



Listening to the people of Fiji

BUILDING THE PEOPLE'S CONSTITUTION: YOUR RESPONSIBILITY

A GUIDE TO CONSTITUTION MAKING FOR THE PEOPLE OF FIJI

SUVA: AUGUST 2012

How can I give my views to the Commission?

You can write your recommendations and deliver it to the Commission at Admin Block 1, Parliament Complex, Battery Road, Suva, or you can post it to the Commission at P. O. Box 2082 Government Buildings, Suva or you can present them at a public hearing of the Commission. You can email them to: constitution submissions@constitution.org.fj or send them to the website of the Commission (www.constitution.org.fj).

You can submit your views as an individual or together with an organisation where you are a member, or with some friends. You do not have to be a constitutional lawyer to be able to present your submission. And your submission does not have to state precise constitutional provisions. The Commission will be pleased to hear your views on everyday matters. You can write your recommendations and deliver it to the Commission at Admin Block 1, Parliament Complex, Battery Road, Suva, or you can post it to the Commission at P. O. Box 2082 Government Buildings, Suva or you can present them at a public hearing of the Commission. You can email them to: constitution submissions@constitution.org.fj or send them to the website of the Commission (www.constitution.org.fj).

You can submit your views as an individual or together with an organisation where you are a member, or with some friends. You do not have to be a constitutional lawyer to be able to

The Commission

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The Commission is assisted by a Secretariat.

This publication has been prepared by the Constitution Commission under the terms of the Fiji Constitutional Process (Constitution Commission) Decree 57 of 2012 which requires the Commission to “inform Fijians including through its website, and through the State and private media, of the progress of the process, in order that they may understand the issues under discussion, and be fully informed how they make their own contribution and submissions” (s. 7(1) (d)). The Commission is grateful to Jill Cottrell for her assistance in the preparation of this publication.

Building the People’s Constitution: *Your* Responsibility

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About this publication

The Fiji Constitution Commission hopes this publication will be read by individuals who want to understand and make a contribution to the constitution making process. And that it will be used for civic education.

This is how the Decrees on the constitution process define civic education:

“civic education” means programmes of education, whether conducted by governmental or non-governmental bodies, having the aim of enabling the people of Fiji to understand the nature and role of the Constitution and the guiding constitutional principles, and to participate effectively in the constitutional process.

The Commission hopes that this publication will help all the people of Fiji to understand:

- reasons for making a new constitution
- the process of making the constitution
- people’s participation in making the constitution
- the experience of previous constitutions
- basic principles for the constitution
- positive and negative aspects of different options for principal features of the constitution.

Using this publication

You don't have to read this through from beginning to end. Most sections can be read alone. We have grouped the topics in a way that we hope makes them easy to understand. We have also given a full list of contents (pp. ii-v) which should help you find your way around.

In case some of the words used cause misunderstanding, we have included at the end a list of important words, and their translation into the iTaukei language and Hindi.

We have also included (on pp ix-x) a list of the main parts of the Fiji Constitution of 1997. This was the country's most recent constitution. You may have looked at that constitution. It would be a good idea to do so, just to get an idea of how constitutions are put together (you can find it on the internet at http://www.paclii.org/fj/legis/num_act/ca1997268/). Constitutions are not all the same, but the 1997 Constitution has a very common structure (except for the "Compact" which was a unique feature). So you can see where the various aspects that we discuss in Part V would fit in an actual constitution. Or you could look at another constitution: the South African one is at <http://www.info.gov.za/documents/constitution/1996/index.htm> and the Kenyan at <http://www.parliament.go.ke> (click on The Constitution).

We have also included some questions after each section. In case you would like to include responses to the questions in your submission, we have numbered each question.

Part I Why a new constitution?

In 2006 a military government took over, though they said they were retaining the 1997 constitution. In 2009, however, the government formally abrogated the constitution. Since then Fiji has been ruled by a military-led government. A crucial function of the new constitution will be to restore democracy and the rights and freedoms of all Fijians. But it will also provide a framework within which the fundamental social, economic and political problems that face Fiji can be addressed.

The Decrees establishing the process set out the purposes of the constitution in section 3 as follows:

The purpose of this Decree is to adopt a Constitution for Fiji that—

- (a) results from full, inclusive and fair participation of Fijians;*
- (b) meets the needs of Fiji and the aspirations of its people;*
- (c) unites the people of Fiji;*
- (d) includes provisions appropriately designed to achieve, among others, –*
 - (i) true democracy, and*
 - (ii) respect for, and protection and promotion of human rights*

This is followed by a number of principles for inclusion in the constitution, discussed later in this Guide (and referred to as “constitutional principles”).

What is a Constitution?

A law: in fact a country’s basic law. It sets up the system of government. It gives the government power to make laws, raise taxes (in a general way), and to govern the country. But it also limits the government’s power: it cannot pass any laws that conflict with the constitution, including that violate the people’s right recognised by the constitution. It gives authority for the creation of courts and other bodies. And it reflects the values of its makers: including, in a modern constitution, the values of the people.

Since the coups of 1987, two major reviews have explored fundamental problems facing Fiji: in 1996-7, by a constitution review commission consisting of Sir Paul Reeves

(chairperson), Tomasi Vakatora and Brij Lal; and in 2008 by the National Council for Building a Better Fiji (NCBBF).

What problems have been identified?

Both bodies did their own research and consulted people widely. The Reeves' Commission focused mostly on constitutional and political issues, while the NCBBF also explored social, economic, and administrative issues. Yet their conclusions on what needs to be done are broadly similar.

The NCBBF described the problems in the following way:

..[T]he people of Fiji are disappointed and disenchanted with the country in which they now live. The high hopes they had at Independence have been dashed. The reality they face is a country scarred by the consequences of political instability and repeated coups, a stagnant economy, a general lack of trust and confidence, growing unemployment and poverty, increasing religious and racial intolerance and divisiveness, the emigration of many talented citizens and a rising tide of crime and violence”.

Both reviews say that a major problem facing Fiji is the lack of unity among its people. Fijians are divided in several ways: by ethnicity, language, religion, region—and wealth. Colonial policies divided them by institutions of government, unequal political and economic rights, a divisive electoral system, and by occupation and role in the economy. The people of Fiji have been so divided that they could not even agree on a common name for themselves as citizens. The Reeves' Commission was particularly critical of the politicians for exploiting ethnic differences and creating animosity among the people.

Both reviews explore options from the national perspectives, while acknowledging importance of the concerns of each community. Key among the recommendations of the two reviews is a common identity and equal citizenship, and an electoral system which would promote political integration. Both recommend a racially integrated local government. Both recognise land as an issue, and seek to resolve differences of approach and interests in a way that is fair to all groups.

Most of the recommendations of the two reviews are reflected in the constitutional principles which are discussed later in this publication.

Why is so much emphasis placed on a constitution?

People often wonder if a constitution is really important, especially in countries which are prone to coups. They may also question whether the constitution can solve the kind of complex problems identified by the NCBBF. It is true that in many countries constitutions have failed to solve such problems.

For a country like Fiji with a great diversity of religions, languages, cultures, and races, there are two important functions of the constitution. The first is to create unity and political integration

among different communities (“nation building”), and the second is to restructure the state to achieve that objective (“state building”). In countries without such diversity, a united nation is taken for granted, and the focus is largely on state institutions and the relationship of citizens to the state. In countries like Fiji it is sometimes necessary also to recognise communities: the relation between the state and communities, the relation between communities and even the relation between the individual and the community.

Nation building is important because competition for resources and control of the state is often based on ethnic manipulation and creating divisions among the people. Another difficulty is lack of common values and interests, especially when there are significant differences of religion, history and traditions, as in Fiji. The purpose of the constitution then is to agree on common principles, legitimate rights of groups and communities, and the structures and powers of state to protect the rights and concerns of all, thus creating a harmonious society.

It is worth quoting Reeves’ Commission view of a constitution as a compact between Fiji’s communities:

People believe in the need to live under a constitution that articulates the values they hold most dear and that has the force of supreme law. In part, this belief reflects the idea that the constitution is a compact among Fiji’s different ethnic communities... More generally, respect for an entrenched constitution no doubt comes naturally in a society where people remember the entry into force of just such an instrument, the 1970 Constitution, ending colonial rule and providing for the people of Fiji to govern themselves as an independent state.

This statement is based on the importance of two things: that the constitutional settlement should be negotiated and agreed by the people, and secondly constitutionalism or the rule of law—that the constitution is binding on both individuals and the state. Law, policies and administrative decisions of the state must be made by the state in accordance with the values and procedures set out in the constitution. This means that state action is predictable, contractual rights are protected, abuse of power is prevented, and trust in state institutions is built. A good constitution provides mechanisms to resolve differences and conflicts peacefully and fairly and so prevents violence.

On national unity, the Reeves’ Commission said that:

[People] were unlikely to have a sense of national unity unless, at the same time, they had self-respect and self-confidence as members of their own community. Racial harmony connoted a positive attitude by the members of each community towards those of other communities based on mutual respect and trust, a sympathetic appreciation of one another’s values and traditions and tolerance of different beliefs, customs and cultural attitudes. National unity connoted a willingness of all communities to work towards common goals.

This suggests that in developing common values and national identity, the constitution has to balance the general values and interests with those of communities. Past constitutions have failed to find the proper balance and failed to build a consensus. We discuss later in this publication how Reeves' Commission and the NCBBF recommend this balance might be struck.

But can a constitution even with these qualities take root and solve problems?

There is no guarantee that even a good constitution can solve pressing problems. Sometimes the lack of effectiveness is due to resistance from powerful interests who do not, for example, believe in reform. Sometimes the ordinary people who may stand to benefit from the constitution do not understand what is in the constitution and fail to take action that would safeguard the constitution. A constitution's influence on state policies or inter-community relations depends on how seriously the government, political parties, and civil society take the constitution and respect it. The Reeves' Commission, for example, said:

Political, religious and other community leaders, as well as all individuals, had a responsibility, both in public and in private, to show good sense, moderation and sensitivity in their comments on, and behaviour towards, members of other communities. Civil society had a vital role to play in providing opportunities for members of different communities to come together.

Consensus on fundamental values, knowledge of and commitment to the constitution are therefore important to its success. How can these be secured? The process of making the constitution can certainly play a part. If people are allowed to and participate in the process, it will increase their interest in constitutional issues, promote a debate among them, and perhaps lead to some consensus. For these reasons, they will have an interest in safeguarding the constitution. An inclusive and participatory process is also likely to lead to serious negotiations for a consensus, and thus the constitution will have "legitimacy" – acceptance by those who will be bound by the constitution. If there is wide public support for the constitution, the military or political adventurers will have to consider seriously the consequences of overthrowing a lawfully elected government or abrogating the constitution.

The next part therefore describes the process for making and adopting the constitution.

Part II The Process of Making the Constitution

How will the new constitution be made?

“The entire process of constitution drafting and adoption, including the collection of public views by the Commission, preparation of a draft constitution and public consultation thereon, and decree of the new Constitution”.

This is how the decrees published on 18th July 2012 described the process for making the constitution. One decree established the Constitution Commission (“Commission”) and the other the Constituent Assembly, (“CA”). They lay down the values of the process, the principles for the new constitution (“constitutional principles”), and the composition of the Commission and the CA.

Phases of the process

The entire process starts in May 2012 and ends in March 2013.

- In the first phase (May-August) civic education would take place to enable the people to understand what a constitution is and the principles of the new constitution, so that they can take part in the process.
- Between July and September, the Commission is to hold public consultations to seek and analyse the views of Fijians on the constitution.
- From October to early January 2013 the Commission would draft the constitution after which it would be published for comments by the people before being presented to the President who would send it to the CA.
- Between the second week of January and the third week of March, the CA would discuss, and if necessary amend, the draft constitution, taking into account the comments of the people.

The constitution will then be reviewed by a judicial tribunal chaired by the Chief Justice to decide whether it properly incorporates the constitutional principles. If the tribunal decides that the constitution does not satisfy the principles, it will go back to the CA for necessary changes. If the tribunal is satisfied straight away that the principles are properly reflected in the constitution,

What is the Constituent Assembly?

The Constituent Assembly is established by the second decree of 18 March 2012. It will consist of the representatives of the all key sectors of society as well members from the government. They will be appointed by the Prime Minister. The decisions on the recommendations of the Reeves’ Commission were made by a joint committee of the House of Representatives and the Senate, and therefore essentially by politicians. This time the majority of the CA may have only a minority of politicians.

or if the CA makes the necessary changes after the constitution has been sent back to it, the President must sign the constitution. And then there must be a public, televised ceremony to show the whole country there is a new constitution.

What are the main bodies involved in the process?

The Prime Minister's role is important as he appoints members both of the Commission and the CA. The roles of the Commission, CA, the President, the Chief Justice and the Judicial Tribunal have been mentioned above. There is an important role for civil society, in the conduct of civic education and representation in the CA. Other groups, including the government and political parties, can also conduct civic education. And we must not forget the people, in whose name the constitution is being made, and who will have ample opportunities to give their views to the Commission, and we hope to the CA—both these bodies are in a sense bound by people's views.

It is important to note that there will be non-Fijian members from outside the country (“international members”) on the Commission and the judicial tribunal; two in the former and “at least two” in the latter (out of five members). The Commission is free to appoint among its staff experts from outside Fiji. In recent years international experts have appointed to bodies with similar functions, in several countries, to ensure impartiality and to bring into the process relevant foreign experiences.

Although its members are appointed by the Prime Minister, the Commission is independent, free to recruit its own staff, and not subject to the direction of the government or any agency. It is, broadly speaking, accountable to the public.

In this publication we are focussing is on the role of the Commission and on the preparation of the draft constitution. The Commission will explain the part of the process connected with the CA when it publishes the draft constitution.

Who will pay for it all?

It is expected that most of the costs will be met by donors, national and international. Any shortfall will be made up by the Fiji government.

How will the people become involved?

People become involved at different stages—at first through civic education and the preparation of their submissions to the Commission. At this stage it is expected that there will be a large number of workshops and other meetings, through which additional items for the constitutional agenda might emerge.

The success of the process will depend significantly on how the people engage with the Commission. The Commission will hold public meetings throughout the country to receive submissions. The meetings will be open to anyone who wishes to attend and observe, though in rare cases the Commission would receive submissions privately. The Commission has a special

responsibility to ensure that members of Fijian diaspora understand the process and are able to express their views.

The Commission will monitor the print, broadcast and electronic media to understand the views expressed there.

With the consent of those who make them, submissions will be placed on the website of the Commission and so accessible to all.

To encourage the people to engage with the process, the Commission decree gives immunity to any person from criminal or civil proceedings for any evidence or information given to the Commission – this means they cannot be taken to court for anything they say there, provided it is relevant to the work of the Commission.

➤ For information about how to give your views to the Commission, please see the back of this publication.

Is there any role for the media?

Yes, there is—and an important one. The decrees emphasise the need for inclusion, transparency, and participation in the process, for which purpose the Commission will need the assistance of the media—to inform the people about the process, dates and time of consultation meetings, constitutional principles and issues, and to promote public debate. The Commission must make use of the media and monitor them for the views of the people.

There will be an even more extensive role for the media in the functions of the CA. The CA must allow the media to cover its proceedings and must provide them with information to follow its progress. However, the media may be excluded from a committee if it is considered necessary to encourage a consensus.

Is there enough time for the Commission and the CA to complete their tasks?

There is no doubt that the timetable is tight. But the work of the Reeves' Commission and the NCBBF, and the public debates on constitutional issues for the last several years, have analysed problems facing Fiji and proposed solutions which will save the Commission time. But the Commission will have to work hard and the pace of civic education speeded up and its scope extended. People must start giving submissions as soon as the programme for consultations is announced, on 30th July, and not wait until the end of the Commission's work. The Commission is hoping to receive all submissions by October 10, 2012. If necessary, the government could be requested to provide a month or so of additional time for the writing process and particularly for getting public feedback on the draft constitution.

“Why should I waste my time talking to the Commission?”

Talking to the Commission will not be a waste of time! You should talk to the Commission if you want it to consider your special concerns or the general welfare of Fijians. You can make the

Commissioners aware of your problems and of the community or the region in which you live—whether it is about the lack of basic facilities like water, sanitation, clinics, or the behaviour of government agencies, or access to justice and so on.

The Commission must ensure that the draft constitution meets the needs and aspirations of Fijians, and among the factors for its decisions is “the wishes of the people of Fiji”. The Commission will have to make a careful analysis of people’s views for this purpose. But the wishes of the people are not the only factor in the Commission’s decisions. Its decisions must be based on:

- *the purposes and the guiding constitutional principles for the Constitution;*
- *the wishes of the people of Fiji;*
- *the lessons of the past; and*
- *best relevant practice.*

How will the Commission make its decisions?

The Commission is urged to make its decisions by consensus:

“consensus” means substantial agreement among the members of the Commission which the Chair or the presiding officer is satisfied indicates that the decision reached is generally acceptable, and refers to decision making in a spirit of cooperation rather than of confrontation.

If consensus cannot be achieved, the Commission will decide by the majority of its members.

Part III Comparing Fiji's three Constitutions

The Commission “*shall study the constitutional history of Fiji with a view to avoiding the mistakes of the past*” (sec. 17(1) (b) of the Decree on the Commission).

Is this the first Constitution Fiji will have had?

No: Fiji has had three constitutions (and some periods of rule by military or non-elected governments without any formal constitution): the 1970, 1990 and 1997 constitutions (and there were others before independence).

How were our other constitutions made?

The first was negotiated between the British government and political leaders of Fiji – but was not so very different from the colonial constitution of 1966.

The second was made by the Interim Government, which was in power after the 1987 coups. There was some public consultation, and then it was approved by the Great Council of Chiefs (there was no Parliament then).

The third was mainly based on the recommendations of the Reeves' Commission. But after their report some changes were made by agreement between the main political parties. Then the Parliament which had been elected under the 1990 Constitution passed the Constitution. The Reeves Commission had consulted the people: they said they spent 38 days holding meetings to listen to people, mostly outside Suva, and received 850 submissions in writing.

This time, the Constitution Commission is supposed to listen to the people and make a constitution and then it will be discussed and adopted by the Constituent Assembly.

Were these three constitutions very different from each other?

They had a lot in common:

➤ They all included a similar system of government (what is often called a “parliamentary system”):

- the people elected a body called the House of Representatives to make laws for the country, to control the government and to represent the people
- the leader of the political party that got the most seats in the House became the Prime Minister
- the Prime Minister chose the Ministers who also had to be members of Parliament
- the House could remove the Prime Minister by a vote (called a vote of no confidence)

There was a second body, called the Senate, that was part of Parliament (its members were not elected by the people; some were chiefs and others were chosen to represent other groups or interests in society).

And there was also a person who mainly was the overall ceremonial head of the country, but had a few powers connected with choosing the Prime Minister and some other important officers (called the Governor-General, representing the Queen under the 1970 Constitution, and the President under the other two because Fiji had become a republic – after the second 1987 coup).

➤ All the constitutions protected the human rights of the people, including:

- freedom of speech
- freedom of religion and conscience
- freedom to meet and join organisations
- right to life
- right not to be imprisoned (except for committing a crime) or to be enslaved or tortured
- right to own property, and not to have it unfairly taken away by anyone including the government
- right to a fair trial if accused of a crime; and
- right to privacy.

➤ All the Constitutions had certain independent officers and bodies to protect these rights, and to try to make it possible to hold the government to account:

- they all stressed the importance of the independence of the courts
- they all created an ombudsman office (to deal with complaints about the public service)
- they all provided for an Auditor-General, described as “independent”, to audit the national accounts, to ensure that public money was being used for the purposes approved by the law.

➤ They all protected certain laws from being easily removed or changed, mostly to protect iTaukei interests, especially land interests.

So how were these constitutions different from each other?

Some of the differences were quite small, but some were very important. Often differences that seem quite small can be very important in the way a constitution actually works. The most important differences were about:

- the election system: about who could vote and who could be a member of Parliament
- who could or must be members of the government, in terms of community or party
- the role of traditional iTaukei institutions
- membership and functions of the Senate

- some differences in the human rights provisions
- affirmative action provisions (that is special arrangements to help people or groups in the country who suffered from some sort of discrimination or were somehow disadvantaged in other ways) – all the constitutions had something on this, but they were different, especially about who would benefit from the special arrangements
- on the independent of offices like the judges and the Auditor-General.

The main importance of the differences was:

- how effective the protection of the rights of citizens were
- whether all citizens were treated equally
- whether the constitutions gave certain benefits to one community as compared to others
- how accountable the government was to the law and the people, and to Parliament.

Why were the Constitutions different?

Some of the differences were just the result of when the constitutions were made. But the main differences were between the 1990 Constitution and the 1997 Constitution. We can say that these differences were because of the history of Fiji in the years before each constitution was made, and they showed different visions of Fiji held by the people who made the constitutions.

The 1990 Constitution shows clearly the desire of the interim government to protect the dominance of iTaukei. The way the judges were appointed made them less independent from government.

The 1997 Constitution showed a determination to treat everyone equally, while also protecting the special interests of the iTaukei community, and the system of elections and government was intended to encourage all communities to work together and prevent any community being excluded from the life of the nation.

Later sections of this publication briefly explain in more detail the differences, as well as the possibilities for a new constitution – because there are plenty of ways in which a new constitution could be different from any of the earlier ones.

Can you give some more details of the differences on human rights?

All the constitutions prohibited laws that discriminated (treated people differently in unfair ways)

- the 1970 Constitution prohibited only race, place of origin, political opinions, colour and creed (religion) as reasons for discriminating
- the 1990 added sex (so women – or men – could not be treated differently in an unfair way just because they were women or men)

- the 1997 constitution added birth (which includes the fact that a person’s parents were not married), sexual orientation, a person’s first language, economic status (being rich or poor etc.), age and disability.

How about differences about Parliament?

The following was the most important difference:

- In the House of Representatives (directly elected by the people) all the constitutions had seats elected on a racial basis, but:
 - in 1970 all the 54 seats in the House of Representatives, were allocated on a racial basis in the sense that each could only be held by someone of a particular race, but 25 of them were elected by all voters in the relevant constituency
 - in the 1990 Constitution every one of the 70 seats was allocated to a particular race: only a person of a particular race could be a candidate and only voters of the same race voted in that constituency
 - in 1997 25 out of 71 were open in the sense that anyone could be a candidate and everyone in the constituency voted .¹
- In the Senate, though always some seats were filled with nominees of the Great Council of Chiefs, the numbers varied: 8 out of 22 in 1970, 24 out of 34 in 1990 and 14 out of 33 in 1997 were GCC nominees.

And the Government?

- The 1990 Constitution said the Prime Minister had to be Fijian (iTaukei).
- The 1997 Constitution tried to introduce a system of “power-sharing” to reduce the confrontation between races and parties: any party that won 10% or more of the seats in the House was entitled to seats in the Cabinet in proportion to its seats there.

Anything else?

The 1997 introduced the “Compact”: principles on which the people were said to have agreed, about the relationships between communities, the need for all to have equal rights while respecting the interests of iTaukei and for social justice programmes to ensure equality of opportunity for all.

The 1997 Constitution also had some other new ideas, such as:

- Parliament must set up committees to oversee each area of government activity (to make the people’s representatives more effective in supervising government)

¹The racial groups were iTaukei, Indo-Fijian and “other” or general voters. Other Pacific islanders were grouped with iTakei in the 1970 Constitution and with others/general in 1990 and 1997.

- Parliament must make a law about a Code of Conduct for public officers.

The 1997 Constitution also had some special regard for women:

- the make-up of the judiciary must reflect both the ethnic and the gender diversity in the country
- both men and women were to have fair chances for training and promotion in the public service
- the constitution did not just talk about “he” when referring to state officers, which gives the impression that only men could be president, or MP or judge etc., but talks about “he or she”.

(A more detailed and systematic comparison of the three constitutions and the Reeves’ Commission recommendations is contained in a Table which will be published on the Commission’s website).

So what lessons can we learn from this constitutional history?

The following conclusions are drawn from the Reeves’ Commission Report and the Report of the NCBBF. The first influenced the 1997 Constitution. And the preamble to the new decrees on the constitution making process refers to the Prime Minister’s statement that the constitution should be based on the values and principles of the People’s Charter for Change, Peace and Progress.

- On the process of making the constitution, the Reeves’ Commission believed that a constitution democratically arrived at (after public participation) had better chances of acceptance, even by a group which may not have achieved all that it wanted.
- The constitutions placed too much emphasis on racial and ethnic differences, so people identified first and foremost with their ethnic community, which prevented the rise of a national identity.
- The persistence of ethnic identity and loyalties meant that all issues were seen from narrow perspectives, not national, as is most clearly demonstrated by policy and claims about ownership and use of land. NCBBF emphasises the need to acknowledge and emphasise
 - *the collective interests that are evolving from the many social, cultural and economic linkages between our different communities in their daily lives.*
- Commenting on the electoral systems, the NCBBF says that the race-based electoral systems in all three constitutions and the clear unfairness of their outcomes were major reasons for the growing disaffection with the 1997 constitutional arrangements. The result of these electoral systems was ethnic polarisation; it

- *“encouraged some politicians to exaggerate communal and religious differences for their own narrow political purposes” and “members elected from communal roll [had] little incentives to take account of, or care about, the concerns of other communities”.*
- The Reeves’ Commission had earlier said, *“The people of Fiji need to make a conscious choice about whether they wish to take a decisive step away from the communal system that has made ethnic politics inevitable since before independence”.*
- The Reeves’ Commission had also commented critically on how political parties had come to focus on ethnic concerns, due to the nature of electoral systems and the recognition of communities as political units, and the difficulties of establishing non-racial parties.
- Looking at provisions for affirmative action in the 1970 and 1990 Constitutions, biased towards iTaukei, the Reeves’ Commission concluded that while it was necessary to reduce inequalities between different ethnic communities, poverty was not distributed on the basis of ethnicity (or gender). Consequently, it was necessary to achieve social justice, as well as ethnic justice. To some extent this approach was adopted in the 1997 Constitution, but there was insufficient time to implement it.
- The Reeves’ Commission traced the roots of Fiji’s problems to the way the 1970 Constitution combined Fijian political paramountcy, communal representation, political parties, and traditional Fijian institutions into the fabric of the state. It advocated transforming paramountcy from domination to protection (restricted to safeguarding the essential interests of iTaukei). However, it did not fully follow the logic of its own position—namely the separation increasingly of the state from communal organisations and values, leaving them to the sphere of the community.
- Both the Reeves’ Commission and NCBBF consider that various features of previous constitutions have resulted in a weak national political leadership. Both emphasised the need for strong and honest leadership based on personal integrity and management skills. The new style of politics implicit in the constitutional principles will require leaders committed to public service, integrity and co-operative approach to government.
- According to Prime Minister Voreqe Bainimarama’s analysis of Fiji’s experience over the past two decades, since the coups of 1987, there has been “a vicious pattern: elections followed by ineffective governance, followed by coup, followed by elections and then another coup, with the cycle continuing and Fiji’s overall situation regressing further and deeper.” He believes that it is necessary to fundamentally re-think Fiji’s future, and to find solutions that will be sustainable in addressing Fiji’s current crisis and its deep seated long term problems.

Part IV Basic principles for the new constitution

To a considerable degree, the basic principles for the new constitution (“constitutional principles”) draw upon the lessons of the past. The Decrees on the process say that within the objectives of “true democracy” and “respect for protection of and promotion of human rights”, the constitution must be based on the following principles:

- (i) *a common and equal citizenry;*
- (ii) *a secular state;*
- (iii) *the removal of systemic corruption;*
- (iv) *an independent judiciary;*
- (v) *elimination of discrimination;*
- (vi) *good and transparent governance;*
- (vii) *social justice;*
- (viii) *one person, one vote, one value;*
- (ix) *the elimination of ethnic voting;*
- (x) *proportional representation; and*
- (xi) *voting age of 18.*

We discuss here what these principles mean and then, in the following section, we explore the options for incorporating them into major features of the constitution.

Common and equal citizenry

- There will be only one kind of citizenship, so that all citizens will have the same rights—men and women, members of all communities, regardless of religion, race, or region.
- Citizenship rights should be more important than rights or privileges within communities.

This principle is central to the fundamental objective of the constitutional review: a nation united, living and working together in equality, focussed on what unites and not on what divides it.

Secular state

- There will be no official religion; no religion will be given preference by the state
- Members of all religions will have equal rights to practise their belief and faith individually or in association with fellow members
- The freedom of religion will be guaranteed in the Bill of Rights
- A secular state is not hostile to religion.

This principle is closely connected to the previous objective, for if one religion is privileged over others, it treats people unequally depending on their religion.

Removal of systemic corruption

In Fiji as in many other countries, recent years have seen a considerable increase in corruption, connected to the abuse of state power. Corruption undermines several constitutional objectives, like integrity, the rule of law, equal access to the state, confidence in public institutions, and the government's ability to provide services. Constitutions in democratic countries try to provide mechanisms to hold the government to account to curtail corruption and some recent constitutions provide a legal framework to combat corruption.

An independent judiciary

- The constitution will have to provide rules for the appointment and dismissal of judges, to give them independence from other parts of the state and its agencies, so that their decisions are always made in accordance with the law, and not due to pressure or bribes from any sources whether private or public.
- An independent judiciary is critical to the protection of human rights and democracy as well as upholding the conditions necessary for the proper functioning of the economy.

Elimination of discrimination

- The constitution will have to establish and enforce principles of non-discrimination, that is, the equality of all citizens (and, for the most part, of other residents).
- It should make illegal any discriminatory law or practices which exist now.

This principle is closely connected to the protection of the rights of minorities and disadvantaged communities.

Good and transparent governance

- Good governance refers to the law, conduct and practices of state institutions which meet standards of fairness, transparency, effectiveness, participation and legality.
- A transparent government gives people access to the information about decisions that affect their lives.
- Good governance covers the rule of law and checks and balances among different state institutions.
- And it refers to a government that is accountable to the people.
- It covers also the protection and promotion of human rights.
- It is often used to refer to good democratic practices.

Social Justice

- Social justice is a broad concept built on the assumption of the human dignity of all people. Its aim is to secure for all the basic needs for a life in dignity.
- It addresses the situation of the poor and the marginalised; promises redress to victims of past injustices; and ensures equal opportunities for all to compete for places in state and often also in the private sector.

One person one vote one value; elimination of ethnic voting; proportional representation; and voting age of 18

- All these points are concerned with the electoral system. Under them:
 - Everyone who is 18 years or more has the right to vote
 - Every vote will count the same
 - There will be no seats reserved for a particular community or group
 - The number of seats a party wins will be in accordance with the number of votes it has won.
- The election system based on these principles will be significantly different from the system under the 1997 constitution under which the voting age was 21, voters had at least two votes: one for a person from their community and the other without restriction of race; and the voting system effectively favoured the largest community in each open constituency, leaving minorities unrepresented.

Part V Putting the Constitution together

Now we discuss the different ways in which constitutions incorporate objectives of democracy and human rights, through adopting various rules, institutions and values. These are not intended as suggestions for adoption by Fijians, but just to get you thinking about possibilities.

➤The discussion of each topic ends with questions that you should think about and discuss with your friends or in your organisations. This will help you in preparing your submissions to the Commission.

1. Values, Rights and Principles

When people read a constitution they are usually looking for the values, for their rights, and what it means for their community and their culture. When politicians look at a constitution they are usually looking at the institutions of government and asking who exercises power under the constitution. Here we look first at the values of a constitution.

1.1 Stating National Principles and Values

Fiji's constitutions have not on the whole explicitly emphasised principles, though certain principles were fairly obvious from specific provisions on institutions. An exception is the 1997 Constitution which, in the Compact, sets out the values by which different communities would relate to each other and the procedures by which they would build co-operation among themselves and resolve their differences. Given the transformation that the constitutional principles aim to bring about in Fiji, there may be value in setting out, in the preamble and at the start of the constitution, national values and principles (emphasising for example national unity, non-racial Fiji, integrity, social justice, etc.)

The following principles are from the new (2010) Constitution of Kenya:

10(2) The national values and principles of governance include—

- (a) *patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;*
- (b) *human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;*
- (c) *good governance, integrity, transparency and accountability; and*
- (d) *sustainable development.*

In public discourse as well in Parliament and the courts, these values have been repeatedly used to judge the constitutionality of laws, policies and administrative acts.

1.2 National identity and political integration

There are several recommendations in the Reeves' Commission Report and the People's Charter about how Fiji could create national identity and political integration among its diverse communities. This would be achieved not by denying its people the use of their languages or the

profession of their different religions or the practice of their culture, but by cultivating principles and values that define the overarching identity of all citizens. Nation building in Fiji will depend on how skilfully the constitution can balance the national and community values and interests. Many of the constitutional principles discussed above seek to make this balance.

Key elements in achieving political integration include an electoral system that encourages co-operation rather than competition between communities, political parties which transcend racial communities, equal citizenship, an inclusive state where all communities have access to and participate in, its institutions, human rights and social justice.

Some communities may feel threatened by the notion of political integration and equality. The poor performance of the economy and increasing unemployment and poverty among many communities and groups (not unique to Fiji) creates a sense of insecurity. It is necessary to be sensitive to these concerns. Within the broad framework for integration, account should be taken of their special interests and reasonable historical entitlements. The delicate balance between individual and community rights has to be carefully negotiated.

It is necessary to assure all citizens and communities of justice and fairness. This principle should be applied to the eradication of poverty and affirmative action, focusing on the poor of all communities. As the Reeves Commission noted, differences between the lifestyles of ethnic groups tend to be seen as an indication of differences in opportunities, proof that society has allocated access to education, employment and other opportunities unfairly.

There should be respect for all cultures and religions, although these should, as far as possible, be detached from institutions of the state, as they best flourish in civil society, minimising conflicts in the public sphere.

Questions

1. **Why has Fiji had so many ethnic problems?**
2. **Do you think that the powers and institutions of government under previous constitutions have been fair to all communities?**
3. **Which are the most deprived communities in Fiji? What should the constitution do for them?**
4. **Which problems are most critical for Fiji: between the rich and the poor, or between ethnic communities? Why?**

1.3 Human Rights

What does it mean to be a human being? Being able to understand, to learn, to worship, to love, to make choices, to have opinions, to marry and have children, to cooperate with others, to express yourself in words and movement. Most people would think that these are very important aspects of being human. If you are religious you will probably believe that these are part of a divine design.

What do they have to do with a constitution? People formed societies, including the modern state, because they are human. They are not human because they live in a state. So the state and its institutions, like the government, should not act in a way that prevents people fulfilling themselves as human beings.

So when a constitution recognises human rights and says they are protected, it is not giving the people something, it is recognising their full humanity. It is saying that the government has no power to act in a way that attacks human rights. Laws and actions that do not respect human rights are not valid.

What rights?

There has been a lot of discussion about what are the rights that human beings have. Now there is a list of rights that are generally accepted. They include the rights to have opinions and to express them, including religious beliefs, rights to join with other people in activities including forming organisations, the rights to life and to physical freedom, the right not to be exploited, to be enslaved or to be tortured.

Mere's story

Mere has a physical disability which means she cannot move far without assistance or in a wheelchair. She was not allowed to attend an ordinary school, but had to travel far from home to attend a special school. She has always found it hard to relate to people without disabilities because her educational environment was mostly in special schools where everyone except some of the teachers was without disability. As a result she is very lacking in self-confidence. Her parents were poor so she rarely travelled home to see her family so she has grown remote from them. Now she has finished school. But she has been unable to get admission to any university because they all say their premises cannot accommodate her wheel chair. They say they cannot afford to make necessary physical adjustments. She applied for a job, but was rejected because the employer said "Our customers will be put off by someone in a wheelchair". And she finds it very hard to move around because taxis and buses cannot accommodate wheel chairs. And at the last election she wanted to vote, but the polling station was a school where there was no wheelchair access.

Have her human rights been violated?

Some are rights that relate to living in a state: a right to vote for the government and to take part in public life, and a right to have a fair trial if you are suspected of a crime.

Some rights are important to having a good quality of life: a right to education, food, housing and a right to health, a right to a healthy environment, and a right to express one's culture. Some are rights in connection with work: rights to choose one's work, rights to fair treatment by employers, rights to form unions and to bargain with employers for better conditions.

A very important right is the right to equality: that every human being is equally valuable, and has equal rights. This is hard for some societies to accept. Some societies do not really believe that women are equal to men and entitled to the same respect and the same chances in life. Some do not accept that everyone, whatever their race or religion, is entitled to be treated equally. Some societies treat people with disabilities very badly.

International law

Countries have agreed about many of these rights, and they are set out in international agreements including the Universal Declaration of Human Rights, which all United Nations members should respect. Fiji has agreed to several other international human rights treaties, every few years it makes a report about how it is trying to carry out what it has agreed to under the various agreements, including:

- Convention on the Rights of the Child
- International Convention on the Elimination of Discrimination Against Women
- International Convention on the Elimination of Racial Discrimination
- Convention on the Rights of Persons with Disabilities [but though Fiji signed this, it has not yet formally agreed to be bound by it]

The international committees which receive the reports then comment on what Fiji has reported, and their reports can be very useful.

From the Report of the Committee on the Convention on the Elimination of Discrimination Against Women, Concluding Observations on Fiji (2010)

28. The Committee welcomes the high rate of enrolment of girls and appreciates the State party's efforts to ensure access and equal opportunities for boys and girls at all levels of education, to establish re-entry policies enabling young women to return to school after pregnancy, and to set up the "Matua" programme (2004), which encourages interested school leavers and adults to continue their education. However, the Committee is concerned that traditional attitudes, perceived gender roles and poverty — particularly the lack of ability to pay the costs associated with uniforms, shoes, books and transportation — continue to limit girls' education and contribute to the increase in girls' dropout rate, particularly in rural areas and the outer islands.

Limiting Rights

Of course everyone cannot be allowed to do just what they like claiming it is their "human right". In fact that is not what the human rights idea says. Being a human being means living in society and the rights make it possible for us to live together in society respecting each other. Insisting on pursuing our "rights" when this does harm to others is usually against the whole human rights idea, which is as much about respecting others as about focussing on our own rights.

The state sometimes has to limit our rights because we are not always sufficiently careful to do so ourselves. For example:

- we cannot always say what we want if this means harming others, for example by inciting violence against them;
- we cannot say just what we want if it is hate speech;
- we cannot always go where we want if this will cause environmental damage;
- we cannot insist on holding a demonstration if this would seriously disrupt traffic;
- we cannot insist on our liberty if we commit a crime and are sentenced to prison.

A constitution does not set out all the detailed rules about when our rights may be limited. It may set out a general principle that rights can be limited if this is reasonable. It may say that the limitation must be something that is justifiable in a democratic society. This means that the state must have a very good reason for limiting the rights of people. And some constitutions insist that rights should not be limited at all if the state's reasonable purpose can be achieved without affecting rights at all.

Who decides if a limit is reasonable? In the end it has to be the courts that decide. Cases might get to the courts like this:

- a person is being prosecuted for a crime; he is beaten up by the police and then “confesses”; when the case comes to the court he argues that his “confession” should not be used because it was obtained through breaching his right not to be tortured;
- imagine Parliament has passed a law that will prevent women from wearing trousers; a young women's group goes to court to argue that this is infringing their right not to be discriminated against, their right to express themselves (including expressing their identities) and their right to work (certain jobs are impracticable when wearing a skirt).

To take the last example: the court would decide (i) is this actually discriminating against women? (ii) does it actually affect their right to work or the other rights? (iii) what is the purpose of the limitation of these rights in the law? (iv) is this limit justified in a democratic society?

But it is, of course, also necessary that public servants, politicians, and all of us, understand the human rights and guide our behaviour by them.

Are rights selfish?

If you really believe in human rights, this cannot be a selfish idea because you are accepting that everyone has rights.

But people often feel it is correct to show that people have duties too. Some constitutions have emphasised that people have duties, or responsibilities, but they cannot go into great detail. The ordinary law is the place for our duties to the state and to each other to be spelled out.

Do all constitutions list all of these rights?

Modern constitutions have often listed more rights than old constitutions, but constitutions do differ. Some constitutions also add that rights under the international treaties that the country has signed must also be respected.

Questions

- 5. What are the rights that you would especially like to see recognised in a new Constitution for Fiji?**
- 6. Are there groups in society whose rights you would specially like to see mentioned (like persons with disability or children perhaps)?**

1.4 Social Justice

We usually think of justice as meaning fairness: treating people equally.

What is social justice?

We realise that just treating people equally may not be enough. In fact, treating people the same even though their needs are different is really not treating them equally. So, for example, social justice requires provision to be made for disabled people so that they can access the work place; for the elderly and infirm so that they receive care; and so on.

Social justice means giving everyone the opportunity to develop fully as a person. It means looking at the results in society. Are there people whose lives are poor, deprived, lacking in a sense of respect and dignity, and whose lives could be improved by sensible government policies, or are even made worse because of bad government policies?

But isn't dealing with these things a matter for politics and not the constitution?

This is a very important point. But one problem is that the very people who are most disadvantaged in society have little political power, too. Secondly, corruption and abuse of power may prevent politics working as it should.

Social justice provisions will not usually tell government how to achieve justice, but set standards.

There are three types of social justice provisions in constitutions.

Directive Principles

These are guiding principles for government, but are not usually enforceable by the courts, but have mainly political importance.

Economic and social rights

We can illustrate economic and social rights from the decisions of the South African courts under their Constitution:

- Government policies on housing must give priority to those in desperate need.
- Government must provide drugs to pregnant women who are HIV positive to prevent transmission of the virus to their babies.
- A very poor family owed the local village store about F\$40. They had no possessions. The store owner wanted to seize their house to pay the debt. But if the family lost this house it would be without any shelter. The Court said that that was not allowed because the Constitution protects the right to housing. If the house had been very valuable and the family could have moved into a less expensive house, the decision would have been different.

These bring the international rights to health (not to be healthy but to achieve the highest attainable standard of health), housing, water, food, education and perhaps to work, into the constitution as rights not just as hopes. They do not make the state legally liable to feed and house everyone, but provide a remedy for serious abuses and failures.

Affirmative action

It may require special steps to overcome the impact of past discrimination, bad policies and neglect. Special funds, programmes and benefits may sometimes be necessary for a while. Constitutions often say that these are constitutional even if they seem to favour one group or certain people – because these are the very groups that in the past have been disadvantaged.

A few constitutions actually require affirmative action for the disadvantaged. These try to ensure that only those who need special benefits actually get them.

Questions

- 7. What problems of social justice is a country with big differences in wealth and opportunities likely to face?**
- 8. What are the major social justice issues in Fiji?**
- 9. What problems of social justice is a country with a lack of trust between ethnic groups likely to face?**
- 10. What role should there be for affirmative action – if any?**

11. Are there difficulties that a system of affirmative action may create, and can they be avoided?
12. Would you agree that for many people the things they really want from a constitution are matters of social justice?

1.5 Representation of the people

One person one vote one value; elimination of ethnic voting; proportional representation; and voting age of 18

Apart from a voting age of 18 others require a bit of explanation. And 18 is the voting age in a majority of countries.

One person, one vote, one value

It is unequal if some people have more votes than others, and some countries do have such a system. It is not necessarily unfair if people have more than one vote if everyone has the same number of votes. In Fiji having more than one vote has been connected with systems of ethnic voting.

The 1997 Constitution system

Another way in which some systems seem unfair to voters is that a person can be elected even though a very small number of people voted for them: if you have 10 candidates for one seat a person might win with only 15% of the vote. Only the choices of 15% of the voters affected the result. The Fiji 1997 Constitution tried to prevent this. It said that a candidate must get more than half the votes to win. Because sometimes no single candidate would get more than half the votes it asked voters to provide more guidance and give their 2nd, 3rd and 4th choices and so on. If no one got more than 50% first choice votes, the 2nd choices of voters, and if necessary 3rd choices etc. would be taken into account. Most voters left their choice to their party, and they did not understand how the parties would use the choice. The system was intended to encourage parties to cooperate with each other, especially across ethnic lines. But it did not seem to work like that.

Ethnic voting

Under all Fiji's constitutions most of the seats in Parliament were allocated to one community or other. The constitutional principles require that the new Constitution does not have such a system. The hope is that moving away from ethnic voting will help Fiji to move away from ethnic politics, to a focus on policies and the competence of candidates.

What is proportional representation?

The goal of proportional representation systems – usually referred to as PR– is to see that the share of seats a party gets in Parliament is in proportion to the share of the votes it receives. So, if a party gets 60% of the vote, it should get about 60% of the seats. This means that even if your party has a support of only a minority of the people, it has a chance of getting a seat (in a 60-seat

Parliament, even a party with only 5% of the vote could get 3 seats). Also, even if you live in a place where very few people support your party, if there are enough people supporting that party elsewhere, it could get a seat in Parliament. A PR system will have large constituencies each with more than one representative in Parliament – in some countries there is only one constituency for the whole country.

Different PR systems

The most common types of PR system are:

- “List PR”
- Single Transferable Vote (STV)
- Mixed member proportional (MMP)

List PR:

- Each party publishes a list of candidates for each constituency
- In many countries with PR systems voters only vote for their choice of party, that is for their party’s list; but in other countries they also have a chance to express a choice among the names on that list
- If a party wins 30% of the votes in the constituency it will get as close as possible to 30% of the seats, and must take enough people from its list, in order starting from the top, to fill those seats.

Single Transferable Vote:

- Constituencies are large, each having several MPs
- Every party will probably put up several candidates in each constituency
- The ballot paper looks a bit like the old one in Fiji: the voter puts 1 beside his or her first choice, 2 beside the second choice and so on.
- If the first choices of voters produce enough winners to fill all the seats that is the end, but –
- If not, the voters’ second choices, and perhaps third choices etc. may be used to fill all the seats.

Mixed member proportional:

Under this system (MMP) Parliament is made up of two kinds of members: some elected for geographical constituencies, and the others from party lists. The result overall is proportional: a party with 45% of the party votes gets close to 45% of all the seats.

- The voter votes for a candidate in their own constituency; those candidates need not be party members

- And the voter votes for a party (party vote)
- The overall result of the voters' party votes decides what percentage of support each party has in the country, and therefore what percentage of the seats it gets in the Parliament
- On the basis of how many party votes a party receives, it takes people from its list to fill the seats
- Unlike a list PR system, the party takes just enough people to bring its total up to the number of seats to which it is entitled based on the people's party votes, because all the individuals who have been elected for constituencies will be members

A slightly different system is possible: people would not have a separate party vote, but the support of the parties would be measured by the way the voters voted for candidates (for this purpose your vote for a candidate would count even if your preferred candidate did not win).

What are the effects of a PR system?

Generally:

- Smaller parties are able to be represented in Parliament so it may be more representative than other systems
- It encourages more parties
- This often means that no single party has enough votes to form a government so governments are often formed by coalition (parties working together)
- It encourages parties to appeal to all voters, so more women and more minority
- candidates get elected.

Comparing a single member constituency system, a simple list PR system and a MMP system (in an imaginary country with 50 MPs and 5 parties)

<i>Single member constituencies (a simple majority system – the one with the most votes wins)</i>	<i>List PR (whole country as a single constituency) Assume the same party support as in the previous column</i>	<i>MMP (25 single member constituencies and 25 from party lists); each voter has a vote for a member for their constituency (constituency vote) and a vote for a party (party vote). Assume a similar voting pattern as in the first column</i>
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Party A wins 28 seats, or 56% of the seats, but gets only 40% of the overall national votes (a common result in such a system)	Party A gets 40% of the votes and under this system therefore gets 40% of the seats (20 seats)	Party A gets 40% of the party votes and wins 14 of the seats in the 25 constituencies; they get 6 from their list to make up 40% of the total seats (20 seats)
Party B wins 15 seats (30%) and also gets 30% of the overall votes	Party B gets 30% of the votes and therefore 30% of the seats (15 seats)	Party B gets 30% of the party votes and wins 7 of 25 constituency seats; they get 8 from their list to make up 30% of the total (15 seats)
Party C wins 5 seats and gets 20% of the overall votes	Party C gets 20% of the votes and therefore 20% of the seats (10 seats)	Party C gets 20% of the party votes and wins 3 of the 25 constituency seats; they get 7 from their list to make up 20% of the total (10 seats)
Party D wins 2 seats and gets 6% of the overall votes	Party D gets 6% of the votes and therefore 6% of the seats (3 seats)	Party D gets 6% of the party votes and 1 constituency seat; they get 2 from their list to make up 6% of the total (3 seats)
Party E wins no seats but gets 4% of the overall votes	Party E gets 4% of the votes and therefore 4% of the seats (2 seats)	Party E gets 4% of the party votes, no constituency seats, so gets 2 seats from their list to make 4% of the total seats.

Membership of Parliament: Party A 28 Party B 15 Party C 5 Party D 2 Party E 0	Membership of Parliament: Party A 20 Party B 15 Party C 10 Party D 3 Party E 2	Membership of Parliament: Party A 20 Party B 15 Party C 10 Party D 3 Party E 2
Forming Government in a parliamentary system: Party A could form government alone	Forming Government in a parliamentary system: Party A would be invited to form government. It would need to form a coalition to rule effectively – it could do so with Party B or with Party C. If it formed a coalition with Parties D and E it would have exactly half the seats (and votes) in Parliament which would make it hard to pass laws etc.	Forming Government in a parliamentary system: The situation would be as in the previous column

Note: this is a very simple example. In a real life situation, the percentages of the vote won by parties would probably require some adjustments (a party might win a percentage of the vote that would not translate into a whole number of members) , and the final result might not be quite such a neat correlation between votes won and seats in the 2nd and 3rd columns.

Questions

13. Do you think that people in Fiji would be happy to have a system in which they had to rank candidates on a list, 1.2.3 etc. (not being able to leave this to a party)?
14. Do you think that people in Fiji attach great importance to having a particular MP who represents their area?
15. Do you think that it would be a problem if there were quite a number of small parties, rather than a small number of larger parties?
16. Do you think it is important to get more women MPs?

2 Systems of Government: Presidents, Prime Ministers and Parliaments

The main purpose of a constitution is (i) to give power to the individuals and institutions to run the state as the servants of the people, and also (ii) to control that power so that it is not abused.

At the centre of every democratic state are three institutions: the Parliament, Executive and Judiciary (courts). The Executive is what we often called the Government—the head of Government, the Ministers with the administrative back-up of the public service.

2.1 The “system of government”

What is the Government?

Usually when people talk of “the government”, they mean the Ministers and the head of the government, usually called the Prime Minister or the President. In Fiji the head of government has always been the Prime Minister.

There are several systems of government in the world. The most common are the parliamentary and the presidential; a few countries combine the two.

How is the government chosen?

In Fiji there has always been a “parliamentary system”:

- The Prime Minister had to be a member of Parliament. After every election, the leader of the party that won the most seats in Parliament would be invited to be Prime Minister. So the Prime Minister was supposed to be the person whose party was the most popular in the country.
- The Prime Minister then chose the Ministers. Usually a Prime Minister would choose Ministers from his or her own party, or from a party that his party was cooperating with.

There was a special rule under the 1997 Constitution: any party that had 10% or more of the seats in Parliament had a right to be in the Cabinet.

Suppose no party got more than half the seats in the House?

Then it would be necessary for two or more parties to agree to work together, and they would probably agree on which party leader would be Prime Minister.

Once they have been chosen how can they be removed?

The idea is that the Prime Minister has the support of the majority of the members of the House (and so the majority of the people). If the Prime Minister no longer had that support, the House could vote to remove him (and all the Ministers). We call this a “vote of no confidence”.

Where does a President fit into this system?

In a parliamentary system the President does not rule the country. He or she is its symbol, and supposed to be a wise guide. Presidents (or Kings or Queens who are like life-long Presidents by birth) have just a few powers, mostly about choosing important office holders. Presidents in parliamentary systems are chosen or elected in various different ways.

Do other countries have this system?

Almost the same system is found in India, the UK, Australia, Canada, for example, as well as Papua New Guinea and Vanuatu – in fact a majority of the countries in the world.

What other systems are there?

Another quite common system is called the “presidential system”:

- the president is head of the government and is voted for directly by the people
- he or she has a fixed term in office – in America it is four years
- the President does not need the continued political support of parliament to stay in office, but can be removed if he or she does something seriously wrong
- the members of the government are often not chosen from among the members of parliament, but are people the head of government knows through politics or in other ways and may be chosen for their expertise.

This is the system that is used in the United States and Brazil.

Is there some rule that says every country must have one of these systems?

Not at all. In fact most of these systems have some features that are special to the country concerned. In some parliamentary systems the Prime Minister can choose all or some Ministers from outside. In some it is very difficult to remove the Prime Minister by a vote of no confidence.

Some systems have such a mixture of rules from the parliamentary and the presidential systems that we called them “mixed” systems.

Mixed systems

Some countries have a Prime Minister, but also have a President who is elected by the people and has more than just a few powers, and is an active part of the government. The President might be responsible for the country's relations with other countries, including for defence, and the Prime Minister for government inside the country. France and Sri Lanka are examples of such a mixed system.

There are a lot of other sorts of mixtures. For example, some countries have a parliamentary system but the head of government who comes out of parliament is also the head of the state and is called President; in Kiribati that person is a member of Parliament: Parliament puts a short list of members to the voters who then choose the President.

This is all very confusing! Isn't one system the best one?

Sometimes people think theirs is the best system because they are used to it and understand it. In many countries there is a lot of debate about making some changes in the system. Some countries have changed from parliamentary to presidential and some from presidential to

parliamentary! How a system actually works in a particular country depends on a lot of things, including the party and voting systems, as well as national cultures and traditions, and the personality of individual leaders. Some arguments about the systems include:

- in a presidential system government is more stable because it cannot be dismissed by the parliament;
- in a presidential system, far too much ambition and public attention may focus on the President, making it easier for the President to become autocratic and leading to people being prepared to commit all sorts of abuses to become President;
- the government in a parliamentary system is less likely to become autocratic because the leader must constantly keep in mind the need to convince a majority of parliament – the people’s representatives – that what the government is doing is right;
- a prime minister can become autocratic if he or she leads a party with a very large majority, and there is no-one with the power to exercise any sort of control over the prime minister;
- in many parliamentary systems, because only members of parliament are Ministers, the choice of possible Ministers is too narrow;
- people used to the parliamentary system would reply that ministers need political sense, which they get by experience as members of parliament;
- in a parliamentary system the leadership is really the Cabinet – more collective and perhaps more national than in a presidential system;
- in a parliamentary system, if it has a strong party system, the government has the support it needs to get laws passed; in a presidential system the president may have to bargain with Parliament to get laws passed, so government may find it hard to achieve much.

There is no best system. Fijians need to think which would work best here considering Fiji’s past experience, the experience of other countries and the different rules that can ensure that the chosen system works as democratically as possible, is accountable to the people and allows the government to govern properly.

2.2 Designing Parliament

Introduction

In a democratic system, the people elect a body which is often called Parliament but may have other names, e.g., Congress. In fact, it may have more than one body, one of which may not be elected, and is often called the Senate. The job of Parliament is to:

- represent the people
- make most of the laws
- approve the national spending and taxing plans
- supervise the government to make sure that it does not exceed its powers, and is trying to carry out its promises to the people.

Work of Parliament

➤ *Representing the people*

- Because the people vote for the members, Parliament is a way for the voice of the people to be heard in national government.
- Individual members, especially if they represent a certain part of the country (a constituency), will pay special attention to issues that concern that part, and even to the problems of individual constituents (though constituents should not expect their member to support them with money)

➤ *Making laws*

- Important laws have to be discussed and approved by Parliament (and then will be signed by the President, usually).
- In a parliamentary system, like that of Fiji under its previous constitutions, almost all laws are prepared by the government; the laws should be designed to carry out the government's programme, which they put before the people at the election.
- And in a parliamentary system, because the government has majority support in Parliament, laws proposed by the government are adopted without too much fuss. Indeed, there may be complaints that Parliament is too willing to go along with the government.
- In a presidential system, if the president has strong support in Parliament, it may be easy to get laws passed; otherwise the President may have to negotiate hard with Parliament to do some things that it wants in return for support for what the President wants.
- Because in a presidential system Parliament is more separate from the government, Parliament will often have ideas of its own about laws it wants to pass.

➤ *Money matters*

- No money may be spent without Parliament's approval; but sometimes it is possible for the government to spend money in an emergency and get approval later.
- And no-one has to pay taxes unless there is a law passed by Parliament. This is very important: Parliament is supposed to stop governments wasting money, or going to war without the approval of the representatives of the people.

- The Auditor-General is an independent state officer who audits the public accounts and in many systems reports to Parliament.

➤ *Approving appointments*

- In some countries certain important public offices cannot be filled without the approval of Parliament.
- These may be: Ministers, senior Judges, ambassadors, chairs of independent commissions, offices such as Attorney-General, Auditor-General etc.
- This is more common in presidential systems, but recently it has been more used in parliamentary systems.

➤ *Supervision and accountability*

- In parliamentary systems the government can be dismissed if it loses the political support of the majority of Parliament, so government should be always considering whether it is doing what it promised to do when it was elected.
- In presidential systems the Parliament often has a role in removing the President, and other public officers if they are guilty of serious crimes, breaches of the Constitution etc.
- In a parliamentary system it is usual for Ministers to have to answer questions before Parliament even if they are not members of Parliament; such a system could be used in a presidential system, too.
- Parliament has the power to inquire into the behaviour of government and public officials; it can order them to attend the Parliament's hearings.

Strengthening Parliament

Because Parliament in a presidential system is more separate from government, it is often more vigorous in supervising government. Parliament may not be energetic in its responsibility of holding the government to account in a parliamentary system. For instance, the Prime Minister chooses Cabinet ministers. MPs may aspire for these well paid and prestigious positions and will seek to impress the PM rather than questioning his or her proposals. Also, the MPs in the government's party will want their party to stay in power so may seek to suppress criticism of government policies.

But even in parliamentary systems a lot of thought has gone into ideas for making supervision more effective:

- Under the Fiji 1997 Constitution, Parliament had to have committees to watch the work of every Ministry.

- Some parliaments have been given research support, so they understand budgets and proposals for laws better.

Making Parliament, and its members, more accountable and responsive to the people

Parliaments in both parliamentary and presidential systems have been criticized for being removed from the public and for failing to fulfil their responsibility to represent the people properly. It is not good enough for MPs to stand for election every four or five years disappear in between. There are various ways in which Parliaments have been made more responsive to the needs and views of the people.

- Individual MPs may lose their seats if they miss many meetings without good reason; the constitution or the law says how many they can miss before running the risk of being thrown out.
- Individual MPs may lose their seats if they leave the party which they were members of when they were elected.
- Individual MPs in some countries may be required by the voters who elected them to quit Parliament if they have been very poor performers as MPs.
- In many countries MPs, and other public officers, have to make a public declaration of their wealth, and repeat it periodically.
- In some countries Codes of Practice for MPs are prepared to guide the MPs as to proper behaviour.
- In many countries ordinary citizens may send petitions to Parliament asking them to investigate something or to pass a law on something.
- In some countries Parliament has to consult the public about laws that it is considering.

One house or two?

The national Parliament in some countries has two houses, in others it has one. There is little sense in having a second house that looks just like the first: second houses usually contain what you might describe as “different voices”. And a second house may be composed in a way that gives political parties less influence than in the first house.

A second chamber might consist all, or partly, of senior, respected members of the community. This may be because they are chiefs or nobles. It may be partly because they are older. It may be because of their experience in public life or their contribution to the community. Historically people used to talk about the “Upper House”, reflecting that this was a body people were expected to look up to. In many countries second houses like this have been reformed or even abolished in modern times.

Second chambers in some countries consist of people representing the parts of the country: the individual States in the US, India and Australia, for example.

In some countries all laws must be approved by the second chamber. In some countries only certain laws must be approved by it – especially laws that particularly affect the states. In some countries, if the first chamber is determined to pass a law, the second chamber can only delay its passage. So their function is to make the members of the first house think again, and to stop laws being passed too hastily.

In Fiji, under all constitutions there was a Senate, and it could delay laws. But certain laws affecting especially iTaukei interests could only be passed if most of the Senators nominated by the Great Council of Chiefs agreed.

Think about the following situations (imaginary or from other countries):

The law says that driving recklessly and causing death or injury to others is a serious crime. Ordinary people are usually prosecuted if they are suspected of having done this. But the son of the Prime Minister was seen driving as though drunk and knocking over a poor person, who died. Nothing happened to the PM's son.

Everyone who earns above a certain amount is supposed to pay tax on their income. But this law does not apply to judges. MPs pay tax on their salaries, but most of what they get comes in the form of allowances, which they do not have to account for, and on which they do not pay tax.

The law says that minibuses must not drive faster than 90 kilometres an hour, but no-one takes the law seriously and the police never stop anyone for driving a minibus too fast.

We can describe all these as failures of **the rule of law**. This means: everyone including the state and all its officers and employees up to the President respects and follows the law. And that law must be fair, consistent and justly administered. And a state where these things do not happen may become a state like the last example in this box – where nobody cares.

2.3 The Judiciary and access to justice

The rule of law is the responsibility of government and its officials, of the police, of those who prosecute crimes, and of the ordinary citizens, as the box above shows. But the really key institution for achieving the rule of law, and the protection of the Constitution is the judiciary – the judges and other people who sit in and run the courts.

Courts

The work of the courts is to:

- decide disputes between people
- decide the guilt or innocence of people accused of crimes
- decide disputes between people and the state: about whether there has been an abuse of state power for example.

They are important in keeping the peace, maintaining economic stability and ensuring a just society, and are very important to ensure the Constitution is respected, and the rule of law observed.

In order to carry out these responsibilities the courts must:

- listen to evidence and decide who is telling the truth
- interpret documents like contracts and wills
- understand the law and apply and interpret it
- understand the Constitution, interpret and apply it.

They have to protect the rights of the people under the Constitution, explain the Constitution so that the government, the police, the public servants etc. know what it means and what they are expected to do. They develop the constitutional rules (especially because a constitution cannot be very detailed). Their responsibility is great because they have the final say on what the law means. But they will not succeed if they are not respected.

For the system to work, and so that the Constitution is enforced and works as it was supposed to the courts must be:

Competent: only people with good knowledge of the law should be judges; so the choice should rest mainly with people who are able to decide who is competent

Honest: the individuals should not take bribes, should be honest in their work

Judicial independence

The biggest concern is the judges will not be independent from government: because they have to decide cases that involve disputes between government and the citizens over government's laws and actions.

But it is also important for judges not to be influenced by society, such as by their religious leaders, their friends, by business, or by civil society, when they make their decisions. Judges have to decide the cases on the basis of the law and the Constitution, and the arguments that are made in the court.

Judges have to keep a bit of a distance from people who may be affected by their decisions, or who have strong views on the way cases are decided.

But they must still remain in touch with social issues, so that they understand the problems that underlie the cases that come before them and the realities of people's lives.

A hard balance! But there are accepted codes of practice to guide them.

Unbiased: they should not lean in favour of anyone in judging evidence or interpreting the law; their judgment should not be influenced by political considerations or racism, sexism or any sort of prejudice.

Independent: they must not allow anyone to interfere with their decisions, and their decisions should not be affected by fear of being victimised, or hope of benefiting, because of their decisions whether those fears or hopes are of government or business or anyone else.

Speedy: “Justice delayed is justice denied” is a famous saying – and a true one.

Accessible: Courts should be available to the people, in terms of geography (not too far away), physically (not a lot of steps for person with disability to climb), financially (not heavy fees to discourage people seeing their rights, and with lawyers available for those who really need them and cannot afford them) and in other ways (laws and procedures not excessively complicated).

Questions

- 17. What must the constitution do to build a strong and independent judiciary in Fiji?**
- 18. How should judges be chosen?**
- 19. What qualifications and characteristics should judges have?**
- 20. How can courts be made accessible to all Fijians?**
- 21. Are there special factors in Fiji, in terms of culture, geography, or gender, or other things, that are needed to make the courts really respected, accessible and effective?**

Prosecutions

Enforcing the law and prosecuting people who break the law are important responsibilities of any State. But it is easy to misuse the power to institute prosecutions. For instance, the State may willingly prosecute more vulnerable members of society suspected of committing crimes but ignore offences committed by powerful people.

The 1997 Constitution of Fiji established an independent Director of Public Prosecutions, who was appointed by the Constitutional Offices Commission and could only be dismissed by the same procedure as for a judge – in order to prevent the DPP being victimized by government if the government disapproved of the decisions the DPP made about who to prosecute or not to prosecute. And unlike many older constitutions the Attorney-General – who was the government’s lawyer and not independent – could not stop any prosecutions.

Questions

22. Do you think that politics should be able to play any part in deciding who should be prosecuted for a crime and who should not?
23. Should it be possible for the government to direct the DPP to deal severely with a particular offence, or less severely with some offence or should such decisions be left to an independent DPP?

2.4 Securing accountable government

Accountability required!

- The elected government fails the people, by proving to be not committed, or ineffective, in carrying out its promises to the people
- An individual MP neglects her constituency, never coming to visit unless she wants votes in an election that is near
- A Minister steals money intended for projects in his Ministry
- A senior civil servant appoints her relatives to jobs, ignoring others who are just as well qualified.

The situations in the box might arise in any country. Something should happen to these, most people would think. Not getting re-elected, being sacked, being punished (by internal procedures or by being taken to court) and by being made to repay what has been stolen. These are all forms of accountability. And accountability is a critical part of good governance. The judiciary and the prosecution system, the election system, various rules about when MPs may lose their seats, anti-corruption mechanisms are all important.

Independent Commissions and Offices

In a democracy, the government of the day is a political body that represents the views of the majority of the people. But some jobs need to be done by neutral bodies, which are outside politics and have no interest in winning future elections. In addition to courts, independent bodies may take this role. They are important to achieving accountability. Sometimes they operate by taking decisions out of the hands of politicians, and appointed officials, and sometimes by monitoring and supervising them, either taking the initiative themselves, or responding to complaints by the people. So they may have preventive functions or redress functions.

Many modern democracies have:

- An *independent electoral commission*, separate from the government, to ensure fair elections that are run in a way that the people and political parties trust.

- An *independent auditor-general* or court of audit that checks the financial statements of the government to ensure that it is using public money properly and honestly.
- An *ombudsman* to assist people who believe that they have been unfairly treated by government (Ombudsman is a Swedish word meaning “representative”; the first ombudsman was in Sweden and the idea and word have been taken over in other countries; but some countries use other names)
- A *Human Rights Commission* that monitors human rights and reports on human rights abuses. A Human Rights Commission may also be able to prosecute government, public servants and citizens for committing human rights abuses and may have tribunals which can hear and settle cases.
- A *Judicial Service Commission* responsible for choosing judges and, sometimes, dealing with complaints against judges.

Some countries have many independent bodies in their constitution (Kenya has 12). Some have very few. The choice of which independent bodies to include depends on the circumstances of the country.

- Kenya and Uganda have independent *Land Commissions* because land is a contentious issue and past governments have stolen land from the people and given it to their friends. Making Land Commissions independent and putting them outside politics is intended to protect land from political abuse.
- The South Africa Constitution sets up an independent *Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities* and a *Pan-South African Language Board*. These bodies were included in the Constitution because in the past government had paid no respect to ethnic, cultural and linguistic diversity.
- Thailand had an *Anti-corruption Commission* in a Constitution.
- In Brazil, the Constitution protects the independence of the *Director of Public Prosecutions* (or *Prosecution Authority*) who is responsible for prosecutions.
- To promote the integrity of its politicians and other public figures, the Cayman Islands Constitution establishes a *Commission for Standards in Public Life*.
- In some countries the *Reserve Bank* is independent or partially independent.

Why include independent commissions in the constitution?

Advantages:

- They can increase accountability by overseeing government (like a Human Rights Commission) or the Auditor General.
- They may fulfil a function that the people don't trust government to do properly (like the Kenyan Land Commission).
- Including them in the constitution protects them from interference or abolition by the government.
- They can use expertise that may not exist in government departments.
- They can work across boundaries – government departments may find it hard to collaborate.
- They can have a representative element if they include people nominated by civil society bodies.

Disadvantages:

- Independent commissions can be expensive.
- Once they are in the Constitution they are difficult to remove, even if they prove ineffective
- They themselves may be unaccountable: they are not elected, and in order to be independent they, like judges, may be hard to remove.

When thinking about designing a Commission it is important to ask questions like:

- If there was no Commission, who would do the job?
- How should the Commission be appointed in order to make sure it can do the job?

Questions

24. Have independent commissions performed their functions fairly and responsibly?

25. How can independent commissions be really made independent?

26. Can you think of tasks now performed by the government which should be transferred to an independent commission? Please explain why, if you answer “yes” to this question.

2.5 Local Government

Some scenarios

Imagine the following possibilities:

- Every decision about health services and education has to be made in the capital city. The result is that sometimes the local clinics do not have drugs, and it takes a long time for new teachers to be appointed to schools.
- Local officials of the national government are posted for short periods and do not seem always to understand local problems and traditions.
- There seems to be no accountability mechanism for decisions made locally by national government officials: a complaints mechanism exists but involves sending a letter to the national capital and no response ever seems to come.

It is usually considered a good thing to have some government institutions near where people live and work rather than concentrated in the capital city. Different countries do this in different ways:

- Sometimes the national government sets up offices outside the capital and sends officials out to implement national policy and provide services. Usually no law is necessary for this. Most countries have some services that are delivered in this way. For instance, national police will be stationed all over. If there are no formally established local governments, this will be the only way people get government services.
- In some countries Parliament passes a law setting up democratic local governments with power to make laws on certain matters, to appoint local officials and to administer laws. The governments are accountable to elected local representatives.
- Some constitutions say there must be a system of local government but give no details.
- Some constitutions, as in India and South Africa, establish democratic local governments, define their powers and set out a framework for their operation. This arrangement differs from the case where Parliament sets up local governments by law because local governments cannot be done away with without a constitutional amendment.

We would use the expression “local government” to refer to bodies mainly elected locally (though sometimes there may be some members appointed by the central government as well). If it is locally elected it should be democratic and accountable to the people in the community.

When setting up a local government system, it is important to work out who does what: what are the responsibilities of the national government and what are the responsibilities of the local governments? Sometimes this is easy. For instance, local governments usually have the responsibility to collect garbage. But sometimes it is difficult. For instance, in most countries local governments are responsible for roads in their areas and for planning because it is local officials and politicians who are most likely to know what local needs are. But roads are also often part of a national transportation plan. The national government needs to be able to have some say over roads across the country. The law (or constitution) setting up local governments needs to consider such matters or provide some arrangements ensuring that the national and local governments can cooperate on what should be done.

Another issue that always arises when local governments are established is funding. Who should pay for the services a local government provides? Some people say that the local people should pay for the services. Others say that is not fair because some areas are poorer than others through no fault of the residents and that the national government should help finance these local governments.

In Fiji there has been a system of local government, in fact several systems. There were councils for the cities, towns and urban areas. And there is a different system for iTaukei villages. The Provincial Councils and Advisory Councils advise on matters concerning iTaukei and other communities respectively.

The Reeves Commission noted that, because Fijian villages, Rotuma and Rabi Island were no longer inhabited exclusively by people belonging to the particular ethnic community, there were problems about operating a system of local government law applying to a group of persons identified by reference to their race or ethnic origin. It recommended that consideration should be given to the question whether the laws for the governance of Fijian villages, Rotuma and Rabi Island should, in the longer term, apply to all persons living within a particular area.

In many countries there are problems about the effectiveness of local government: do they actually provide services effectively, are they accountable? Is there a problem of corruption?

Questions

27. Is it important for Fiji to have a system of local government?

28. Which government functions would you want to be carried out by a local body?

29. Should it be a democratic system?

- 30. Are there any other points you would want a constitution to mention about local government?**
- 31. Do you think that there should be separate local authorities (such as provincial councils) for only one community or that the system of local authorities should not be race-based?**

2.6 The “Separation of powers”

Today, a separation of powers is considered a fundamental element of a democratic system. What is it?

It is about not putting too much power into a few hands. You can imagine how dangerous it would be in a modern state if one person could say “I make the laws. I apply the laws. And if you have any disagreement about how I do these things you can complain –but only to me!” Of course no individual would have time to do all these things. But the same dangers would arise if the same individual or group controlled all these actions.

The separation of powers is also about the different bodies controlling each other to prevent abuses of power – “checks and balances”.

It is perhaps easiest to understand how this works by looking at the American presidential system.

Congress (their parliament) makes laws, the executive (the President, Ministers etc.) implements them, and the courts settle disputes about the law. In the US, a person can be a member of only one of the institutions at a time. The “checks” one body has over another are as important as the separation of powers and officials in America:

- the President can’t go to war unless Congress agrees
- if Congress passes a hasty and unwise law, or any other law the President disagrees with, he or she can refuse to sign it
- but if Congress really thinks the law is needed it can insist, so the President can only delay the law
- if the President commits serious crimes, or violates the Constitution, or otherwise behaves very badly, he or she can be removed by Congress
- the President can choose some important state officers, including senior judges, ministers and ambassadors, but these choices have to be approved by the Senate
- the Courts can decide that something the executive has done, or a law that Congress has passed and the President has signed, is unconstitutional

- the Judges can be removed from office only if they have done something seriously wrong and then only by the Congress.

The separation of powers and “checks and balances” work a bit differently in a parliamentary system:

- the head of government (usually “Prime Minister”) and ministers are usually members of Parliament
- the Prime Minister usually can control his/her supporters (the majority) in Parliament
- but if the PM does lose the confidence of those supporters Parliament can dismiss the PM
- the relationship between the courts and the other branches is rather similar to under a presidential system: courts are independent of the executive and legislature
- in many countries the parliament does not approve appointments, but this is becoming more common.

Also, in a parliamentary system, Parliament’s staff is separate from the public service. And, in well-functioning parliamentary systems Cabinet ministers may not participate in parliamentary committees which supervise government. They may be asked to appear before the committees to answer questions

2.7 Political Parties

What are political parties?

Political parties are organisations of people, usually only citizens of the country, formed to put forward political ideas, press for change in laws and policies, and to put up candidates for election so that they can push for their ideas for be realised within government.

Do we have to have parties?

It is natural for people with common interests to work together to develop their ideas and to get those ideas accepted. If ideas, including for change in society, remain just individual ideas, they are likely to be lost. Well organized political parties develop a vision for their country and a strategy for achieving the vision. Unfortunately parties do not always achieve this ideal. So it is important for the people – the electorate – to pay attention to what parties are doing, to push them to represent their views, and to act responsibly, and not to vote for them if they betray the voters.

Some countries, even where there are elections, have banned parties. This usually means either that in reality there are parties hiding under other names, but people know what these names mean, or that some parts of society are excluded from participation in politics because they cannot organise. If it is impossible for people to organise, there will be little opposition to

government which may fall into the temptation to abuse its powers. To ban parties is also against basic principles like the freedom of association.

Should elected politicians be allowed to leave their party and join another?

Sometimes politicians stand for election as a member of one party and then, while they are MPs, switch to another party (cross the floor). Some countries allow this saying that it protects the free speech of MPs, and that it allows MPs to keep their party accountable to the people who voted for it because if the party changes direction the MP can leave it. Other countries outlaw floor crossing because (i) it allows MPs to be bought by another party (e.g. a party might offer MPs from other parties special positions if they cross the floor); (ii) creates instability because MPs can move around and the government can't be secure in its support in Parliament (a particular problem in parliamentary systems); and (iii) is dishonest to voters who usually support MPs because of the party they belong to.

Can parties be controlled?

Yes, there are many ways in which the law and the Constitution can regulate parties. For example, in many countries parties have to register in order to be able to support candidates. And they may be:

- required to have democratic constitutions for choosing their officials and candidates
- required to disclose where their funds come from
- barred from receiving any money from certain sources
- limited in the amount they can spend on election campaigns
- required to have a certain percentage of women among their candidates.

Parties may be carefully monitored to ensure they do not break these rules and do not indulge in racism or other divisive tactics. A party that has a regular practice of breaking the law may be banned for some time.

In some countries worried about divisive politics, parties based on race, religion, gender or region have been prohibited. Rules like this are not easy to apply in practice, and may be used mainly to attack the opposition to government.

And in some countries the government (which means the taxpayer) gives some money to parties especially for election campaigns. This is to reduce the temptation to seek funds from sources that may influence the way the party operates if it gets into power (as big business and foreign donors might influence parties), and also the public funds can be used to influence parties into being inclusive in ethnic and gender terms in the way they chose candidates.

Only the broad outlines of party regulation are usually included in a constitution.

Questions

32. What do you think have been the problems with parties in the past?

33. What do you think might go into a new constitution to ensure that parties are accountable and effective?
34. Do you think elected MPs should be able to change their party?
35. Should the constitution lay down rules for the membership of parties, and their choice of candidates (such as including women etc.)?

2.8 Security forces

What do we mean by “security forces”?

We mean all branches of the military, and the prison services, and police, and also perhaps intelligence services.

What is the role of the military?

In a democratic system the military forces’ role is to:

- respect and uphold the Constitution
- protect the country against external threats
- in exceptional circumstances be used inside the country.

Why are security forces seen as possibly creating problems?

- they have access to more force than any other body in the country
- in many countries they have a tradition of secrecy about financial matters
- in many countries security forces may use “national security” as a shield to prevent themselves being held accountable to the people as every other branch of government is.

How can security forces be subject to the Constitution?

The most important principle is that the security forces must be subject to civilian control which means that ultimate command must be in the hands of a non-military person or group of people. But this is not the end: if the government of the day has too much control over the military, it may be used by that government to keep it in power even if the people have voted to remove it, or the courts have decided it is no longer in power constitutionally,

So some constitutions provide expressly:

- the security forces are subject to civilian control
- that such control should not involve the government of the day only
- they must respect human rights
- there must be a mechanism for scrutinising their work, including their finances, even if there is a need to respect confidentiality of certain matters
- their use in some ways, such as within the country in emergencies or outside the country, must be subject to approval by Parliament.

From the South African Constitution

National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.

What about the police?

Modern constitutions often also deal with the police because, like the military, they (sometimes) bear arms, and even if not armed they have power that can be used against the people. Some Constitutions have emphasised the role of the police: to protect the public, and also their responsibility to respect human rights. The provisions about police may also be designed to prevent corruption and ensure police accountability. We should also remember that in many countries the ordinary police officer is poorly paid, and subject to temptations.

Questions about the police force that a constitution might answer include:

- Who appoints the officer in charge of police?
- To whom is that person responsible?
- Is there a procedure under which representatives of the public are involved in supervision of the police?
- Where can the public go to if they have complaints about the police?

Questions

- 36. What would you wish to see in the Constitution about the role of the military and the police?**
- 37. Should the military have a role within the country? Should the constitution set that role out?**
- 38. Who should be in final control of the military?**
- 39. Should the constitution say anything about the composition of the military?**

2.9 Combating corruption

What is Corruption?

Thinking about corruption

Should the following count as corruption? A person –

- claiming costs for travel on government business but actually going on holiday?
- appointing their cousin to build a government building?
- paying voters to vote for him or her?
- when standing for election, promising that a bridge will be built if he or she is elected?

If they are committed by a public official should something be done? If so what? And should the constitution say anything about such acts?

A standard definition of corruption is ‘the use of public office for private gain’. Most people think of corruption as involving bribery, or public officials who get secret commissions for helping a company get a contract to supply government, or to get a job, for example. Favouritism can also be corruption: for example if it means giving a job to your friend or relative even if they are not the best candidate.

Some people would think of corruption as occurring only in the public sector, while others would say it can take place corruption within the private sector, the media and NGOs, as well.

What is wrong with it?

It breaks rules. It often has bad consequences, for example public money is wasted or diverted. It may increase distrust in government and discourage investment. Its impact on economic growth is a matter of debate. It is unfair to others: to the person who was best qualified for the job that went to a cousin of the public servant, or the company that would have done the best work but was passed over for the company that paid the bribe, or to the person who can’t pay a bribe for something they are entitled to, so they are deprived. It may also have bad effects on the people who do it.

Why do people do it?

Traditional explanations refer to bad systems and bad people. As with other crimes, opportunities matter. So do the chances of being caught. If people believe that others are getting away with corruption, they may feel justified in doing it themselves. A culture of corruption can develop.

What can be done about it?

The various ways of dealing with it include:

- investigation and prosecution, by police or special agency
- prevention, by reducing opportunities and improving supervision
- education, so people understand what is wrong with it

How much is there in Fiji?

It is hard to say. Corruption often takes place in secret and no one may complain. However, Transparency International, the anti-corruption NGO, which publishes a ‘Corruption Perception Index’ in which local and international experts give countries a score out of 10 (with 10 being the least corrupt), gave Fiji 4/10 in 2005.

Another Transparency International survey in 2010 found a sample of popular opinion in Fiji believing that political parties were the sector most affected by corruption (with a score of 3.4 out of, with 5 being ‘extremely corrupt’), followed by business (3.2) and the public service (3.0). The police did better (2.8) and the military the best (2.1).

The 2010 survey found that 53% of the sample believed that corruption had decreased in the last three years, while 36% believed it had increased and 11% believed it had stayed the same. While perceptions of corruption are not necessarily related to experience, the 2010 survey also found 12% of the population paid a bribe to access a public service in the last 12 months.

What about customary practices?

Gift giving may create obligations that lead to corruption. So may concern for family and relatives which leads to the practice of nepotism. “Rank pulling” is also claimed to be another form of corruption in Fiji where persons of status use their positions of power to gain special privileges. Voters may expect favours from politicians.

Why can't the police deal with it, like other crimes?

They can. Investigations of Fiji’s 2001 Agriculture Scam were led by the police, and eventually led to successful prosecutions. However, there is a risk in every country that the police themselves may be corrupt. Corruption investigations may require special skills and powers that can be abused. There have been concerns that governments may direct anti-corruption investigations against their opponents, and away from themselves.

After a military-led ‘clean-up campaign’, the Interim Government set up the Fiji Independent Commission Against Corruption (FICAC) in 2007.

Questions

- 40. Is corruption a serious problem in Fiji and, if so, in what organisations is it most serious?**
- 41. Should the new constitution expressly state that it is your constitutional right to report cases of corruption without fear of reprisal or recrimination?**
- 42. Do you believe that having a special body like FICAC is useful in the fight against corruption?**
- 43. If so, what powers/authority and scope should anti-corruption bodies like FICAC have?**

44. Who should appoint such a commission?

45. What accountability mechanisms should be in place to audit anti-corruption bodies?

46. Are there other ways of preventing corruption in Fiji?

2.10 Land

Land is a key resource in every country. Yet most constitutions say little about it. Many say no more than: everyone has the right to own property, and it cannot be taken away by government unless there is good reason for it. Sometimes the constitution will say that good reason must be that the land is needed for a public purpose. And the constitution will usually say that compensation must be paid, and also that the process for taking land must be fair.

Fiji's previous constitutions all had provisions of this sort. But because of the importance of land, and the disagreements that have surrounded it, they all said more. Especially they all said that the main laws about land could be changed only with difficulty; particularly they could not be changed without the agreement of most of the Great Council of Chiefs' nominees in the Senate.

Although land does not feature directly in the constitutional principles, it has been a major source of conflict in Fiji. Indirectly, many constitutional principles are relevant to it (especially good governance and social justice). However, there are considerable difficulties in resolving the land issues in a constitution. In order to appreciate its true significance, land has to be understood in a country's historical, political and economic contexts.

Land has many dimensions which make simple policies and solutions difficult. Land is the basis of much economic development, livelihood and shelter. But it is also a basis of identity, emotional attachment, and psychological security. The issue is also complicated by senses of past injustices.

A satisfactory resolution of the land issue must address all its dimensions. The task will require sensitivity among policy makers and guidance by leaders of different communities. It may be that a solution can be found within the general principles and objectives of the constitution review as outlined in the Decree.

Questions

47. Some say that the misfortunes facing the 1997 constitution were due to its failure to address the land question. Do you agree with this statement? Why?

48. Has the Land Bank created by the Bainimarama government been effective in making more land available for use?

- 49. What would you say are the real underlying reasons for the great anxieties about land?**
- 50. What should be the objectives of land policy, thinking in terms of fair and effective use of land, protection of interests in land, access to land, and the interests of the nation as a whole?**

Part VI Conclusion

“What is the point of a new constitution? It will undoubtedly be overthrown soon”

Several people have made this remark. It brings us back to Prime Minister Bainimarama’s observation, quoted earlier in this publication, of “a vicious pattern: elections followed by ineffective governance, followed by coup, followed by elections and then another coup, with the cycle continuing and Fiji’s overall situation regressing further and deeper.” Two of Fiji’s three constitutions resulted from coups, one to entrench the partisan interests of the coup makers, and the other to move to a new political order.

The NCBBF also gave considerable attention to the consequences of coups and coup culture. It said:

*Coups have done lasting damage to Fiji in a whole range of areas, from the social and economic context, to ethnic relationships through to the institutional framework and to Fiji’s international relationships. Coups have undermined democratic governance and the rule of law. Coups ruin people’s lives, destroy confidence as well as social and economic opportunity, leaving lasting fissures within the society. Despite the superficial appearance of short term gains for some elements in society, **there are no long-term winners in coups**. All sectors of society suffer in one form or another. In his speech of 16 January 2008 to the first meeting of the NCBBF, the Interim Prime Minister asked that the ending of the ‘coup culture’ should be one of the main objectives in developing the People’s Charter.*

Why has Fiji had so many coups?

In order to end the coup culture, it is important to understand reasons for coups. You should consider whether the main causes of the frequency of coups include the following factors:

Understanding the nature of the armed forces

Some of the comments made about the armed forces and their role in Fiji are:

- their size is out of proportion to the population
- there is little need for the military in defending the country from foreign invasion or other threats
- the military has carved for itself an important—and valued—role as international peace keepers but in so doing it may have also developed vested interests, protected by the existence of a sizeable army
- the military is dominated by one ethnic community, to which it perhaps perceives that its interests are aligned

- the military after past coups easily secured immunity for coups because it otherwise it could block change by force
- powerful political and economic interests have allied with the military and, in some cases, prompted the military to overthrow the government for their own selfish and narrow interests
- neither the military nor civil society always understand the role of the armed forces in a democratic society (meaning that the military may lack a measure of professionalism).

The NCBBF concluded that, combined with other factors mentioned below, “the lack of clarity surrounding the role of the military, [has], directly or indirectly, contributed to Fiji’s coups since 1987”.

Social and political reasons facilitating coups

Coups have perhaps been made easier and more likely in Fiji because of the following considerations:

- that the country has been deeply divided, along ethnic or regional lines, where it appears as if one or another community would have a stake in the overthrow of the existing system
- that democracy has had shallow roots of in Fiji so that large sections of the people are willing to accept or even applaud the overthrow of elected governments
- there have been inefficient and partisan governments whose overthrow is likely to appeal to some sections of society
- poor governance has led to injustices that provoke conflict
- there has been no other force to counter the power and capacity of the military
- that communities have been vulnerable and unable to defend their interests.

Is there a way out of this “vicious pattern”?

This question was addressed by the NCBBF, and its recommendations touch on many features of the constitution, some discussed in this publication. After a careful analysis of the causes of coups, it made 13 recommendations to stop coups, including:

- removing the social and economic circumstances that cause coups
- strengthening other state institutions to provide countervailing power centres within Fiji’s governance systems
- encouraging ethnic integration through a reform of the electoral system
- transformation of public leadership in politics, institutions, the private sector, civil society, trade unions, churches, media and the chiefly system to build national unity and identity, and the advancement of the interests of all the people of Fiji
- building up processes for national reconciliation and healing and conflict resolution
- ensuring the separation of state and religion

- strengthening sanctions against people who commit coups, and, most importantly,
- redefining the role of the military, including protecting human security, to bring it closer to the people.

To this list other commentators have added:

- changing the recruitment policies to the military and striving for an ethnically balanced force
- reducing the size of the military and its role in international peace keeping.

Question

51. The Commission would greatly welcome your views on the reasons for coups and how the new constitution can facilitate an end to coups, and contribute to Fiji becoming fully and truly committed to democracy, national integration, human rights, and social justice.

Appendix 1: Some Important Words

English	i-Taukei	Hindi
Abuse of office	Butakovakacacaka	दफ्तर का दुरुपयोग
Accountable	saumi taro kina	ज़िम्मेवार
Affirmative action	Veisauuasivi	सकारात्मककदम
Amnesty	Vosotivakamatanitu	क्षमादान
Bill of rights	Lawatunidodonu	अधिकारों केकानून
Charter	Yavutu	चार्टर
Citizenship	lewenivanua	नगरिकता
Coercion	Veilecavikaukauwa	दबाव डालना
Commission	matabose	कमिशन
Consensus	lomavata	सर्वसम्मति
Constitution making	Buliyavunivakavulewa	संविधान बनाना
Constituent Assembly	MataboseniVakavulewa	संविधानसंघठन
Constitution	YavuniVakavulewa	संविधान
Coup	Vuaviri	सत्ता पलटाव
Decree	Dikiri	डिक्री (डिक्री)
Democracy	Demokarisi	प्रजातंत्र
Diaspora	KaiVitituyawa	प्रवासीनागरिक
Dignity	Rokovi e dua	मान-सम्मान
Discrimination	veivakaduiduitaki	भेदभाव
Drafting	Volaikotovakawawa	तैयारकरना
Electoral system	Gacagacanineidigidigi	चुनाव प्रणाली
Empowerment	vakacokotaki	ताकत देना
Equality	Nanumivakatautauvata	बराबरी

Executive	Vakailesilesiliu	अधिकारिक
Good governance	Veiliutakivinaka	देश का उच्च संचालन
Government	Matanitu	सरकार
Hansard	Tabananivavakadewa	हेनसार्ड
Human Rights	Dodonuvakamata-tamata	मानवअधिकार
Immunity	Vosotivakalawa	क्षमादान
International community	Veimatanutani	अन्तरराष्ट्रीयसमाज
International law	LawaniVeimatanutani	अन्तरराष्ट्रीयकानून
Judicial Tribunal	MataveilewaiTuvakaikoya	न्यायपंच
Judiciary	Mataveilewai	न्यायपालिका
Justice	Lewaivakadodonu	न्याय
Legislature	Bose Lawa	प्रशासन
Media	TabananiTukutuku	समाचार माध्यम
Merit based	Digitakivakavuli	योग्यता अनुसार
National identity	Yacedakilairaraba	राष्ट्रीयपहचान
NGO	Soqosoqoseganiokaenamatanitu (NGO)	गैर-सरकारीसंस्था
Ombudsman	TuraganilewaLevu (Obatisimani)	न्यायमूर्ति(ओम्बड्समेन)
One person, one vote	Duanatamata,duanadigidigi	एक व्यक्ति, एकमत
One value	Duanayavu	एकमूल्य
Oversight	Wanonovamatua	नज़रान्दाज़ करना
Parliament	Palimedi	संसद(लोकसभा)
Parliamentary system	TuvatuvaenaPalimedi	संसदीय प्रणाली
Permit	Veivakadonuivakalawa	स्वीकृति
President	Peresitedi	राष्ट्रपति
Presidential system	Tuvatuvavakaperesitedi	राष्ट्रपतीय प्रणाली
Prime Minister	Paraiminisita	प्रधान मंत्री

Principles	Kenayavu	सिद्धांत
Promulgation	Vakalawataki	लागूकरना
Proportional Representation	Vakaturimatavakavanua	बराबर भागीदारी
Public Consultation	Veitaratarararaba	जनता से विचारलेना
Public interest	Gagadrenilewenivanua	जनता केहित में
Referendum	Nanumanilewenivanua	लोगों का मत
Representation	Mata digitaki	प्रतिनिधि
Rule of Law	Veiliutakivakalawa	देश का कानून
Secular State	Veimatanituvakavuravura	धार्मिकस्वतंत्रता वाला देश
Secular society	Veivanuavakavuravura	धार्मिकस्वतंत्रता वाला समाज
Separation of powers	Waseinikaukauwa	ताकत का बंटवारा
Social cohesion	Veiyalonivakamata-tamata	सामाजिकएकता
Social Justice	LewaVakavanua	सामाजिकन्याय
Sovereignty	Matanitutuvakaikoya	उच्च प्रशासन
Systemic Corruption	Cakacakavakailoaniveikilai	योजना अनुसार भ्रष्टाचार
Violation	Vakacacanivakalawa	उल्लंघन करना

What was in the 1997 Fiji Constitution?

Introduction: this is not intended as a recommendation. It just indicates the sorts of topics that constitutions generally contain. The 1997 Constitution had a very common structure, though Chapters 2, 8 and 13 were very specific to Fiji. The issues in Chapter 5 would have been put with human rights in many constitutions.

PREAMBLE

CHAPTER 1-THE STATE(About the country the Constitution and its legal status, language and religion and the state)

CHAPTER 2-COMPACT

CHAPTER 3-CITIZENSHIP(Who was a citizen, who had a right to be a citizen or to apply to become a citizen etc.)

CHAPTER 4-BILL OF RIGHTS(Human rights, permitted limits on rights, enforcement, including the Human Rights Commission)

CHAPTER 5-SOCIAL JUSTICE(Social justice and affirmative action)

CHAPTER 6-THE PARLIAMENT

Part 1-GENERAL(About how laws were to be made)

Part 2-HOUSE OF REPRESENTATIVES(About membership of the house – mainly on elections)

Part 3-SENATE(About Membership of the Senate)

Part 4-BOTH HOUSES(About voting, quorum in each house, losing one's seat in a house, and procedures in the two houses)

Part 5-INSTITUTIONS AND OFFICES(On the Constituency Boundaries Commission, the Electoral Commissions, Speakers (presiding officers) of the two houses, the Leader of the Opposition – all institutions connected with Parliament)

CHAPTER 7-EXECUTIVE GOVERNMENT

Part 1-EXECUTIVE AUTHORITY(About the offices of President and Vice-President)

Part 2-PRESIDENT AND VICE-PRESIDENT(About qualifications for being President and Vice-President, the appointment process and how they could be removed from office)

Part 3-CABINET GOVERNMENT(About the Prime Minister, and Ministers, and their appointment, their relationship with the President, and what happened in there was a vote of no confidence in the Government in the House of Representatives)

Part 4-GOVERNMENT ADMINISTRATION(About the permanent secretaries, the Commissioner of Police, the Military Forces and the Director of Public Prosecutions)

Part 5-PREROGATIVE OF MERCY

CHAPTER 8-BOSE LEVU VAKATURAGA(GREAT COUNCIL OF CHIEFS)

CHAPTER 9-JUDICIARY(About the role of the judges, their qualifications and appointment, their independence, how they could be dismissed, and the structure of the most important courts; the Judicial Service Commission)

CHAPTER 10-STATE SERVICES(About recruitment and promotion policy, including merit, inclusiveness etc., appointment of members of independent service commissions, the roles of the Constitutional Offices Commission and the Public Service Commission)

CHAPTER 11-ACCOUNTABILITY

Part 1-CODE OF CONDUCT

PART 2-OMBUDSMAN

Part 3-AUDITOR-GENERAL

Part 4-GENERAL PROVISIONS RELATING TO CERTAIN CONSTITUTIONAL OFFICES(Especially about pay etc. and removal)

Part 5-FREEDOM OF INFORMATION(Said there must be a law on freedom of information)

CHAPTER 12-REVENUE AND EXPENDITURE(About how all taxation and expenditure requires the approval of Parliament, the passing of the laws on finance)

CHAPTER 13-GROUP RIGHTS(Certain laws, about Taukei land rights especially, could be changed only with difficulty, and on the necessity for laws about customary land rights and dispute resolution)

CHAPTER 14-EMERGENCY POWERS(How, in a situation of emergency, special powers could be exercised by government, but how subject to approval of Parliament)

CHAPTER 15-AMENDMENT OF CONSTITUTION(How the Constitution could be changed if necessary)

CHAPTER 16- COMMENCEMENT, INTERPRETATION AND REPEALS(When the Constitution was to come into effect, and certain rules about how it was to be interpreted)

SCHEDULE-OATHS AND AFFIRMATIONS

BUILDING THE PEOPLE'S CONSTITUTION: YOUR RESPONSIBILITY

A GUIDE TO CONSTITUTION MAKING FOR THE PEOPLE OF FIJI

This little book has been prepared by the Constitution Commission for the people of Fiji. It explains in simple language, with examples, and questions to think about, what sorts of issues may be dealt with by a Constitution.

The book contains brief discussions of most of the topics you are likely to find in a modern constitution: national values, human rights, social justice, the system of government, the role of Parliament, the system of elections, the courts, accountability, political parties, security forces including police, local government, corruption and land.

In such a small book there can be no detailed discussion. But we hope that this will give people some idea of the issues, and help them to make suggestions to the Commission. It tries not to tell the reader what ought to be in the Constitution, but genuinely invites suggestions.

The book also explains the constitution making process, especially the role of the Commission.

The Commission hopes that the book will be helpful to organisations working with the people to understand the issues and prepare to make submissions, and to the media, and to individual members of the public.

The Commission has been appointed by the government of Fiji to consult the people, and to draw of the lessons of the past, relevant experiences from elsewhere, and technical expertise, to produce a draft Constitution. The Decree establishing the commission says that the draft constitution should result "from full, inclusive and fair participation of Fijians; meet the needs of Fiji and the aspirations of its people; unite the people of Fiji; include provisions appropriately designed to achieve, among others, true democracy, and respect for, and protection and promotion of human rights"

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