities need to confront their historical realities and relationships in any discussion of the Constitution.

d. Dialogue with those who do not support the Constitution should be encouraged. It is important that people are aware that the Constitution can be amended legally through parliamentary procedures.

e. Include Constitutional awareness in the school civic education curriculum.

f. Support in-depth research into people’s perceptions and experiences of the Constitution. Many participants found the research process educational and empowering. Research offers them the opportunity to reflect on issues that are important to their lives.

g. Convene a national assembly representing Fiji’s different communities to discuss issues of national significance in the absence of local constituencies this can serve as a bridge between the people and parliament.
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**Legislation**


Constitution Monitoring Report: September 2013 - September 2014
INTRODUCTION

Fiji’s fourth Constitution was promulgated on 6 September 2013. Government leaders proclaimed the document as laying “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). There are some progressive elements in the Constitution such as a wide-ranging Bill of Rights that includes socio-economic rights, a non-racial electoral system, a common national identity and independent oversight institutions and commissions that aim to promote greater accountability and transparency. However, since the 2006 coup and especially since April 2009, Fiji has operated and continues to operate “in the context of restrictive laws” that affect how people participate in the transitional process (Bhim, 2013, p. 168). The Government has promulgated decrees relating to the functioning of independent offices such as the judiciary, the Human Rights Commission, trades unions, media and the legal profession. Despite all this, the 2013 Constitution does pave the way for the country to move from eight years of undemocratic rule to parliamentary rule.

This Constitution Monitoring Report covers the implementation of the 2013 Constitution from the promulgation of the Constitution in September 2013 to September 2014, specifically examining human rights protections, progress toward Free and Fair Elections, and establishment of new institutions. This paper was commissioned by the Citizens’ Constitutional Forum (referred to here as CCF) to provide civil society oversight of this process in the absence of official mechanisms for oversight.

OBJECTIVES

With the absence of formal mechanisms and timelines in place to ensure and oversee the implementation of the provisions of the Constitution, CCF, as an NGO established to promote equality, justice and peace respecting the rule of law, under a Constitution that guarantees democracy and human rights, has sought to monitor the implementation of the 2013 Constitution in:

1. documenting the main events from the promulgation of the Constitution;
2. holding our elected leaders accountable in respect of their functions as per the 2013 Constitution;

This paper reviews the implementation status of the 2013 Constitution, the challenges that implementation has faced so far, and prospects for the future, specifically what opportunities need to be exploited to ensure that the gains in the Constitution are not lost as a result of the challenges.

This paper will help assist CCF and its CSO partners to strengthen its advocacy so that it is coordinated and strategic in terms of monitoring the implementation of the 2013 Constitution.
This in turn, will enable a more conducive environment for elected leaders to promote and protect the ‘values that underlie a democratic society’ to ensure a smooth transition to democracy and further democratic consolidation.

BACKGROUND - THE CONSTITUTION-MAKING PROCESS

On 9 April 2009, the Fiji Court of Appeal ruled the 2006 military coup unconstitutional. On the very next day, President Ratu Josefa Iloilovatu abrogated the 1997 Constitution on the advice of the military-backed Interim Government. 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). The military-backed government then announced a roadmap for achieving “true democracy” for Fiji. An important aspect of this road map was to be the adoption of a new constitution which would reflect 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 December 2006, the military government had ruled by decrees with presidential assent. Following the purported abrogation of the Constitution, the military government embarked on more intensive legal, policy and institutional reform. The formulation of the decrees have had little input and consultation from the public although there have been some instances where the Government has embarked on some minimal consultations, for example there were public consultations in the lead up to the Media Industry Development Decree 2012 (Decree 29 of 2010) (the Media Decree).

With elections scheduled to take place in 2014, it was imperative that a new constitution should be in place well beforehand. In July 2012, the Government issued two decrees to facilitate this work - the Fiji Constitutional (Constitution Commission) Process Decree, 2012 (Decree 57 of 2012) and the Fiji Constitutional Process (Constituent Assembly and Adoption of Constitution) Decree (Decree 58 of 2012). 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. Pursuant to Decree 58, the Prime Minister was to nominate all the members of the Constituent Assembly. 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 of the draft Constitution in the Constituent Assembly; before its adoption.

1 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 a voting age of 18. Overshadowing these 11 principles was the requirement for the Constitution to grant immunity for events of 2006 and thereafter.
Together the two decrees provided for a constitution-making process that was divided 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 training for the people, to enable them to actively and effectively participate in the constitution-making process.

The second phase was the consultation phase in which the Commission visited approximately 120 locations around Fiji from July to October 2012 for face-to-face public consultations 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.

However, in October 2012 the Government amended Decree 57, with the Fiji Constitutional Process (Constitution Commission) (Amendment) Decree 2012 (Decree 64 of 2012), thereby limiting the Constitution Commission's role in preparing consequential changes to existing laws, as well as consulting the people on its final draft and presenting it to the Constituent Assembly. In late November, the Commission developed the draft constitution, carrying out consultations with Fiji experts and having it peer-reviewed by three international experts. On 23 December, the Commission presented the draft constitution to the President. However prior to the presentation, the police had confiscated the copies the Commission was printing, burning the printer's proof copy (Radio Australia, 2012). The Commission's draft was later leaked to the public without official authorization.

On 10 January 2013, the government formally rejected the Constitution Commission's draft. On 21 March, in deviation from the roadmap to democracy outlined by the Ministry of National Planning in 2009, the Constitutional Process (Adoption of Constitution) Decree 2013 (Decree 12 of 2013) was imposed. This abandoned plans to put the draft constitution to a representative Constitutional Assembly, and allowed a ‘period of time as the President deems necessary’ for written submissions from the public. In March 2013, the government released a draft constitution in which the public was given two weeks to comment, later extended to five weeks. On August 22 2013, a revised draft constitution was released, and formally assented to as the Constitution of the Republic of Fiji 2013 by the President on 6 September 2013 (with some further revisions).

The interim government’s ‘public consultation’ on its draft elicited 1093 submissions, which are yet to be made public. While there was limited public involvement in the drafting of the 2013 Constitution, to the Government’s credit it was receptive to public opinion. The March 2013 government draft excluded provisions for safeguarding iTaukei, Rotuman or Banaban land. After much public opposition this was remedied in the 2013 Constitution. The 2013 draft also made the Prime Minister the Commander in Chief of the Republic of Fiji Military Forces. After much debate and discussion on the idea of a politician as the head of the military, the 2013 Constitution reverted to the status quo ante whereby the President as Head of State remained as the titular head of the military.

Finally, on 22 August the interim government released the Constitution (Radio Australia), which was promulgated by the President on the 6 September (Radio Australia, 2013).
There are no mechanisms in place to ensure and oversee the implementation of the provisions of the Constitution within a specified timetable. This paper attempts to provide civil society and the Fijian public a form of oversight of this process in the absence of official accountability mechanisms.

The 2013 Constitution has provisions for all current decrees and existing laws and institutions to continue even though they might be inconsistent with the Constitution (2013 Constitution s 173). In effect, these laws and decrees are superior to the Constitution until such time as they are amended or repealed (Citizens’ Constitutional Forum, 2013). The fact that some of the decrees are given entrenched status under the Constitution is a concern for various reasons. First, they take precedence over the Constitution itself in that they cannot be amended in any form until the first sitting of Parliament, and even then these amendments cannot (i) have retrospective effect, (ii) ‘nullify any decision made’ under a decree or (iii) grant any compensation for anyone affected by the decree. Second, given decrees were arbitrarily made, it is not appropriate in principle for them to be shielded from parliamentary scrutiny. Third, these protections constitute a fetter on Parliament’s legislative function.

The transitional provisions (Chapter 12) in the 2013 Constitution permitted all current office holders to remain in office until Parliament was in session. It also granted the Prime Minister powers to determine and shape the transition process in the lead up to and after elections. The functions of the Constitutional Offices Commission (section 166) in appointing members to independent institutions such as the Electoral Commission were the sole prerogative of the Prime Minister. This posed difficulties for the transition process as the Prime Minister retained the power to appoint individuals and institutions tasked by the Constitution to carry out ‘free and fair elections’. Calls by political parties, trade unions and pro-democracy activists for the interim government to institute a caretaker government ahead of the elections to ensure credible, free, fair and transparent elections in 2014, were not heeded. (ABC News, 2012) (FBC News, 2013) (Yabaki, Election Concerns, 2013). This raised concerns that the transitional provisions did not provide for a caretaker government to take the country to elections and guarantee a level playing field in terms of campaigning for the first election after a sustained period of arbitrary rule. The interim government demonstrated no inclination to operate in caretaker mode and continued to operate as if it were an elected government making preparations for elections. The Attorney General’s position as Minister responsible for Elections as well as General Secretary of a political party clearly indicated a conflict of interest, despite assertions to the contrary, and reflected poorly on the government (Pacific Islands Development Program, 2014).
PROGRESS TOWARDS FREE & FAIR ELECTIONS

After almost eight years, Fiji scheduled elections for 17 September 2014. The elections were of crucial importance to all Fijians, who were enthusiastic to see a return to democratic parliamentary rule.

The 2014 elections are significant for a number of reasons. It was the first elections in Fiji in which:

1. a proportional system was used;
2. parliamentary seats were not allocated along racial lines;
3. The voting age was brought down to 18. Young people (18-35 years) make up 47% of the voting population in Fiji.
4. Social networking sites were used for campaigning; and
5. There were laws on election campaign contributions.

There are three important criteria for an election to be ‘free and fair’. There needs to be:

a. a comprehensive constitutional and legal framework;

b. an independent and impartial electoral administration supported by free media and a peaceful order;

c. an agreement from all political parties to participate in competitive elections (Citizens’ Constitutional Forum, 2013).

Legal Framework

The interim government undertook and decreed that ‘free and fair’ elections would take place on 17 September 2014. The 2013 Constitution set out the fundamental framework for elections to take place: rights and eligibility to register and vote, candidature, electoral system, electoral management bodies, media freedom, and penalties for corrupt/violent behavior. However, there remain impediments for the full realization of these provisions (Citizens’ Constitutional Forum, 2013).2 While electoral rights are granted, they can be limited by a decree. For example, the right to contest elections is granted however, trade union officials were restricted from being a member of a political party or a candidate. The media was allowed to report on election related events but the the Media Decree places limitations on how and what the media reports on. The 2013 Constitution established two institutions for electoral management and administration: the Electoral Commission and the Supervisor of Elections.

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Key Events

Voter Registration

In 2012, the interim government released the Electoral Registration of Voters Decree (Decree 54 of 2012). The Decree provided a comprehensive framework for the creation and registration of a national register of voters. Initially the Permanent Secretary for Elections was responsible for this. It was not until 2014, after the Electoral Commission was appointed when they took over the responsibility.

There has been a general consensus from all quarters of Fiji that the registration of voters has been free, fair and accessible, which is reflected in the number of people being registered. As of 17 June 2014, 554,000 voters had registered out of the 600,000 projected. The sheer number of people registering to vote is an indication of people’s desire to return to parliamentary rule. Civil Society Organizations (CSOs) and political parties generally agree that the registration process has been accessible, fair and effective. The one possible shortcoming of the process has been the reluctance of the Fiji Elections Office to publicly release the National Register of Voters (NRV) to political parties and CSOs (Radio Australia, 2013) (Radio New Zealand International, 2014).

On 27 March, 2014 the Voter Registration Decree was amended, with the Electoral (Registration of Voters) (Amendment) (Decree 9 of 2014) prohibiting political parties and CSOs access to the National Register of Voters. The amendment to the Decree removed public scrutiny and objection provisions - the requirement to publish the NRV and a registered voter’s right to object to names registered in the NRV. This affected the transparency of the electoral exercise and the integrity of the NVR, prompting the political parties to call into question aspects of the election process (Radio Australia, 2014).

Voter registration came to an end when the writ of elections was issued on August 4th (Fiji One, 2014). By that time, almost 590,000 eligible voters had registered.

Registration of Political Parties

Section 23 of the Bill of Rights in the 2013 Constitution provides for political rights of citizens stating that:

(1) Every citizen has the freedom to make political choices, and the right to—

(a) form or join a political party;
(b) participate in the activities of, or recruit members for, a political party; and
(c) campaign for a political party, candidate or cause
Section 56 further stipulates eight criteria for people wishing to be candidates either for a party or as an independent:

(1) A candidate for election to Parliament must be either nominated by a registered political party or nominated as an independent candidate in accordance with the laws governing elections.

(2) A person may be a candidate for election to Parliament only if the person—

(a) is a citizen of Fiji, and does not hold citizenship of any other country;
(b) is registered on the Register of Voters;
(c) is ordinarily resident in Fiji for at least 2 years immediately before being nominated;
(d) is not an undischarged bankrupt;
(e) is not a member of the Electoral Commission, and has not been a member of that Commission at any time during the 4 years immediately before being nominated;
(f) is not subject to a sentence of imprisonment when nominated;
(g) has not, at any time during the 8 years immediately before being nominated, been convicted of any offence under any law for which the maximum penalty is a term of imprisonment of 12 months or more; and
(h) has not been found guilty of any offence under a law relating to elections, registration of political parties or registration of voters.

However, s 6(5)(c) of the Constitution provides for laws to limit these rights and freedoms. A number of decrees also contain ‘ouster clauses’, which prevent any challenge to actions of the government in a court of law (Citizens’ Constitutional Forum, 2013).

On 15 January 2013, the interim government issued the Political Parties (Registration, Conduct, Funding and Disclosures) Decree 2013 (Decree 4 of 2013, the Political Parties Decree) that required existing political parties to register and adhere to very strict criteria, including:

- Gaining 5000 signatures in support;  
- Be accompanied by a fee of $5005 as deposit; and  
- Giving parties a 28 day timeframe to register.

The strict criteria made it difficult for smaller parties to register. Section 14.1(c) of the Decree also prohibits trade unionists from being active party members. The existing parties complained that the process for political party registration was not independent as there was no impartial body to

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3 The 5000 signatures to be collected must be distributed throughout Fiji: 2000 from the Central Division, 1750 from the Western Division, 1000 from the North and 250 from the East.
supervise the process, and it was lacking transparency and independent processes for mediation (Citizens’ Constitutional Forum, 2014).

Four political parties registered in May 2013 – Fiji Labour Party (FLP), National Federation Party (NFP), Social Democratic Liberal Party (SODELPA) and the People’s Democratic Party (PDP) (Fiji Times, 2013) (Radio Australia, 2013) (Radio Australia, 2013). The Political Parties Decree was further amended on 28 March 2014, with the Political Parties (Registration, Conduct, Funding and Disclosures) (Amendment) Decree 2014 (Decree 10 of 2014). The amendments included new subsections on penalties in s 14 of the Political Parties Decree - ‘Restrictions on Public Officials in a Political Party’, and re-writing s 22 (offences related to sources of funds) by prohibiting political parties and independent candidates from receiving funds from a foreign government, inter-governmental or non-governmental organization, or any non-Fijian citizen.

The Fiji First Party, led by Prime Minister Bainimarama, was registered in May 2014 (Pacific Islands Report, 2014). The final two parties – Fiji United Freedom Party (FUFP) and One Fiji Party - that contested the 2014 September elections were registered in August (Fijian Elections Office, 2014) (Fiji Times, 2014). However, one proposed party, the Activists People’s Party, could not be registered on time as the writ for elections was issued on 4 August, as a result of which all pending applications became null and void (Fiji Village, 2014).

**Resignation of Trade Unionists to Contest Elections**

Three prominent trade unionists resigned in the first half of 2014 in order to be eligible to contest the elections. Felix Anthony, the leader of the People’s Democratic Party resigned as the General Secretary of the Fiji Trades Union Congress (FTUC) on 5 May (Fiji Times, 2014); Attar Singh, the General Secretary of the Fiji Islands Council of Trade Unions (FICTU) resigned on 22 May to contest for the National Federation Party (NFP) (Fiji One, 2014); and Pramod Rae, the General Secretary of the Fiji Bank and Finance Sector Employees Union resigned to contest for the National Federation Party (NFP) (Fiji One, 2014).

**Appointment of the Electoral Commission**

Section 75 of the 2013 Constitution establishes the Electoral Commission and sets its appointment, roles and duties as:

1. The Electoral Commission established under the State Services Decree 2009 continues in existence.
2. The Commission has the responsibility for the registration of voters and the conduct of free and fair elections in accordance with the written law governing elections and any other relevant law, and in particular for—
   a. the registration of citizens as voters, and the regular revision of the Register of Voters;
   b. voter education;

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*SODELPA was initially supposed to register as the Soqoqo Duavata ni Lewenivanua (SDL) Party however the Political Parties (Registration, Conduct, Funding and Disclosures) (Amendment) Decree. (Decree 11 of 2013, February 16) prohibited parties from using vernacular names (Fiji Government, 2013) (Radio Australia, 2013) (Radio Australia, 2013)*
(c) the registration of candidates for election;
(d) the settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results; and
(e) monitoring and enforcing compliance with any written law governing elections and political parties.

(7) The chairperson and the members of the Commission shall be appointed by the President, on the advice of the Constitutional Offices Commission.

Section 132 of the Constitution establishes the Constitutional Offices Commission:

(1) This section establishes the Constitutional Offices Commission.

(2) The Commission shall consist of—
   (a) the Prime Minister, who shall be the chairperson;
   (b) the Leader of the Opposition;
   (c) the Attorney-General;
   (d) 2 persons appointed by the President on the advice of the Prime Minister; and
   (e) 1 person appointed by the President on the advice of the Leader of the Opposition.

On 9 January, the interim government announced the composition of the seven member Electoral Commission: Chen Bunn Young as its chair and Professor Vijay Naidu, James Sowane, Jenny Seeto, Larry Thomas, Father David Arms, and Alisi Daurewa as its other commissioners (Radio New Zealand International, 2014) (Radio Australia, 2014) (Radio Australia, 2014). Constitutionally, these appointments are to be made by the Constitutional Offices Commission (COC). While the constitutional provision exists, there were practical difficulties in following the process to the letter, as some of the office holders would not technically fill their functions until after the first sitting of Parliament. However, in the interim, s 167(3) of the Constitution states that the Prime Minister performs the role of the COC until it is appointed after the first sitting of Parliament. The appointments to the Electoral Commission were made by the President on the advice of the Minister Responsible for Elections (also the Attorney General) (Fiji One, 2014) (Radio New Zealand International, 2014).

Appointment of the Supervisor of Elections

Section 76(4) of the 2013 Constitution states that the Supervisor of Elections is appointed by the President, on the advice of the COC, following consultation with the Electoral Commission.

In late December 2013, the interim government had advertised for the position of the Supervisor of Elections internationally, seeking a highly qualified and experienced person to fill the position. However, no appointments were made until late March 2014. In announcing the Supervisor of Elections, the Attorney General stated that of the 13 international applicants, none met the
job criteria (Radio Australia, 2014; Islands Business, 2014). Subsequently, the Attorney General named the acting Permanent Secretary in the Ministry of Justice, Mohammed Saneem, to take up the position (Radio Australia, 2014). Following the announcement, political parties raised concerns and objections on the method of his appointment and his suitability questioning the motive behind his appointment (Islands Business, 2014). CCF also queried the subsequent independence of the Office of the Supervisor of Elections (Radio Australia, 2014).

Electoral Decree

While release of the Decree signaled a positive step towards holding of the elections, the Decree contained some problematic provisions.

Section 3 of the Decree grants immunity to the Electoral Commission, the Supervisor of Elections and employees of the Fiji Elections Office from any criminal or civil proceedings. Candidates and political parties effectively had 19 days to inform voters of their candidate numbers. Section 52 prohibits voters from taking in materials to the polling stations to assist with voting, however, the Fiji Elections Office made a provision for each voter to be provided with a booklet containing the names and numbers of all candidates, but not their party affiliation.

Of particular concern is s 115 of the Decree, which restricts any person or group receiving funding from foreign governments or organizations from conducting or participating in any campaign, including organizing debates, public forums, meetings, interviews, panel discussions or publishing any material, related to the elections. CSOs expressed disappointment at this section as it greatly limited their ongoing and planned civic and voter education activities. In an effort to create a better understanding of the work of CSOs and how the Commission could assist and work with them, the Electoral Commission met with seven NGO representatives on 19 March (Fiji Live, 2014) (Fiji One, 2014). The Commission met with CSO representatives again on 4 April, after which the Chair of the Commission revealed that it was seeking independent legal advice on some of the provisions of the Electoral Decree of 2014 (Fiji One, 2014). CSOs had also met with Mr Aiyaz Sayed-Khaiyum (the Attorney General, Minister Responsible for Elections and General Secretary of Fiji First) to raise their concerns regarding s 115. As a result of that meeting, they were advised that any CSO doing any work on elections must have all their materials scrutinized by the Supervisor of Elections (Radio New Zealand International, 2014). Eleven CSOs applied for and received approval from the Electoral Commission to carry out voter education and outreach (Fijian Elections Office, 2014). These included the Fiji Women’s Rights Movement, FemLink Pacific, Pacific Dialogue, Fiji Young Women’s Forum, Citizens’ Constitutional Forum and Fiji Women’s Forum.

On 27 June, the Electoral Decree was amended, and amongst other minor changes a provision was made, inserting a new subsection into s 36 (National Candidates List) to clarify that only
the candidate’s photo, name and number, not political party and symbol, would be included in the National Candidate List. The amendment to the Electoral Decree also sought to clarify the requirement that individuals are only eligible to contest elections if they are ‘ordinarily residents in Fiji for at least 2 years immediately before being nominated’. The amendment stipulated that individuals were to be present and living in Fiji for at least eighteen months of the two year period prior to elections (s23 of the Electoral Decree).

This amendment occurred during a court dispute (Waqavonovono v Chairperson of Fijian Electoral Commission [2014] FJHC 570; HBM92.2014 (1 August 2014)) in which a National Federation Party candidate’s nomination was rejected on the basis that she did not meet the ‘ordinarily resident’ requirement. While the case was still pending the Decree was amended to clearly exclude Ms Waqavonovono from falling within the definition of ‘ordinarily resident’. This also resulted in the withdrawal of seven other candidates. The Attorney General, Minister Responsible for Elections and General Secretary of Fiji First was a defendant in these proceedings. The Chief Justice hearing the case also assented to the amendment as Acting President.

This controversial amendment was condemned by political parties who claimed that the electoral process “was being blatantly manipulated to suit the regime’s agenda” and that “Fiji First has an unfair advantage over other political parties in the country” (Fiji Labour Party, 2014) (National Federation Party, 2014). The actual process of amendment also drew attention to significant constitutional and legal anomalies: first, the propriety of the Chief Justice as Acting President assenting to amendments to the very provision of the Decree being litigated in the High Court and its implications for the separation of powers; and second, the Attorney General’s Chambers being the drafters of the legislation in which its own Minister was involved, albeit wearing another hat (notwithstanding his being General Secretary of a political party as well).

As a result of this amendment, seven candidates were forced to withdraw their candidacy, none of which were from the Prime Minister’s political party.

**Cancellation of CCF - USP Conversation Series**

In the lead up to the September elections CCF commissioned four discussion papers and had planned to hold a series of public conversations in collaboration with the University of the South Pacific’s School of Government, Development and International Affairs (SGDIA). The first of the public series was held on Tuesday 29 July on USP’s Laucala Campus in Suva. Following the event, the Supervisor of Elections lodged a complaint with the Fiji Independent Commission against Corruption (FICAC) that CCF had breached section 115 of the Electoral Decree. The Elections Office asked CCF to retract the discussion paper stating that they had not received the necessary approval. CCF rejected allegations that it was in breach of the decree:

“*By publishing a research paper on international benchmarks on free and fair elections and holding a public conversation on the same paper, we were not in breach, because we were not carrying out a campaign, we were carrying it out for educational purposes and engaging in public discussion.*” (Radio New Zealand International, 2014).

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5 The six other nominations of candidacy that had to withdraw due to this amendment were Jone Vakalalabure, Seru Rabeni, Arvin Datt, Mohammed Tahir, Anare Jale and Ofa Fisher (Fiji Sun, 2014)
Officers from FICAC searched the CCF’s premises for documents relating to the research paper and also carried out interviews with staff (Fiji Live, 2014). CCF retracted the discussion paper and live feed from their website and cancelled the remaining planned public conversations series (Fiji Live, 2014).

**Election Observation**

Under section 119 of the Electoral Decree, the Minister Responsible for Elections (who is the General Secretary of a political party and a candidate) is empowered to appoint and invite observers. This raised concern around impartiality of observers.

On 29 March, the Australian Foreign Affairs Minister confirmed that Australia was invited to observe and co-lead a multi-national observation group for the 2014 elections (ABC News, 2014). On 21 June, the Fijian Government announced that Indonesia would co-lead the multi-national observer group with Australia (Pacific Islands Report, 2014). In August, Australia appointed former Defense and Workplace Relations Minister Peter Reith to lead the Australian contingent (Radio Australia, 2014). The 14 member multi-national observer group included Indonesia, India and Papua New Guinea, Israel, South Africa, Brazil, Russia, Turkey, Japan, New Zealand, Korea, Iran and the UK. In June, the European Union declined to be part of the multi-national observer group as it is contrary to EU policy to work under the direction of a third party (Pacific Islands Report, 2014). However, in late August the EU sponsored three observers, technically independent of the EU, to be part of the multi-national observer group (Fiji One, 2014).

Pursuant to s 115 and 119 of the Electoral Decree, CSOs met with the Minister Responsible for Elections in June in an effort to present their proposal for an independent domestic observer mission composed of 15 CSOs (NGO Coalition on Human Rights, 2014). However, to the disappointment of the Civil Society-Domestic Elections Observation Group (CSO-DEOG), the Minister verbally refused their request (Fiji Times, 2014), asserting that the presence of the Multinational Observer Group and party scrutineers were sufficient. As a result, the CSO-DEOG was dissolved (Fiji Times, 2014).

**Issuance of the Writ for Elections**

In accordance with Section 59 of the Constitution and Section 19 of the Electoral Decree, the Acting President, Chief Justice Antony Gates, issued the Writ for Elections on 4 August 2014 (Fiji Times, 2014) signaling the close of voter registrations and registration of new political parties. It also signified the official commencement of campaigning by political parties.

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6 The organizations that were part of the group were the Ecumenical Centre for Research, Education and Advocacy (ECREA), Partners in Community Development Fiji (PCDF), Transparency International Fiji (TI Fiji), Fiji Women’s Crisis Centre (FWCC), Fiji Women’s Rights Movement (FWRM) Pacific Dialogue (PD), Citizens’ Constitutional Forum (CCF), Social Empowerment Education Programme (SEEP), Fiji Disabled People’s Association (FDPA), Fiji Council of Churches (FCC), Drodrolagi Movement, National Council of Women (NCW), Academics, School of Social Science, Fiji National University (FNU), Academics from School of Government, Development and International Affairs, University of the South Pacific (USP), Interfaith Search Fiji, and Aspire Network.
**Elections Campaigning**

Political campaigning in the lead up to elections featured many keenly debated topics ranging from issues related to public policy to changes to the 2013 Constitution. On 14 June 2014, the leader of the Social Democratic Liberal Party (SODELPA), Ro Teimumu Kepa, stated that once elected to power they would seek to change the 2013 Constitution. In doing this, they would refer to the Supreme Court “for an advisory opinion on the status of the 1997 Constitution” (Radio New Zealand International, 2014). Following this announcement, the Commander of the Republic of Fiji Military Forces (RFMF), in an interview with The Age Newspaper, in Australia, stated that “the military will not tolerate an elected government rewriting the Constitution” (Marks, 2014). This statement drew the ire of the political parties and activists who saw it as unwillingness on the part of the military to accept the results of the elections. The military were also perceived as assuming the role of the defender of an imposed constitution that granted them full and unconditional immunity. A second and more recent statement by the new Commander pledged that the military would be apolitical in its role and uphold and protect the supreme law of the land. They would not be involved in the elections. The FLP leader, Mahendra Chaudhry, called on the military and its commander to “respect the will of the people”. He further called on them “to show support for a constitution for Fiji which is genuinely democratic, will ensure transparency and good governance and provide political stability.” (Fiji Live, 2014).

**Launching of Party/Candidate Manifestos**

While all the major political parties launched their manifestos before elections, the two independent candidates failed to release theirs. The People’s Democratic Party (PDP) was the first to release theirs on 12 July (Fiji One, 2014), followed by the Social Democratic Liberal Party (SODELPA) and National Federation Party (NFP) on 18 and 21 July (Fiji Live, 2014) (ABC Australia Plus, 2014), the Fiji Labour Party (FLP) on 2 August (Fiji One, 2014), and Fiji United Freedom Party (FUP) and One Fiji Party (OFP) on 12 and 13 of August (Fiji Live, 2014) (Radio Australia International, 2014). Fiji First Party (FFP) released its manifesto on 5 September just twelve days before the election (Fiji One, 2014).

PDP, SODELPA, NFP and FLP stated outright that they intended to change the constitution if elected to power.

**Nomination for Candidates and National Candidate List**

With the issuing of the writs, the Fiji Elections Office was open for receiving nominations of candidates wishing to contest until the 18 August (The Fijian Government, 2014). The drawing of candidates’ numbers was to be held on 23 August.

The day before the drawing of numbers was to take place, there was controversy regarding the number of qualifying candidates. The Supervisor of Elections had disqualified a FLP candidate (Steven Singh) and rejected an objection to a FFP Candidate (Praveen Bala) who had a pending manslaughter case in the Magistrates Court. However, upon appeal the Electoral Commission reinstated the FLP candidate and disqualified the FFP one (Fiji Live, 2014). Until the day of the drawing of the candidate numbers, there was confusion about the candidate list. According to
the Supervisor of Elections, 249 candidates were confirmed. The Electoral Commission, however, contradicted him stating that 250 candidate numbers were to be drawn as they had decided to uphold the appeal by FLP candidate, Steven Singh, while also disqualifying Fiji First’s candidate Praveen Bala. The Commission concluded that Bala was still a public official when he signed his nomination (Fiji Live, 2014). This created confusion with the political parties and displayed a lack of communication between the Commission and the Supervisor (Fiji Sun, 2014).

Following this, the Supervisor of Elections rejected the Commission’s decision and disqualified the FLP candidate. The FLP condemned the decision by the Supervisor, threatening judicial review (Fiji One, 2014). It argued that “purported rejection by the Supervisor of Elections is unlawful and in contravention of the Electoral Decree and the Fiji Constitution 2013.” (Fiji One, 2014). Section 76 (3) of the 2013 Constitution states: “The Supervisor of Elections must comply with any directions that the Commission gives him or her concerning the performance of his or her functions”.

The Supervisor of Elections went ahead with the drawing of candidate numbers on the 23 August, despite the Electoral Commission and the political parties calling for it to be postponed. The Commission Chair Chen Bunn Young stated that they could not support the decision made by the Supervisor and had directed him not to proceed, causing the Commission to boycott the drawing of candidate numbers (Radio New Zealand International, 2014). In defending his decision, the Supervisor said he was acting within the boundaries of the Electoral Decree when he decided not to consider the Commission’s decision because they had gone past the cut-off time (Radio New Zealand International, 2014). In a further development, The Electoral Commission sought independent external legal advice on this matter.

**Electoral Commission vs. the Supervisor of Elections**

The Electoral Commission took the Supervisor of Elections to court to seek clarification on the deadline for a decision on appeals of candidate nominations, and the extent of the Supervisor being bound by decisions of the Commission. The Electoral Commission asked the High Court to declare the draw of candidate numbers void and of no effect (Electoral Commission v Supervisor of Elections [2014] FJHC 627; HBC240.2014 (24 August 2014)). The Commission also wanted the Court to rule that the Supervisor is bound to follow the directive of the Electoral Commission to include the name of Steven Singh in the candidate list and remove Praveen Bala of FFP as the directive was made within the relevant timeframe, requesting the Court to order another draw of numbers for all candidates the day after – based on the names approved by the Commission.

In delivering its judgment, the Court upheld the decision of the Supervisor of Elections. Justice Kamal Kumar said the drafters of the decree were at fault for not clearly defining the specified timeframe in the section. He also stated that the Supervisor was right in not following the directive of the Commission because if he had, he would have violated the Electoral Decree. The Court noted that, even if the Court agreed with the interpretation of the Electoral Commission regarding the specified timeframe, the Court did not have jurisdiction to make the declaration challenging decisions of the Supervisor as void, as to do so would constrain s173(4)(d) of the Constitution. The judgment ensured that FFP candidate Praveen Bala remained on the National Candidates List while FLP’s Steven Singh remained ineligible. The National Candidates List
drawn on Saturday 23 August also remained. Following the decision, the major political parties (except FFP) felt that Mr Saneem had overstepped his boundaries. They argued it was clear that the Supervisor of Elections had defied the functions and powers of the Electoral Commission, especially the fundamental fact that the Supervisor is required to act upon the directions of the Commission (FBC, 2014).

**Pre-Polling**

Notices of poll and of pre-poll voting were issued on 25 August by the Electoral Commission (Fiji Times, 2014). Pre-polling began in September with almost 66,000 voters eligible to cast their votes early leading up to September 17. There were alleged and reported cases of voter intimidation and disenfranchisement. One incident reported to the FEO involved an elderly couple who qualified for postal voting whereby ballot papers were delivered by the courier company DHL. The couple claimed that the courier who brought their papers attempted to force them to vote for the Prime Minister Frank Bainimarama against their wishes (Radio New Zealand International, 2014). The matter was reported to FICAC, who investigated it; the results of that investigation are yet to be released.

**Appointment of the Secretary General to Parliament**

Section 79 of the Constitution provides for the procedures for appointment and the functions of the Secretary General to Parliament.

> 79.—(1) This section establishes the office of the Secretary-General to Parliament.

> (2) The Secretary-General to Parliament shall be appointed by the President on the advice of the Constitutional Offices Commission.

On 16 September, a day prior to Elections, the Attorney General appointed Viniana Namosimalua as the Secretary General to Parliament (Fiji Times, 2014).

**PROGRESS TOWARDS FREE & FAIR ELECTIONS - ANALYSIS**

As mentioned earlier, in the absence of a fully functioning elected legislature, both the Prime Minister and the Attorney General played a crucial, albeit unfettered, role in ensuring the implementation of some of the provisions of the Constitution, particularly with regard to the conduct of elections. The announcement of the election date, appointment of the Electoral Commission and the Supervisor of Elections, together with the issue of the Electoral Decree has been welcomed by political parties, NGOs and the international community, signaling a positive step towards a return to parliamentary rule.

However, the interim government’s refusal to put a caretaker government into operation prior to elections combined with persistent tinkering with electoral mechanisms has raised some
serious doubt about the elections being truly ‘free, fair and credible’. Some of the Prime Minister and Attorney General’s actions raised questions about the transition and guarantee of a level playing field ahead of the elections and subsequently. This included the Attorney General actively intervening in the electoral process while remaining Minister Responsible for Elections and General Secretary of a political party; and the Prime Minister making little effort to distinguish between the inappropriate deployment of incumbency and political campaigning.

The amendments to decrees governing registration and conduct of political parties and the Electoral Decree strongly suggest the government’s desire to ensure the process was favorable to them. Restrictions placed on trade unionists vying for political office was an indication of the government’s lack of respect for fundamental internationally recognized labour rights to which Fiji is party under the ILO Conventions. At the same time, the generally compliant and cooperative attitude of the interim government’s political opponents, despite a measure of criticism, suggested the latter accepted these shortcomings were a necessary compromise to ensure a return from the arbitrariness of the previous eight years to democracy and the rule of law.

CSOs play a crucial role in the electoral process and should be seen as partners as opposed to adversaries. Many Fiji NGOs are well positioned to carry out voter education, human rights education and electoral observation activities within and around the communities. Provision should be made to ensure that local CSOs are invited and given accreditation to be observers. As established key actors in their local communities, not only do the CSOs have contacts within the communities, they are also familiar with the local nuance, practices and governance structures and would be able to engage at a contextual level to identify key points for strengthening governance from a community perspective. As citizens of Fiji, local knowledge would make domestic observers instrumental in bringing to attention any perceived gaps that might undermine the process. Given those factors, the Minister declining an application for a domestic observer group was as disconcerting as it was puzzling. Now that the 2014 election has been completed, the inclusion of a domestic observer group coordinated by CSOs for the next election (2018), and the relevant building of capacity towards that end, could be achieved by participating in elections at municipal level.

HUMAN RIGHTS PROTECTION

Legal Framework

The interim government has made attempts to increase respect for human rights. The lifting of emergency regulations in 2012 that restricted rights to freedom of association, peaceful assembly and expression and media freedom is an indication of that. Credit must also be given to the government in retaining many of the more progressive elements of the Constitutional Commission draft constitution (the 2012 draft constitution). The Bill of Rights in the 2013
Constitution contains an extensive range of rights from civil-political to socio-economic to group rights pertaining to children and persons with disabilities. However, protection mechanisms of these rights are weak – legislation deemed ‘necessary’ by Parliament is permitted to limit the provisions in the Bill of Rights (Citizens’ Constitutional Forum, 2013) (Amnesty International, 2013). In the absence of amendment by Parliament, decrees that restrict or limit rights remain, such as the Essential National Industries (Employment) Decree (Decree 35 of 2011) and the Media Industry Development Decree (Decree 29 of 2010).

Key Events

Media Freedom

Since the 2006 coup and especially since 2009, the media has been subjected to intimidation and harassment (Amnesty International, 2014). While restrictions that were placed in 2009 have been revoked, challenges to the full realization of freedom of expression and publication remain. Some people in the media have raised concerns of self-censorship despite the fact that government censors are no longer present in the newsrooms (Radio Australia, 2014). The decree bans anything from being printed or broadcast which is not in the ‘public interest’ (Fiji Government, 2010). Journalists who breach the ambiguously phrased provision may be jailed for up to two years.

In the lead up to elections, restrictions on media coverage somewhat lessened despite the fact that the Media Decree remaining in place. Mainstream media reported and gave coverage to opposition political parties and candidates. Although positive steps have been made by the media including the relaxing of restrictions in the lead up to elections, concerns about media freedom still remain.

On 3 March 2014, Fiji One News broadcast a public meeting at which a participant asked Fiji’s Prime Minister Voreqe Bainimarama for guarantees that his community’s land would be protected, and then told Bainimarama that race was still a “fact of life” in Fiji. The chief went on to caution Bainimarama that:

“From the past experiences, this group of people, known in Tebara as the Vasu (referring to Indo-Fijians) will try to pacify you, and assuage you just to have their aspirations met. These people do not want you to lead them. They only want a constitution and other investment initiatives done. Let me warn you that the upcoming elections will be a tough one. Because even though we have lived together for a long time, we can’t mix water with kerosene.” (Republika Magazine, 2014).

The Ministry of Information had then lodged a complaint against Fiji TV for airing the comments, labeling it “hate speech”. The Media Industry Development Authority (MIDA) after an investigation found that the statements amounted to hate speech (ABC News, 2014). The MIDA Chair went on to state that the speaker, Ratu Timoci Vesikula, had “breached the bill of rights” by casting slurs on Indo-Fijians and that his statements amounted to him “threatening racial hatred”. He also denied that he was impinging on the freedom of the media by ruling against Fiji One News and said the TV station should not have broadcast information likely to “promote communal discord” (ABC News, 2014).
In another incident, two Journalism academics from the University of the South Pacific (USP) issued a press release on 26 June asking the government to stop the harassment of the media and also making comments regarding statements by the Commander of the Republic of Fiji Military Forces to The Age newspaper in Australia admitting torture. The Chair of MIDA denounced the press release and called for a criminal investigation into the comments (Fiji Village, 2014). There have been two instances where the government has successfully initiated contempt of court cases against a media house7 (in 2009) and an NGO8 (in 2013) that indicates the suppression of freedom of expression in Fiji (Amnesty International, 2013) (Amnesty International, 2014).

**Press Freedom Day**

On May 3, the University of the South Pacific's School of Journalism in conjunction with Fiji Media Watch organized a panel discussion on “Reporting On The Elections Now and After the Elections” to mark World Press Freedom Day. Fiji Media Watch cancelled the event as it was noted that their participation in co-hosting the event could potentially breach section 115 of the Electoral Decree, which placed restrictions on any organization receiving foreign funding from engaging in election relating activities that could be considered a ‘campaign’ (Radio New Zealand International, 2014) (Pacific Media Centre, 2014). The USP School of Journalism went ahead to host the event on its own because educational institutions are exempt under s 119.

**Freedom of Assembly & Association**

Despite the Constitution guaranteeing basic political rights and the government’s rhetoric about transparency and accountability, a number of events indicate the government’s ambivalence towards people choosing to exercise their freedoms of assembly and association.

On 6 September 2013, as the President was promulgating the Constitution, a group of youth and women’s rights activists gathered outside Government House to protest the event. The group argued that “the President’s assent is just providing a rubber stamp to the controversial document, which replaces the constitution set aside by the military-backed government in 2009” (Radio Australia, 2013). Shortly after, 14 protesters, mainly women, were taken in by the police for questioning, and detained for several hours. The Fiji Women’s Rights Movement (FWRM) claimed, in a statement supporting the protestors, that “the group was protesting against today’s signing into force of the Fiji Constitution, which has been controversially pushed through by the government despite a lack of transparency and lack of public participation” (Pacific Media Centre, 2013).

Again on 8 November, a group of 14 activists were detained and questioned by police for assembling outside the venue where Bainimarama was delivering his budget address. According to a police spokesperson, the police arrested them because these activists were wearing t-shirts calling for ‘budget accountability and transparency’. (Radio New Zealand International, 2013)

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7 The Fiji Times was found guilty of contempt of court charges for publishing comments about the Fiji judiciary. They were fined 300 000 FJD and the editor-in-chief was sentenced to six months’ imprisonment, suspended for two years.

8 The Citizens’ Constitutional Forum (CCF) was convicted for contempt of court for publishing details of a UK Law Society Charity Report on the rule of law in Fiji that was critical of the judiciary. The organization was fined 20 000 FJD plus 2 500 FJD in costs and its Chief Executive Officer was fined 2 000 FJD plus 2 500 FJD in costs and sentenced to 3 months imprisonment, suspended for 12 months on good behavior.
These protestors were detained for almost seven hours before being released. Charges for both these incidents are yet to be laid and indicate that despite the 2013 Constitution guaranteeing the right to assemble freely and protest peacefully, the government intends to continue with ‘a business as usual” approach.

The ILO has identified Fiji as one of the five countries where workers’ rights abuses are most pressing (Amnesty International, 2014). In January 2014, Daniel Urai with five other unionists were arrested in relation to a strike at the Sheraton Hotel in Nadi. Authorities had claimed that the strike was unlawful. Urai had claimed not to be part of the protests (Radio New Zealand International, 2014). Charges against him were later dropped.

On 4 March 2014, the interim government in conjunction with the Indonesian Embassy in Suva organized a public lecture at the University of the South Pacific (USP) in Suva. The panelists were former West Papuan activists. There was some interest shown by regional and Fiji students in attending this event. The students, with help from the student association, held a few briefing meetings before the event. On the day of the event, the Fiji Police Force’s Criminal Investigations Department contacted one of the students at USP, informing him that he might not be able to attend the event. Nine USP students said they were cautioned by USP security about what they could or could not do during the lecture. Security personnel were stationed at the entry and exit points of the lecture theatre and student’s bags were checked (Fiji Times, 2014).

There have also been instances of seemingly politically motivated heavy-handed retribution by the government. In one instance, a second year University of the South Pacific student had his government scholarship summarily terminated for ‘associating in political agendas’ in May 2014 (Radio Australia, 2014). This student was a volunteer with an aspiring independent candidate’s campaign. After a concerted effort on social media and community uproar, including from NGOs and political parties (Pacific Media Centre, 2014) (Pacific Media Centre, 2014), the scholarship was reinstated two weeks later. No reasons were provided for why the student’s scholarship was initially revoked or the rules and regulations the student had breached (Pacific Media Centre, 2014).

**Freedom of Speech, Expression and Publication**

Article 17 of the Constitution states that “*every person has the right to freedom of speech, expression, thought, opinion and publication…*”

The Citizen’s Constitutional Forum (CCF), in its bid to make the public aware of the contents of the 2013 Constitution, published a booklet summarizing the main provisions. In April 2014, the Attorney General held a national press conference, publicly slandering the booklet and asking CCF to immediately withdraw it. The Attorney General referred to the publication as “misleading, damaging and full of lies/’ in particular in relation to the interpretation of s 27, which related to “compulsory or arbitration acquisition of property” (Fiji One, 2014). The Attorney General stated that the CCF booklet contained additions, omissions and ‘legal anomalies’ that appeared to be “deliberately done to misinform the public” (Fiji Live, 2014).

CCF in its response reiterated that they had a constitutionally entrenched right pursuant to Article 17 to distribute the booklets, however, in the spirit of critical engagement the distribution ceased
until the matter could be resolved. CCF, through private correspondence and press releases further stated that they had addressed the concerns raised by the government, refuting accusations of “attempting to mislead the public through the spreading of lies”, calling on the Attorney General to refrain from making unsubstantiated allegations and inviting him to have face to face meetings with CCF, on matters that may seem unclear to him (Citizens’ Constitutional Forum, 2014).

**Torture, Cruel and Degrading Treatment**

Article 11 of the 2013 Constitution states that:

1. Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment.

2. Every person has the right to security of the person, which includes the right to be free from any form of violence from any source, at home, school, work or in any other place.

Since the 5 December 2006 coup there have been reported and documented cases of brutality and gross violation of human rights. Despite commitments to address past human rights violations and investigate reports of torture and deaths in custody, there has been no progress on this to date (Amnesty International, 2014). The Constitution also grants full immunity to the oppressive arm of the state for past, present and future human rights violations from the period between December 2006 to the first sitting of the Parliament in October 2014, thus allowing perpetrators of human rights violations to act with impunity⁹.

In August 2014, Vilikesa Ratu Soko, a robbery suspect, died in hospital from injuries he suffered after his arrest. The family went public claiming that his death was a result of police brutality (Fiji Times, 2014). The Police Commissioner Ben Groenewald alleged that the deceased was known to be sickly, had refused to take medication during his stay at the hospital and had internal bleeding (Fiji Times, 2014). A few days later four police officers were suspended as police continued with investigations (Fiji Times, 2014). NGOs and political parties called on the Commissioner to deliver justice to the victims of this tragic incident and conduct this investigation in a timely manner, without unreasonable delay (Citizen’s Constitutional Forum, 2014) (Fiji Times, 2014). The police investigation has now been concluded and at the time of writing the matter has been referred to the Department of Public Prosecutions (Fiji One, 2014).

**Rights to Political Participation – To Contest Elections**

Section 23 (2) of the 2013 Constitution states that

Every citizen has the right to free, fair and regular elections for any elective institution or office established under this Constitution.

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⁹ Article 173 (5) of the 2013 Constitution removes the power of the courts to hear cases to any government action from December 5 2006 until the first sitting of the parliament
Subsection 4 however limits political rights

(4) A law may limit, or may authorise the limitation of, the rights mentioned in this section—

(c) for the purpose of regulating persons who are not eligible to contest for a place in Parliament or in a public office, or an office within a political party;

Section 23 of the 2014 Electoral Decree further provides for eligibility criteria to stand for elections as a candidate:

23.—(1) A person is not eligible to be elected as a Member of Parliament unless duly nominated as a candidate in the election.

(4) A person is eligible to be nominated as a candidate for election to Parliament only if the person—

(a) is a citizen of Fiji, and does not hold citizenship of any other country;
(b) is registered in the Register of Voters;
(c) is ordinarily resident in Fiji for at least 2 years immediately before being nominated;
(d) is not an undischarged bankrupt;
(e) is not a member of the Electoral Commission, and has not been a member of that Commission at any time during the 4 years immediately before being nominated;
(f) is not subject to a sentence of imprisonment when nominated;
(g) has not, at any time during the 8 years immediately before being nominated, been convicted of any offence under any law for which the maximum penalty is a term of imprisonment of 12 months or more; and
(h) has not been guilty of any offence under a law relating to elections, registration of political parties or registration of voters, including any offence prescribed under this Decree.

(5) For the purposes of subsection (4)(c), a person is deemed to be ordinarily resident in Fiji if that person has been out of Fiji for official Government business or duties or has been holding an official Government position in any other country.

There have been claims by some candidates that their right to contest the election was violated. National Federation Party candidate Makereta Waqavonovono, sought constitutional redress for her ineligibility to contest the elections stating that the provisions of the Electoral Decree violated her constitutional rights provided in s 23(2), 23(3)(c) and s 26 of the 2013 Constitution (Fiji Times, 2014). As stated above in relation to Free and Fair election, the Electoral Decree was amended with the consequence that it disqualified seven candidates from contesting the elections, none of which were from the Fiji First Party.

Jagnath Karunaratne, the leader of Fiji’s United Freedom Party, was banned from contesting the election because of a seven-year-old traffic offence which carried a fine of $300 or three months
imprisonment if the fine was not paid (Radio Australia, 2014). The Supervisor of Elections also disqualified Fiji Labour Party candidate Steven Singh, based on a conviction that had actually been set aside by the Courts. His appeal against the decision was subsequently upheld by the Commission in a letter dated 22 August 2014, which stated: “There is … no conviction against Mr. Singh that might disqualify him from being nominated” (Radio New Zealand International, 2014). However, by the time the mistake had been acknowledged the timeframe for reinstating Mr. Singhs nomination had elapsed and he was unable to contest the elections.

**HUMAN RIGHTS PROTECTION - ANALYSIS**

In spite of the numerous proclamations relating to the protection and promotion of wide-ranging progressive human rights provisions in the Constitution, concerns about the government’s restriction of dissent by pro-democracy activists, unionists and academics persist. Since the promulgation of the Constitution, there have been several violations of rights to freedoms of association, assembly and expression as highlighted above. The Human Rights and Anti-Discrimination Commission remains silent regarding government violations of various provisions of the Bill of Rights. This body has not been established officially, although the original body, the Fiji Human Rights Commission, is still in existence under the Human Rights Commission Decree, as a department under the Prime Minister’s Office. The functions of this body have not been realized in full, similar to the Constitutional Offices Commission in appointing the Chair and four other members. Section 45 (11) has a key provision which states that Parliament shall ensure that adequate funding and resources are made available to the HRADC to be able to be effective and 45 (12) is a provision which is linked to its independence, stating that the Commission shall have control of its own budget and finance. What is operating in practice is a relic of the old Human Rights Commission (a hangover from the 1997 Constitution) which is now operating as a department under the Prime Minister's Office. The media, although becoming more proactive in reporting on election related developments, still operates in a climate of wary self-censorship and a restrictive decree, limiting its ability to report on human rights violations.

The legal framework needs to take into account the circumscribed role of the judiciary. Their capacity to hold the government to account is limited by constraints placed on their powers of judicial review under the decrees that severely restrict human rights. The most persuasive justification for the removal of these limitations is that while they remain in place, the capacity of the judiciary to give more full effect to the provisions of the Bill of Rights and the rights of citizens against the power and might of the government and other large institutions remains partial and incomplete.

In a multicultural, multiethnic society prohibitions against hate speech are appropriate, however much care needs to be taken so that concern for political correctness does not become a convenient
way to gag alternative views. With eight years of muzzling debate and discussions on issues of national importance, people finally felt they could air their views without fear. Actions by MIDA following comments made at the Tailevu Provincial Council meeting only underscored the point that freedom of expression was still restricted. Instead of opening up a safe and constructive space for discussions around racial issues, MIDA only closed them up, fueling resentment. More significantly, it indicated that the constitutional provisions that gave this freedom had little substance and a fortuitous opportunity to finesse argument and debate around these issues was lost by MIDA’s seeming rush to judgment.

Government officials and civil servants who administer and implement government policies also play a key function in transition processes. It is important to recognize the restrictive framework in which they operate, as public servants can often be summarily dismissed and their rights of appeal are also heavily circumscribed.

The eight years of arbitrary rule has had an impact on the media and how it executes its function. The media in a democracy plays a crucial role in accountability and transparency of government actions. They are one of the main mediums through which information is transmitted between the rulers and the governed. Self-censorship remains prevalent in the media although certain media organizations are starting to report more freely. Parliament will need to review the Media Decree to ensure that the media operates in a freer environment conducive to a democratic society.

Since the 2006 coup, state security forces have acted with impunity in relation to dealing with the opposition, human rights and democracy activists, trade unionists and criminals. The government has turned not only a blind eye to these incidents but defended well-documented cases of human rights violations by military and police personnel. There still exists a wider culture of violence and impunity among Fiji’s security forces, which authorities have shown little or no interest in addressing.

**INDEPENDENT INSTITUTIONS AND COMMISSIONS**

The 2013 Constitution establishes ten independent institutions and commissions. Eight of these commissions appear in the Judiciary chapter (Chapter 5) of the Constitution: Judicial Services Commission (JSC), Independent Legal Services Commission, (ISLC) Fiji Independent Commission against Corruption (FICAC), Director of Public Prosecution (DPP), Accountability and Transparency Commission, (ATC) Public Service Disciplinary Tribunal, Mercy Commission and Legal Aid Commission (LAC). The Constitutional Offices Commission appears in Chapter 6 (State Services) along with the State Services and Part B includes the Disciplined Forces.

Five of these Commissions continue as established either through the 1997 Constitution or through decrees – Independent Legal Services Commission, Fiji Independent Commission against Corruption, Director of Public Prosecution, Fiji Human Rights and Anti-Discrimination Commission and Legal Aid Commission while the rest are yet to be established. It is recommended
that these be set up as a matter of urgency. All other commissions are likely to be set up now that elections have been held.

Key Events

**Auditor-General’s Reports**

Since the 2006 coup, the government has not disclosed the government’s financial statements or the Auditor General’s reports. On 9 November 2013, the Attorney General released a statement that the Auditor General’s Reports would be released ‘soon’ without stating a date (Fiji Times, 2013). Since then there have been calls by political parties for more transparency in disclosing government financial statements (Radio New Zealand International, 2013). In a further development, the government disbanded the Public Accounts Committee on 14 March 2014 (The Fijian Government, 2014). The Attorney General stated that all of the reports compiled by the Auditor General would be considered by the Committee and be tabled in the upcoming Parliament which would be chaired by the Opposition (The Fijian Government, 2014). This move by the government drew strong criticism from the opposition parties which stated that the move was part of a cover up by the government (Radio New Zealand International, 2014). On 17 October 2014, it was announced that the Auditor General Reports would be discussed by a Parliamentary Standing Committee on Public Accounts for further deliberation, and the Standing Committee would provide this report to Parliament (Fiji One, 2014).

**Accountability and Transparency Commission**

During the interim government’s draft constitution consultations, in April 2013, the Attorney General told those attending that an Accountability and Transparency Commission would be set-up by July 2013 (Swami, 2013). It is the first time there is constitutional provision providing for an independent accountability and transparency institution. This is a clear indication of the importance placed on ensuring greater accountability and transparency in state institutions. While the rhetoric of the government has been towards greater accountability and transparency, at the time of writing this commission is yet to have materialized.

**Code of Conduct**

Section 149 of the Constitution provides for the parliament to make laws in relation to the conduct of office holders of the Constitution. The Code of Conduct legislation is to establish procedures, monitoring by the Accountability and Transparency Commission for compliance, investigate possible breaches, protect whistleblowers and provide for annual declarations by the officers that are to be made public. The new Fiji Parliament should implement these laws as a priority.

**Freedom of Information**

Section 150 of the Constitution provides for the Parliament to make laws in relation to Freedom of Information to ensure citizens’ right to access official information and documents held by the government and its agencies. The new Fiji Parliament should implement these laws as a priority.
INDEPENDENT INSTITUTIONS AND COMMISSIONS - ANALYSIS

Since its promulgation there has been some delay in implementing the provisions of the 2013 Constitution, particularly accountability and transparency mechanisms like an Accountability and Transparency Commission. In spite of promises and statements made by the Attorney General this institution is yet to materialize. The disbanding of the Public Accounts Committee in early 2014 and the delay in releasing the Auditor General’s reports since 2006 cast some doubt on the repeated rhetoric of transparency and accountability by the government. However, since the sitting of Parliament in October 2014, the government has displayed some transparency in relation to the financial reports, with approximately 30 volumes being tabled in Parliament at the time of writing.

However, setting up these institutions unilaterally without any consultation with the opposition could affect credibility and independence of these institutions. Now that parliamentary elections have been completed, the next step would be to establish the relevant institutions, oversight committees and commissions.

The rhetoric and practice with regard to accountability and transparency of the government has serious implications on the trust that people have placed in public institutions. Parliament provides an opportunity for the government to renew its commitment to human rights, accountability and transparency and the Constitution by putting in place Freedom Of Information and Code of Conduct Bills, as part of the new legislative agenda; and secondly, setting up the relevant enforcement mechanisms to facilitate freedom of information, such as the Accountability and Transparency Commission and the Human Rights and Anti-Discrimination Commission in full complement to carry out their functions effectively and independently as stated in the Constitution. It is recommended that these institutions are adequately funded and resourced to carry out their independent oversight functions.

The effect of having Freedom of Information (FOI) legislation is that official documents, such as Auditor General’s report, budget documents, commission enquiries and investigations would be accessible to the public. CCF had done prior work on a draft FOI and this could be a basis of a revamped submission should an FOI and a Code of Conduct bill be introduced by the Parliament. These bills, alongside the other Commissions such as FICAC and an Accountability and Transparency Commission and the rewarding of whistleblowers (FIRCA policy) would, as a package, strengthen accountability and transparency. The successful implementation will only be as successful as the political will demonstrated by those elected.
OTHER CONSTITUTIONAL ISSUES AND EVENTS

Key Events

Resignation of the Prime Minister from the RFMF

On 5 May 2014, Prime Minister Bainimarama stepped down as the Commander of the Republic of Fiji Military Forces (RFMF) (Australia Network News, 2014). He appointed the Land Force Commander Brigadier Mosese Tikoitoga as his replacement. Under the Political Parties Decree, members of the Republic of Fiji Military Forces (RFMF) are not permitted to be members of political parties and must not engage in political activity.

OTHER CONSTITUTIONAL ISSUES AND EVENTS - ANALYSIS

The resignation of the Prime Minister as the Commander of the RFMF was an important event in the transition, and an indication that his control and influence in the RFMF would begin to diminish. How the RFMF responds now, after elections, and the implications of the new Commander’s pledge to uphold the Constitution remain to be seen.

Another area of concern with election campaigning was the role played by certain media organizations, particularly the Fiji Sun newspaper and Fiji Broadcasting Commission TV (FBC TV) which has been slanted in favour of the government over a period of years. FBC TV commentators have not shied away from disclosing their sympathies towards the government, understandable if not excusable given they are a statutory corporation. This phenomenon while regrettable is an unfortunate consequence of legislative and other means that stifle dissent and provide preferential treatment for compliant media. Now that Fiji has returned to Parliamentary rule, it is to be hoped that the media will perform its role as an impartial entity, providing a constructive platform to all political parties and candidates in subsequent elections.
RECOMMENDATIONS

Free and Fair Elections

For elections to be truly free and fair:

- Amend provisions of the Electoral Decree, the Political Parties Registration Decree and the National Registration of Voters Decree ensuring greater accountability and transparency
- Amend provisions that prohibit CSOs from effectively contributing to free and fair elections by way of educating and familiarising the public about the electoral process, particularly s 115 of the Electoral Decree
- Make provisions to allow accredited domestic observers to ensure more national ownership of the electoral process and add credibility to the election outcome

Human Rights Protections

Review the decrees (and provisions thereof) that restrict basic rights and freedoms such as the Public Order Amendment Decree, Administration of Justice Decree 2009, Media Industry Development Decree, Essential Services Decree and the Crimes Decree to amend or repeal them to:

- Ensure restrictions placed on the rights of freedom of expression, peaceful assembly and association are removed
- Ensure steps are taken to prevent attacks, intimidation and harassment of human rights and democracy activists
- Eliminate barriers to justice for serious human rights violation to ensure victims and families can seek legal redress through the courts
- Guarantee all those who were involved in torture and/or ill-treatment of persons are brought to justice
- Ensure that political parties are not discriminated against with regards to their formation, funding and in the exercise of their rights to freedom of expression, assembly and access to the media.
- Ensure independence and adequate resourcing of the Fiji Human Rights and Anti-Discrimination Commission

Accountability and Transparency Commission

During the term of this Parliament:

- Introduce legislation that sets up the Accountability and Transparency Commission
- Introduce the Freedom of Information and Code of Conduct Bills into Parliament
CHALLENGES

Implementation of a new Constitution is not an easy task and like all tasks of such profound importance and of such a scale it is not without challenges.

Knowledge and understanding of the Constitution

A majority of Fijians display insufficient knowledge of the Constitution as can be seen in the Constitution Perception Survey in this volume. Provisions of the Constitution are not well understood and Fijians are yet to internalise the Constitution. The government’s initiatives in translating it into the iTaukei and Fiji Hindi languages and making available free, pocket-sized copies is an important first step to making the document more accessible. However, constitutional education would benefit from targeted civic education to reach women and youths, public officers, the private sector and other non-state actors as well as the community at large so they are well educated on the Constitution and their respective roles in upholding its provisions.

Political Will

Implementing key constitutional provisions requires efficient action and clear leadership by the government and the Parliament, but it is equally important that civil society, religious leaders, the private sector and Fijian citizens be broadly consulted. Only a consultative, inclusive process to carry out implementation will be credible to the Fijian people. Politicians must transcend historic divisions and will distinguish themselves by doing so. The public must be vigilant and demand expedited delivery on promises made and a new social compact. The people have high expectations that the Constitution will in fact bring about fundamental change to counter negative ethnic politics, to end the culture of impunity, and to end pervasive poverty by promoting equitable development and distribution of resources.

While fundamental change will take time, the expectations of the Fijian people must be met through the creation of transparent and credible structures. These structures are instrumental to creating the framework for a vibrant and inclusive return to democracy and rule of law.

Accountability and Transparency

Parliament will play a decisive role in the implementation process. It is, therefore, essential that Parliament be held accountable to vet very carefully and rigorously in accordance with high standards all proposed appointments to commissions and key government positions, as well as proposed legislation. Parliament will enact the legislative framework for the implementation process, including the creation and resourcing of independent commissions.
CONCLUSION

The path ahead for Fiji is an uncertain one and there remains a profound responsibility on political leaders and the people to make the Constitution work. Although the 2013 Constitution is far from perfect, with wide-ranging powers vested with the Prime Minister and the Attorney General, lack of adequate checks and balances between the three arms of the government, weak human rights protection mechanisms, entrenchment of restrictive decrees and granting of broad immunity provisions to the administrative arm of the government, the 2013 Constitution does provide for a progressive move from eight years of undemocratic, authoritarian control to parliamentary democratic rule.

Implementation of the provisions of the Constitution has not been as swift as one would have hoped, but understandable in the circumstances of promulgation which occurred on 6 September 2013 and the somewhat laboured preparations for the elections held on 17 September 2014. In the absence of a defined timeline for implementation, political will and commitment from political leaders and parties, together with sustained constructive engagement of CSOs will be of great importance.

The 2013 Constitution creates new governance arrangements and institutions, while also seeking to give all Fijians a shared stake in the country’s future. One of the main challenges thus far has been, and will be for the foreseeable future, reconciling diversity with a common identity. In this respect there will need to be a more nuanced and deeper understanding of the relationship between Fijian citizenship and iTaukei identity, rather than treating them as mutually exclusive concepts. Beyond that, there is a need to ensure that public accountability mechanisms are made to work through legislative means with the enactment of laws that strengthen these mechanisms and administrative structures that provide the people at large with a platform and the means to sustain meaningful and participatory engagement beyond elections.
REFERENCES


The Fijian Government. (2013, September 6). President’s Address to the Nation. Retrieved February 28, 2014, from President’s Address to the Nation


**Cases**


*Waqavonovono v Chairperson of Fijian Electoral Commission* [2014] FJHC 570; HBM92.2014 (1 August 2014)
Legislation


Electoral (Amendment) (No. 2) Decree. Suva: Government of Fiji (Decree 26 of 2014, July 31).


Electoral (Registration of Voters) (Amendment) Decree. Suva: Government of Fiji (Decree 9 of 2014, March 27).


Fiji Constitutional Process (Constituent Assembly and Adoption of Constitution) (Amendment) Decree. Suva: Fiji Government. (Decree 1 of 2013, January 10).


Political Parties (Registration, Conduct, Funding & Disclosures) Decree. Suva: Fiji Government. (Decree 4 of 2013, January 15).

Political Parties (Registration, Conduct, Funding and Disclosures) (Amendment) Decree. Suva: Fiji Government. (Decree 11 of 2013, February 16).

Political Parties (Registration, Conduct, Funding & Disclosures) (Amendment) Decree. Suva: Fiji Government. (Decree 10 of 2014, March 28).

Appendices
& Annexes
APPENDIX 1

CITIZENS’ CONSTITUTIONAL FORUM (CCF) NATIONAL PERCEPTION SURVEY

Researcher Administered Questionnaire

I. Ensure the respondent is familiar with the purpose of this survey. Read through research information sheet with the respondent.

II. Explain ethical issues including:

   a. confidentiality

   b. use of a recording device

   c. answer any questions the respondent might have

III. Researcher to complete the oral consent form indicating that they have adequately explained the research, ethical issues and answered any questions asked by the respondent.

Part I: Establishing Demographic Information

Age:...........................................................................................................................................

Gender: ......................................................................................................................................

Ethnicity: ..................................................................................................................................

Religion: ......................................................................................................................................

Level of Education: ...................................................................................................................

Occupation: ......................................................................................................................................

Location: ......................................................................................................................................

Have you read the 2013 Constitution?
..................................................................................................................................................

If Yes, What are your thoughts on it?
..................................................................................................................................................
..................................................................................................................................................
..................................................................................................................................................

If No, Is there a reason you have not read it?
..................................................................................................................................................
..................................................................................................................................................
..................................................................................................................................................
Part II: The Constitution Making Process

There are three main parts to this survey, in this first section I would like to ask you some questions about the Constitution making process.

1 Generally, what do you remember of the 2012 Constitution making process?
   a. Did you take part in it?
      ............................................................................................................................................
   b. How did you take part?
      ............................................................................................................................................
   c. What made you take part?
      ............................................................................................................................................

2 Generally, what do you remember of the 2013 Constitution making process?
   d. Did you take part in it?
      ............................................................................................................................................
   e. How did you take part?
      ............................................................................................................................................
   f. What made you take part?
      ............................................................................................................................................

Researcher, if respondent did not take part in either of the processes, please go to Question 6.

3 If the respondent took part in both the 2012 and 2013 processes:
   Did you notice any differences between the nature of the 2012 and 2013 constitution making processes?
   ............................................................................................................................................
   ............................................................................................................................................

The following questions depend on which process they participated in. If they participated in both, please still ask the questions separately.

4 Based on the outcomes of the 2012 process, how do you feel about your participation?
   ............................................................................................................................................
   ............................................................................................................................................

5 Based on the outcomes of the 2013 process, how do you feel about your participation?
   ............................................................................................................................................
   ............................................................................................................................................
If the respondent did not take part in ANY of the processes:
6 Why did you not take part?
............................................................................................................................................
............................................................................................................................................

If the respondent only took part in ONE of the processes:
7 What made you take part in one of the processes and not the other?
............................................................................................................................................

To ask all, even if they didn’t participate in either:
8 Did you see the two processes as separate or as one continuous process?
............................................................................................................................................
............................................................................................................................................

If respondent answers with short statements, please clarify:
   a) How were they the same/different? (depending on their answer above)
............................................................................................................................................

Part III: The Contents of the Constitution

This second section is about what is contained in the Constitution. This section might seem a bit technical; it is alright if you do not have answers to some of these questions.

1 What is a Constitution?
............................................................................................................................................

2 What is the purpose of a Constitution?
............................................................................................................................................

3 What do you know about Fiji’s Constitution?
............................................................................................................................................

4 What is the ‘Rule of Law’?
   a. Is the ‘Rule of Law’ important for a country’s development?
   ............................................................................................................................................
   b. How so?
   ............................................................................................................................................
5 What is the ‘Bill of Rights’?
..................................................................................................................................................
   a. What rights do you know of that are in Fiji’s Constitution?
..................................................................................................................................................
   b. Do you know what the ‘Claw Back’ clause is?
..................................................................................................................................................
      If yes: How do you feel about it?
..................................................................................................................................................
6 Do you know that there is an ‘Immunity Clause’ in the Constitution?
   a. What do you know about the ‘Immunity Clause’?
..................................................................................................................................................
   b. How do you feel about this clause?
..................................................................................................................................................
7 The voting age has been reduced from 21 years to 18 years, what do you think about this?
..................................................................................................................................................
8 Everyone is now voting under one constituency, what do you think about this?
..................................................................................................................................................
9 The size of parliament has been reduced from 71 members to 50 members, what do you think about this?
10 Do you think the military and the police have the same roles and responsibilities in maintaining law and order?
..................................................................................................................................................
      If yes: What are their roles? ..................................................................................................
      If no: What is the difference? ..................................................................................................
11 Do you think the roles of the police and military have changed?
      If yes: ..................................................................................................................................
   a. How have they changed?
..................................................................................................................................................
   b. How do you feel about this change?
..................................................................................................................................................
Part IV: The Implementation of the Constitution

This final section is about your thoughts on the implementation of the Constitution.

1. The 2013 Constitution is Fiji’s fourth constitution, how do you feel about this?
   ............................................................................................................................................
   ............................................................................................................................................

2. Do you think this Constitution will take Fiji forward?
   
   *If yes:*
   a. What about it do you think has the ability to take Fiji forward?
      ............................................................................................................................................
      ............................................................................................................................................
   
   *If no:*
   b. What about it do you think limits Fiji from moving forward?
      ............................................................................................................................................
      ............................................................................................................................................

3. How do you think Fijians, as a group, can make this Constitution work?
   ............................................................................................................................................
   ............................................................................................................................................

4. Do you think you would personally contribute to making this Constitution work?
   
   *If yes:*
   a. How would you do this
      ............................................................................................................................................
      ............................................................................................................................................
   
   *If no:*
   b. Why not?
      ............................................................................................................................................
      ............................................................................................................................................
**Summary**

We have talked about a lot of issues, thank you so much for sharing your thoughts with me. Before we end, I was wondering if you have anything you would like to add about the:

a. Constitution making process

............................................................................................................................................
............................................................................................................................................

b. Content of the Constitution

............................................................................................................................................
............................................................................................................................................

c. Making the Constitution Work

............................................................................................................................................
............................................................................................................................................

Is there anything else you would like to add generally about the things we have discussed or about participating in this research?

............................................................................................................................................
............................................................................................................................................

Do you have any questions for me before we end?

............................................................................................................................................
............................................................................................................................................

*On behalf of CCF, thank you so much for your time and knowledge.*
APPENDIX 2

ORAL CONSENT SHEET

*Perception Survey*

**General Information**

1. I have read the relevant information sheet to the participant or given the participant the research information sheet and answered any questions that arose.

2. I have read out the relevant consent form information sheet (below) and answered any questions that arose.

3. I have indicated that the session will be recorded and sought consent for this.

I, _____________________________________________[researcher] verify that this participant has agreed to be part of the study.

_______________________________
Signed: [researcher]

**Interview Recording**

The above participant has given consent to have the interview recorded/ not recorded.

_______________________________
Signed: [researcher]

**Identified**

The above participant has given consent to be identified as _____________________________ in the research document.

_______________________________
Signed: [researcher]
Survey Information

I understand that the research is to gather information for a national perception survey on the 2013 Fiji Constitution.

I understand that

1. I will not be paid for my participation in the survey.
2. I may withdraw my participation at any time.
3. If I feel uncomfortable in any way during the session, I have the right to decline to answer any question or to end the session.
4. Participation involves answering a number of questions asked by the researcher. The session will last approximately 30 – 45mins.
5. The session will be recorded. If I have any objection to being recorded, I will inform the researcher and I can at any time during the session request to pause the recording.
6. I will not be identified by name in the research document unless I give permission in advance.
7. Recordings will only be used for the purpose of the survey and will not be circulated for public use.
8. I have read and understood the explanation provided to me and I voluntarily agree to participate in this interview.
The Fijian constitutions all protected human rights to some degree. This table summarizes which rights were protected in each constitution with a specific reference to the section protecting the right in question.

<table>
<thead>
<tr>
<th>Protected Right</th>
<th>1970</th>
<th>1990</th>
<th>1997</th>
<th>GDC</th>
<th>2013</th>
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<tr>
<td>Life</td>
<td>4</td>
<td>5</td>
<td>22</td>
<td>29</td>
<td>8</td>
</tr>
<tr>
<td>Dignity</td>
<td></td>
<td></td>
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<td>29</td>
<td></td>
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<tr>
<td>Liberty</td>
<td>5</td>
<td>6</td>
<td>23</td>
<td>31</td>
<td>9</td>
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<tr>
<td>Slavery and forced labour / trafficking</td>
<td>6</td>
<td>7</td>
<td>24</td>
<td>31</td>
<td>10</td>
</tr>
<tr>
<td>Cruel or inhuman treatment</td>
<td>7</td>
<td>8</td>
<td>25</td>
<td></td>
<td>11</td>
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<tr>
<td>Property</td>
<td>8</td>
<td>9</td>
<td>40</td>
<td>37</td>
<td>27</td>
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<tr>
<td>Privacy</td>
<td>9</td>
<td>10</td>
<td>26, 37</td>
<td>32</td>
<td>24</td>
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<td>Procedural / substantive justice</td>
<td>10</td>
<td>11</td>
<td>27-9</td>
<td>38-9, 41</td>
<td>12-6</td>
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<td>Religion / conscience</td>
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<td>35</td>
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<tr>
<td>Expression</td>
<td>12</td>
<td>13</td>
<td>30</td>
<td>33</td>
<td>17</td>
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<tr>
<td>Assembly and association</td>
<td>13</td>
<td>14</td>
<td>30, 31</td>
<td>34</td>
<td>18-9</td>
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<td>34</td>
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<td>Equality / discrimination</td>
<td>15</td>
<td>16</td>
<td>38</td>
<td>29</td>
<td>26</td>
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<td>Labour / economic participation</td>
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<td>33, 36, 37</td>
<td>20, 32-3</td>
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<tr>
<td>Secret ballot</td>
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<td>31</td>
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<td>Education</td>
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<td>35</td>
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<td>Children</td>
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<td>Access to information</td>
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<td>34</td>
<td>25</td>
<td></td>
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<tr>
<td>Adequate standard of living</td>
<td></td>
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<td>36</td>
<td>34-8</td>
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<td>Environmental</td>
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<td>38</td>
<td>40</td>
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<tr>
<td>iTaukei, Rotuman &amp; Banaban lands</td>
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<tr>
<td>Tenant land interests</td>
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<tr>
<td>Land owners mineral royalties</td>
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<td>30</td>
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</tbody>
</table>
Limitations on rights are acceptable only if necessary to sustain a free and democratic society. This principle is enshrined in the Universal Declaration of Human Rights and other progressive constitutions. The limitation of rights in the 1997 Constitution was allowed only if ‘reasonable and justifiable in a free and democratic society.’ The 2013 Constitution has not included this general qualification in its Bill of Rights. In short, the government may limit rights even if it is not justifiable in a free and democratic society.

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>2013 Fijian Constitution</td>
<td>‘limitations expressly prescribed or authorised or permitted (whether by or under a written law)’ (s. 6.5.a)</td>
</tr>
<tr>
<td>1997 Fijian Constitution</td>
<td>‘only to the extent that the limitation is reasonable and justifiable in a free and democratic society.’ [included as a sub-section of specific rights]</td>
</tr>
<tr>
<td>Ghai Draft</td>
<td>‘only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’ (s. 48.1)</td>
</tr>
<tr>
<td>Universal Declaration</td>
<td>‘only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.’ (s. 49.2)</td>
</tr>
<tr>
<td>Canadian Constitution</td>
<td>‘only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’ (s. 1)</td>
</tr>
<tr>
<td>South African Constitution</td>
<td>‘limitations must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.’ (s. 36)</td>
</tr>
</tbody>
</table>