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**CONSTITUTION MAKING
IN THE 21st CENTURY**

Citizens' Constitutional Forum. Public Lecture 2011. Presenting Professor Cheryl Saunders

CONSTITUTION MAKING IN THE 21st CENTURY

Public Lecture hosted by the
Citizens' Constitutional Forum Limited (CCF) and
School of Government, Development and International
Affairs, Faculty of Business and Economics. USP
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Constitution Making
in the 21st Century

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Constitution Making
in the 21st Century

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Foreword

This is the 8th of CCF's annual lecture series which began in 1998; intended initially to address various aspects of the 1997 Fiji Constitution.

In its history, the Citizens' Constitutional Forum (CCF) which began in 1993 is the only NGO in Fiji that was created directly in response to the 1987 first military take-over, especially to address issues such as racism, understanding about the constitution, democracy and human rights.

Professor Saunders has been a friend of CCF over all those years and stood ready to assist CCF again after the 2006 military-take over and in particular after the purported abrogation of the 1997 Fiji Constitution in April 2009. At the time writing the Public Emergency Regulations (PER) is still in place extended endlessly for over thirtieth time. Numerous decrees have become part of what purports to be Fiji's current ruling landscape. Part of this scenario is the need for CCF to acquire a Government permit before the lecture could be held.

In her presentation Professor Cheryl Saunders deliberately chose not to speak about Fiji. She knows how constitutional debate is about to begin but chose to talk about Constitution Making in the 21st Century. So while her lecture was not on Fiji since all countries are part of the global world Fiji could draw relevance from her global picture presented with such clarity and interest to an audience of over one hundred people.

As it has become our practice CCF is fortunate to have the School of Government, Development and International Affairs of the University of the South Pacific as joint sponsor of the lecture. CCF is grateful for this continuing partnership with USP in sponsoring the lecture and in particular in providing once again the venue for this event.

Rev. Akuila Yabaki
CEO,CCF

Introduction

Reverend Akuila Yabaki
CEO, Citizens' Constitutional Forum Limited(CCF)

Your Excellencies, Invited guests, Ladies and Gentlemen,

Good evening and welcome. This is the 8th of CCF's Annual Lecture series which began in 1998; intended initially to address various aspects of the 1997 Fiji Constitution. CCF chose back in 2008 to engage with the Government in the drafting of the People's Charter for Change, Peace and Progress, intended to address root causes of Fiji's problems.

Amongst the root causes, we identified what can be said were limitations in the 1997 constitution and constitutions in place prior to that in addressing issues which have led to Fiji's troubles. Whether it's raced based voting or provisions which allow ethnically aligned government policies.

World over, Constitutions have become subject to civil litigation based on alleged breaches and flaws in the Constitutional design. That's why we now need to talk about "Constitution Making in the 21st Century".

About 90 constitutions have been developed over the last 20 years around the world and they all show variations in their approaches. The various models used to draft constitutions vary from country to country based on the political climate, demography and national circumstances which would lead to free, fair and inclusive democratic elections and ensure stability and economic growth for its people.

Legal experts and scholars state that the constitution of a nation is its supreme law, wherefrom the powers of government are derived and wherein the rights of the citizens of that nation are outlined. In many cases, a nation is established when its constitution is created.

Constitutional litigation raises fundamental questions about what the constitution permits and forbids the government and citizens of a country to do. It follows, therefore, that the interpretation of a constitution is a matter that requires careful consideration. Herein lies the challenge in Constitution making.

The steps required for putting together Fiji's next constitution is expected to commence soon. The National Charter Advisory Council has recommended Cabinet to fast track the establishment of a Constitutional Commission as we work towards democratic elections and a constitutional government.

We know that over the next 12 to 18 months, the government and interested organizations would take the first step to explore global models on constitution development. Fundamental to this are the best practices to be followed so that we have a document that can legitimately be made into law.

I believe that our guest speaker tonight will take us through a number of scenarios which have led to Constitutional development and processes adopted globally. When we look at global models, they all call for the need for wide and inclusive consultations referred to as popular participation.

However, this depends on the political climate in individual countries, which varies on a case by case basis. In some instances, there is a need for Elite by-in in drafting and adopting a new constitution. Generally, ratification is required through a national referendum to measure the peoples' support and to some extent, that they have a say on the fate of what is to become the highest law of the land.

Those genuinely seeking a suitable remedy to solve the political turmoil in Fiji would explore these options as a way forward. But, it is evident that to bring about political stability in Fiji and a constitution which is by the people and for the people, a home grown solution is needed. A way forward for Fiji which would not be based on any global models but one based on "the Fiji Model."

The "Fiji model" must be reflective of the need for opposing sides to burn their differences and work together. Having a national identity with all citizens now being called Fijians, the citizens must join the constitutional process as a project in national unity.

Fiji does not need to have international constitutional experts anymore, certainly not to produce a constitution for Fiji; similar to the approach taken in the Peoples' Charter 2008, calling for broad-based support from all stakeholders to be creative participants in regard to the way forward for Fiji.

The role of civil society in this process is vital. Civil society organizations, who work with people at the grassroots level, must help people move away from institutionalized thinking and empower them to be able to make informed decisions on their own and for the better good of their communities and future generations. Participation of such groups, through assistance would reflect on the outcome of the constitutional process.

During this painful yet historic transition, there is a need for a collaborative approach by all relevant stakeholders to ensure political and economic stability and this can only come about through engagement and dialogue.

With these few opening remarks and a brief introduction I now hand you over to Professor Vijay Naidu, Professor & Head, School of Government, Development and International Affairs, University of the South Pacific and also might I say Member of CCF Board of Directors to please kindly introduce our guest speaker for this evening, Professor Cheryl Saunders.

Introduction of Guest Speaker

Professor Vijay Naidu, Head of School of Government, Development and International Affairs, University of the South Pacific

As Head of School of Government, Development and International Affairs, I have great pleasure and feel privileged to introduce Professor Cheryl Saunders. She is a pre-eminent and internationally distinguished scholar of Constitutional Law

Current Position: Professor Saunders holds a Personal Chair in the Faculty of Law at University of Melbourne, For her academic distinction, she was made Laureate Professor at the University of Melbourne 4 years ago. She is Director of Studies, Government Law, Melbourne Law Masters.

For many years she was Director of the Centre for Comparative Constitutional Studies, and Associate Dean Graduate Studies and Co-Director of Juris Doctor, then Associate Dean (JD).

Education: BA. LLB. PhD (Melb). Born in India.

Teaching and Research Interests: Constitutional Law, Administrative Law, Comparative Public Law, Comparative Federalism, Principles of Public and International Law, Protecting Rights, Legal Theory, Methodology of Comparative Constitutional Law, including the significance of constitutional history and theory, Constitutional Making, design and change.

Publications: She has authored, co-authored and edited 15 books and more than 200 book chapters, refereed journal articles, reports and public submissions

Cheryl Saunders is an editor of the Public Law Review and member of editorial boards of a range of Australian and international journals including Publius, Jus Politicum and Constitutional Court Review, South Africa.

International positions: She has held visiting positions at universities of Oxford, Cambridge, Paris, Georgetown, Indiana, Hong Kong, Copenhagen, Fribourg, Capetown and Auckland. Professor Saunders is President Emeritus of the International Association of Constitutional Law and the International Association of Centres of Federal Studies, and a former President of



Professor Cheryl Saunders

She is active in public debate on constitutional matters in Australia and internationally. She has promoted public understanding of the Australian Constitution since 1991 as deputy chair of the Australian Constitutional Centenary Foundation. She has been involved in aspects of constitutional design in other countries including Fiji, South Africa, Zimbabwe, Sri Lanka, East Timor, Iraq, and Nepal. She is a member of the Advisory Board of the International Institute for Democracy and Electoral Assistance (International IDEA) based in Stockholm.

In 1994 as a national recognition for her services to law and to public administration, Professor Saunders was made an Officer of the Order of Australia. She was awarded a Centenary Medal in 2003.

She was awarded an honorary doctorate by the University of Cordoba, Argentina in 2005. She is a Fellow of the Academy of Social Sciences in Australia and a Foundation Fellow of the Australian Academy of Law. During the mid to late 1990s, Cheryl Saunders assisted the Citizens' Constitutional Forum and the Commission on the Review of the 1990 Constitution as Fiji engaged in the process of constitution making. Cheryl has been a friend of Fiji and has shown an on-going interest in our development trajectory.

We have a most distinguished and qualified speaker on the topic of
"Constitutional Making in the 21st Century"

Please welcome Professor Cheryl Saunders!

Lecture Proper presented by:

Professor Cheryl Saunders

Any human society has a set of rules that governs the relations between its members and the ways in which they make collective decisions. Historically, in much more simple times, the rules were customary and organic. But the idea of a Constitution that took hold from the late 18th century had significant additional features. The primary constitutional rules took written form, typically in a single document called a 'Constitution'.

These rules became supreme or fundamental law, overriding all other law and government action. The Constitution both empowered and limited institutions of government. Over the course of the latter part of 20th century, this became the conception of a Constitution that prevailed throughout the world, with only a very few, sui generis, exceptions.

Once a Constitution is understood in this way, legitimacy becomes an important question. To put the point in another way, the question is this: under what conditions will a community, and its leaders from time to time, accept that certain rules have 'constitutional' status, so that they override all others and limit what can be done in the exercise of public power, not only now or next year, but over what might be a long period of time?

I have followed constitutional developments in Fiji since the 1990s and I am aware that constitutional debate is about to begin again.

The answer may depend on a range of factors. Who authorised the Constitution? How was it made? What is in it? How well does it work? What relationship does it have to the previous Constitution? The weight given to each of these factors and the way in which they apply has varied over time. Once, for example, it was accepted, in both Fiji and Australia, that imperial authorities could legitimately put Constitutions in place, at least as a matter of law, because they represented the 'sovereign' power. Those times have long since gone.

I have been invited this evening to talk about Constitutions in 21st century. Given the place and the audience, I should make it clear in advance that I do not intend to say a great deal specifically about Fiji. I have followed constitutional developments in Fiji since the 1990s and I am aware that constitutional debate is about to begin again. How that debate unfolds, however, ultimately is a matter for Fijians; hence my topic. Nevertheless, Fiji also is an integral part of the constitutional world of the 21st century. I hope that what I have to say tonight is useful and relevant for this reason.

A very large number of Constitutions has been made across all regions of the world since the fall of the Berlin Wall just over 20 years ago. By my rough calculation, around 104 new Constitutions have been put in place during this time, generating a wealth of experience. And the spate of constitution-making is not yet over. Constitution-making processes are presently underway in, for example, Nepal, Southern Sudan and Thailand. A new wave of constitution-making has recently been kick-started by the Arab Spring in countries around the Mediterranean: Morocco, Tunisia, Jordan, Egypt and now, presumably, Libya as well. As constitution-making evolved over this period it assumed some distinctive features, which became even more pronounced over the first decade of the 21st century.

First, there is now, effectively, universal acceptance that the authority for a Constitution must derive, in one way or another, from the people of the state concerned. This idea is not, of course, new, but it has been reinforced by the aspirations of people everywhere in the aftermath of the overthrow of authoritarian regimes. Moreover it now has a practical as well as theoretical dimension. People expect actually to be involved in the constitution-making process; a point to which I will return.

The Constitution-making process must not only be inclusive, but must also engender trust, between segments of the community and, critically, between their leaders.

Secondly, most Constitutions now are made for multi-cultural societies. This is a change from earlier times when it was assumed, rightly or wrongly, that a Constitution was made for a people with a common history, religion and language to whom, however fancifully, a common will might be attributed. These new conditions place much greater expectations on Constitutions: to build the nation as well as the state; to provide at least some of the missing cohesion; to protect effective minorities against majority decision-making. To fulfil these expectations, the Constitution-making process must not only be inclusive, but must also engender trust, between segments of the community and, critically, between their leaders. The deeper the divisions in society the more important trust is likely to be and the more challenging it will be to achieve.

A third, marked characteristic of constitution-making in the 21st century is the involvement of the international community, or segments of it, in what traditionally has been regarded as quintessentially the business of a sovereign state. International involvement is most

intense where a constitution-making process is preceded by some form of conflict, attracting the peace-making offices of the UN or other states, which in turn have the potential to spill over into constitutional process or design. Even leaving these extraordinary – although not uncommon- cases aside, however, international law now impinges on constitution-making in a variety of other ways. International human rights norms increasingly are incorporated into Constitutions, either by reference or in transcribed form. And an argument is gathering strength that public participation in constitution-making is not only a sensible national strategy but also a right under international law. The obvious tension here between international standards and local constitutional ownership is eased somewhat by the reality that local populations typically expect their own Constitutions to comply with such international norms.

One final characteristic of constitution-making in the 21st century is the emphasis on process, as distinct from substance; on how the Constitution is made, as distinct from what is included in it. Process has always been important, in the sense that both the role and status of a Constitution mean that it should be made in a way that differs, preferably significantly, from the ordinary law-making process. The significance of process is now further enhanced, however, by the contemporary focus on public participation in constitution making and the need to build trust. Getting these right increasingly is seen as the key to a Constitution that is effective and lasting. Process can underpin the legitimacy of a Constitution, increase public knowledge of it, instil a sense of public ownership and create an expectation that the Constitution will be observed, in spirit as well as form. A constitution-making process may assist to set the tone for ordinary politics, including the peaceful transfer of power in accordance with constitutional rules.

International human rights norms increasingly are incorporated into Constitutions, either by reference or in transcribed form.

I propose to build the rest of my remarks tonight around the stages of a 21st century constitution-making process. I will distinguish three in particular: agenda setting; design and approval; and implementation. No process is exactly the same, but all go through these stages, whether they are acknowledged or not. In relation to each of them I want to continue to trace the themes that I have identified already, including legitimacy, trust, and public participation. To the extent that I can, I will try to bring the argument down to earth, by referring to practical examples.

Agenda setting Concept

In any constitution making exercise there is a stage before the process gets much publicity, when the agenda effectively is set. The idea of an 'agenda' for this purpose includes both the way in which the Constitution will be made and the scope of the changes to be made. As far as the former is concerned, relevant considerations include, for example, the nature of the constitution-making body, the electoral rules that should apply, how the state is to be governed during the constitution-making process, procedures for ratification of the Constitution and arrangements for public consultation. Ideally, the entire process should be prescribed in advance, together with realistic time-lines, with a degree of inbuilt flexibility.

This is the stage also at which a decision must be made about whether to maintain legal continuity with the previous constitution. A decision in favour of continuity effectively determines how the new constitution will be brought into effect as law. A decision against continuity leaves this question open. Many, although by no means all, constitution-making processes seek continuity. In some cases, however, a decision is made to return to an earlier Constitution, as in Indonesia and Thailand. And in others the new Constitution is intended to stand alone, as a new expression of popular will. Continuity is relevant to legitimacy but not essential, as long as legitimacy can be secured in other ways. A decision to make a new Constitution in a way not prescribed by the old one thus makes the design of an alternative constitution making process all the more important. I note in passing that a decision against legal continuity does not affect the question whether the previous Constitution is used as a de facto model, in whole or in part. Most new Constitutions build on familiar principles and institutions, even where they are ostensibly making a fresh start.

The new Constitution is intended to stand alone, as a new expression of popular will.

The agenda setting phase also determines the limits of change: even if the ultimate decision is that there are no prescribed limits. So, for example, if it is decided to design a new Constitution by amending the old one there is likely to be an indication of the areas in which change is sought or, conversely, of the parts of the Constitution that must be preserved. Even in the case of a process to establish a completely new Constitution the essentials of the new arrangements may be prescribed in advance: democracy, republicanism, parliamentary or presidential, the form of electoral system; and so on. There is a link between limits of this kind and the design of the constitution making body itself. The more legitimate the constitution making body in its own right, the greater its potential to depart from its terms of reference as long as, ultimately, it is confident of securing final approval for the Constitution. The decision of the Philadelphia Convention in 1789 to ignore its mandate by drawing up a new Constitution for the United States is merely the most famous example of this kind.

Method

Because this first agenda setting phase of a constitution-making process has a relatively low profile, there is a danger that important decisions will be made by default. Most obviously, where a country is emerging from conflict, all or parts of the constitutional agenda may effectively be set in the course of the peace process, in a way that has the advantage of bringing the conflict to an end, but has unfortunate consequences for the Constitution in the longer term. The Constitution for Bosnia-Herzegovina, which was literally prescribed by the Dayton Peace Accords, is a case in point. Even in less dramatic circumstances, however, decisions about all or parts of the constitution-making agenda may be made inadvertently or without adequate planning. And yet this is a critical period, at which the decisions made can effectively determine the success or failure of a constitution-making process. This is also the point at which it is important to lay the foundations of trust between key stakeholders.

There was potential for even more violence unless a mutually satisfactory solution was reached.

The significance of this phase can be illustrated by the example of South Africa, as it moved to create a new, non-racial Constitution following the collapse of apartheid. For obvious reasons there was deep mistrust between the principal political groupings. Violent acts had been committed on all sides. There was potential for even more violence unless a mutually satisfactory solution was reached. And the interests and goals of the principal players were diametrically opposed. Consider, in particular, the position of the two major parties. The white National Party government controlled the existing Parliament, which had been elected on a racial franchise. It also controlled the other institutions of the state, including the police, the military and the broadcasting service. It was clear that it would lose power to a black majority once non-racial elections were held. And it was apprehensive of the Constitution that would be put in place by the black majority.

The African National Congress, on the other hand, was confident of easily winning the elections once a non-racial franchise was introduced. For that, however, constitutional change was needed. And it was not prepared to accept that the new Constitution could be put in place by the existing white majority Parliament, which in its eyes, not surprisingly, lacked legitimacy for the purpose. Nor was it prepared to allow the National Party to control other key institutions of the state while the elections and the constitution making process were underway. While it could have seized power by force and made a Constitution unilaterally this would have precipitated a blood-bath, which was in no-one's interests.

The eventual solution provides a text-book example of bringing stakeholders together during the agenda setting phase to agree on both a process and constitutional outcomes

with which all parties could live. At the risk of oversimplifying a highly complex and fraught process the key steps were these. A Multi-Party Negotiating Forum agreed on 34 principles with which the final Constitution must comply. These included, for example, a democratic system of government based on equality and non-discrimination; separation of powers; judicial independence; proportional representation; freedom of information; and the protection of linguistic and cultural diversity. The 34 principles were enshrined in an interim Constitution, which was written by the MPNF but formally enacted by the white majority Parliament. The Interim Constitution thus created continuity with the Constitution without jeopardising the legitimacy of the final Constitution that was still to come. The Interim Constitution also provided for the election of a new Parliament on the basis of a non-racial electoral system; set out a process by which this Parliament, doubling as a Constitutional Assembly would draw up and approve the final Constitution; and provided arrangements for power-sharing in government during this period. In addition, to give security to all parties that the constitutional principles would be observed, the Interim Constitution required the final Constitution to be certified as compliant with the principles by a new, independent Constitutional Court.

Public participation is most difficult during this first phase of a constitution building process.

This process, broadly, worked and the South African example still is much admired. The details of it are not important and may be difficult to replicate precisely elsewhere. The significance of the South African case for present purposes is that it established a sufficient level of trust between stakeholders to enable them to reach agreement on the parameters for a new, democratic Constitution and on the open and participatory process by which it would be made. In doing so, they also solved the problem of bridging the gap between a government with contested legitimacy and a new governing regime based on an undoubtedly legitimate Constitution, through the useful device of an interim Constitution.

Public participation is most difficult during this first phase of a constitution building process. Typically, this stage is less formal and transparent. Negotiations between stakeholders may need to be confidential to be effective. On the other hand, public participation may be necessary to gain public acceptance of the legitimacy of the process and to inform decisions about critical features of the new Constitution. This was somewhat less important in South Africa, where the MPNF was broadly inclusive and the two major parties were confident that they were speaking for their members. This is one aspect of the South African process that was criticised, nevertheless. Under less favourable conditions, public participation in an appropriate form is likely to be even more important during the agenda setting phase.

Design and approval

The second phase of a 21st century constitution making process is more familiar. This is the stage during which a draft of the Constitution is developed and becomes law. Exactly what this involves depends on the mechanism used, to which we will come in a moment. But on any view it requires policy decisions about the content of the Constitution, a drafting process to give these decisions legal form, agreement on the draft as a whole and a procedure for bringing the Constitution into effect as fundamental law.

Various different mechanisms are available for this purpose, alone or in combination with each other. Three of the most common are as follows. The first is an advisory body of some kind, constituted by experts or representatives or both. The second is an elected Assembly, which may be either a regular Parliament or a specially constituted Constitutional Assembly. The third is a referendum. Each of these mechanisms has strengths and weaknesses. An advisory body may have expertise and may even be broadly representative but will not have the legitimacy to bring the Constitution into effect as law. It is always, therefore, combined with another, more democratic process. An elected body may have legitimacy in its own right to enact the Constitution. But oddly, it may not be sufficiently representative for constitution-making, if its composition relies solely on the ordinary electoral process. If the elected body is a Parliament, moreover, it may find it hard to rise above ordinary politics; while if it is a Constituent Assembly, there may be a question about its relationship to the Parliament. Finally, a referendum cannot stand alone but relies on some other process to design and draft the Constitution. In theory, ratification by referendum confers a high degree of legitimacy. But a referendum is also a blunt instrument. The quality of the Constitution depends on the earlier process, whatever it is. And a referendum must be coupled with a very effective public information campaign for the vote to have a chance of really reflecting public opinion about the new Constitution.

An advisory body may have expertise and may even be broadly representative but will not have the legitimacy to bring the Constitution into effect as law.

The arrangements for design and approval of a new Constitution should be chosen with its legitimacy and effectiveness in mind. In practice, the final choice is likely also to be influenced by a combination of constitutional tradition and conditions on the ground. Is there a (suitable) existing Parliament? Is a referendum practicable? Are there groups who should be included in constitutional deliberations but who would be unlikely to succeed in an ordinary electoral contest? These and similar considerations help to explain the very different deliberative processes adopted around the world in relatively recent times in, for example, Timor Leste, Kenya, South Africa, Indonesia and Nepal.

Important though these choices are, it is also necessary in each case to pay attention to a host of lesser but important details that may tip the balance between failure and success. Most constitution-making bodies assign initial responsibility for parts of the new

Constitution to a series of committees. How should the constitutional cake be divided for this purpose? And how should the decisions of the committees be co-ordinated? What should be the time frame for finalising the draft Constitution? How should deadlocks be resolved? Should super-majorities be required to approve the Constitution in an Assembly or by referendum, in recognition of the higher status of a Constitution? What should be the minimum prescribed turnout for a referendum?

This is the phase also in which extensive public participation is widely expected and practised. Designing effective public participation in constitution making is, however, rapidly becoming an art in itself. The days have long since passed when public participation took the form of public meetings addressed by participants in a constitutional process, seeking public approval for developed constitutional proposals. The public is now expected to be engaged actively and during the formative stages of constitutional deliberation. This requires a foundation of public information and education in a form that is helpful and reliable. It needs to be tailored to the needs of different segments of the public and made available through a wide range of media. Laying this foundation is not easy, because constitutional ideas are often so abstract.

Successive constitution-making exercises have learnt from each other, in this regard. The engagement of the public in South Africa, for example, was another much admired feature of this process, ultimately attracting 2 million public submissions. Many of the South African techniques have been adopted elsewhere. On the other hand, embarrassing questions later were raised in South Africa about whether all these submissions actually had been taken into account. More recent processes accordingly have paid greater attention to ensuring that submissions are collated, analysed and made publicly available so that contributions from the public make a difference to the Constitution that is not only symbolic but real.

Designing effective public participation in constitution making is, however, rapidly becoming an art in itself.

There is continuing innovation in the design of deliberative constitution-making processes with extensive public participation. The high water mark so far is the very recent constitution making process in Iceland. You may recall the disastrous financial collapse in Iceland in 2008. It led to widespread dissatisfaction with the political system, as well as with Icelandic financial institutions, and to a movement for constitutional change. The body in Iceland with the legal authority to replace the Constitution is the Icelandic Parliament, or Althing. Ultimately, presumably, it will act. In the meantime, however, an eye-catching and elaborate preliminary process has been underway. It began with a discussion about a new Constitution involving 1000 delegates, randomly selected from the public. Following this brief, one day meeting a Constitutional Council was appointed, following an electoral process, to draw up a Constitution for submission to referendum. And all this, as I understand it, before enactment by the Althing. This Council used the technique of 'crowdsourc-

ing' to engage with the public about the constitutional draft, using all forms of social media including Facebook, Twitter, YouTube and Flickr. The draft Constitution has now been presented to the government of Iceland and no decision is expected until next year. But I am sure that we have not heard the last of crowdsourcing as a technique in 21st century constitution-making.

Implementation

The final phase of a constitution making process is implementation. This phase extends for an indefinite period from the time the Constitution is passed. For obvious reasons, it is most intense in the first few years. The immediate target of implementation is the wide range of action that needs to be taken to give any Constitution effect. All manner of laws must be passed including, for example, electoral laws. Constitutional institutions, such as Human Rights Commissions, must be established, Judicial and other appointments must be made. The first legislature must be elected and its committees established. And so the list goes on. Less obvious, no less important but undoubtedly even more difficult is the need to establish a constitutional culture in which constitutional requirements are understood, and both the letter and the spirit of the Constitution are observed, by those who have the responsibility for exercising public power.

Once a Constitution became law national euphoria died quickly...

Until relatively recently this stage of constitution-making attracted little attention. Once a Constitution became law national euphoria died quickly, the international community lost interest and implementation was left to the ordinary political process. This has now changed, as various constitutional failures have drawn attention to the significance of the implementation phase. Implementation is now regularly taken into account in designing a constitution making process to try to encourage vigilance after the Constitution takes effect. In one recent spectacular example, in Kenya, the demands of implementation are anticipated in the Constitution itself. Schedules to the Constitution identify the legislation that needs to be passed, prescribe both time lines for doing so and sanctions for failure and create a Constitution Implementation Commission, together with a parliamentary oversight body. Interestingly, the CIC is also charged with the responsibility of involving the public in the implementation process.

The new focus on implementation is timely and necessary. But I suspect that there is only so much that can be done through formal implementation arrangements of this kind. The effectiveness of the Kenyan approach still remains to be seen. In the end, a Constitution must attract natural support, from those engaged in public life, from civil society and from the public at large. And so we return to the themes with which I began, the importance of legitimacy and trust.

Conclusion

Let me make three broad observations by way of conclusion.

First, constitution making has changed significantly over the last 15-20 years and is continuing to do so. Thanks to the sheer volume of constitution making we have learnt a great deal and there is now a considerable body of practical experience. As a generalisation the trend is towards openness, inclusivity and the active involvement of the people at all stages of the process. This is a complex trend, however. Leadership and vision are necessary too. A constitutional process needs to produce a workable result. In the end, the goal is to design a process that is worthy of a task as significant as that of making a Constitution by which people will be governed, which will be recognised as legitimate, and respected, by those to whom it applies.

Secondly, an ambiguous relationship has emerged between national action and international norms in the sphere of constitution-making. Constitutions are inherently local instruments. They must respond to local needs and they must be 'owned' by the people of the state concerned. It is hard to see how they can effectively perform their functions on any other basis. At the same time, however, there are international standards for democracy and human rights which now have implications not only for the substance of constitutions but also for the processes by which they are made. This tension between localism and universalism is evident across the whole field of constitutional law, attracting a great deal of attention from both practitioners and scholars. It is far from clear at the moment how the balance finally will be struck. For present purposes, however, the two can broadly be reconciled as national communities, often armed with considerable knowledge about what is happening elsewhere, draw on international standards to measure the legitimacy of their own Constitutions and the ways in which they are made.

Constitutions are inherently local instruments. They must respond to local needs and they must be 'owned' by the people of the state concerned.

One final, obvious, lesson from the experiences to date of the 21st century is that making a Constitution is not easy and the outcome is never exactly what everyone wants. One of the reasons for the emphasis on process is to enable a satisfactory compromise to be reached between the competing interests and ideas that are features of in modern communities. As a fall-back, there are well-known instances, of which India, Ireland and Chile are examples, in which some problems have proved so intractable that they have deliberately been left unresolved in the interests of agreement on an otherwise satisfactory Constitution, with a view to finding a solution over time through constitutional evolution or formal change. It does not seem to me desirable to embark on constitution making with less than the best possible Constitution as a deliberate goal. Constitutional moments are too rare and too important to be wasted. But it may be useful to remember that techniques of this kind also have worked, in various parts of the world, when the constitutional going gets sufficiently tough.

Fiji Government Response

Permanent Secretary at the Prime Minister's Office
Lt. Col Pio Tikoduadua

I have been asked by the good padre, to discuss in 8 minutes the topic of "CONSTITUTIONAL REVIEW PLANS BY GOVERNMENT." I am assuming here that he would like me to discuss what government is doing to review our past constitutions and what we are doing about writing a new one. No doubt you will agree with me that this is no topic to discuss fully in 8 minutes, particularly in a nation such as ours where we have had constitutional talks and review 3 times in 40 years and have had 3 constitutions.

All our constitutions so far have endured a short and painful life and ultimately after much turmoil and lack of oxygen and opportunity to grow died a sudden death. Two of them never made it past 10 years in lifespan whilst the 1970 constitution barely made it past 16. To the credit of this government, it persevered to keep the 1997 constitution alive but it was best for the common good to be abrogated to pave the way for a clearer advance to our objective in 2014.

We are at the start line again for the fourth time to try and do it right and get it right.

We are at the start line again for the fourth time to try and do it right and get it right. So, I hope that in 40 years from today, my 12 year old son, Mosese (who I hope would still be alive then), would be standing in some corner of Fiji or the world, and hoping him to say "My Dad and Fiji did it right and got it right 40 years ago, that is why our constitution from 2013 until today 2055, is a model worth emulating. For it has endured the test of time, adapted, developed and supported to continue to mature to see us through in the next 40 years in 2099.

The government under the Strategic Framework for Change and inspired by the Peoples Charter for Change Peace and Progress desires that we as people of equal birth and equal rights do it right this time round so that in 40 years our children will hail and not curse our legacy. Fiji, in 2014 will have a new constitution. The Strategic Framework for Change statement by the Prime Minister on 1 July 2009 clearly stated this. The same statement noted the mandate granted by the President to Government to (I quote) "ensure that true democratic, non communal, equal suffrage based elections for parliamentary representation are held by September 2014" (unquote).

I would like to quote further from the Prime Minister's 1st of July statement which discussed further his intentions for the conduct of the preparatory process to produce the constitution which is to be written in English and also in the vernacular. (I quote)

“It is with this economic background and projections that I now turn to various salient reforms and time frames which my Government shall implement, be focused on and oversee over the next 5 years.

Work on the new constitution under which the 2014 elections shall be held will commence by September 2012. The new constitution shall derive its impetus from the recommendations under the Charter. As I have stated earlier the new constitution must include provisions that will entrench common and equal citizenry, it must not have ethnic based voting; the voting age shall be 18; and, it must have systems that hold elected governments accountable with more checks and balances.

Consultations with the various stake holders for the drafting of the new constitution shall also commence in September 2012. These consultations shall be extensive and will not just be limited to political parties. It shall include civil society including NGOs and citizens of our country.

Consultations shall include but not be limited to, discussions on the size of the new parliament, the appropriateness of a bi-cameral system, the term of office of a government and systems of checks and balances.

I seek the assistance of the international community to provide expertise and resources when this process begins in September 2012.

The new constitution must be in place at least a year before the September 2014 elections - in other words by September 2013.

The new constitution must be in place at least a year before the September 2014 elections - in other words by September 2013. This will allow all Fijians and parliamentary candidates ample time to familiarize themselves with the provisions of the constitution. The constitution shall be translated into the vernacular and it shall be made available to the members of the public in pocket size” (unquote). The Prime Minister has echoed similar sentiments in various local and international forums where he was invited to speak on the Roadmap to Elections in 2014.

The electoral process and parliamentary model are two critical areas amongst many more that will make the agenda of the consultative dialogue on the new constitution.

Well before November 2011, members of Government in various forums have begun talking and consulting with the people on their views on what our new constitution should enshrine. The views have been wide and varying. An issue consistently raised by the people during discussions with the Prime Minister and those forums that I have personally attended question the environment in which the final consultation on the constitution will be held.

My usual answer is that the sentiments of the majority of the people on the new constitution are captured in the final document of the People's Charter for Change, Peace and Progress. A portion of these views by the people on the new constitution is expressed in the Prime Minister's 1st of July statement.

I am glad to note here that the Citizens Constitutional Forum was part of the Charter process.

Those of our Fiji community that did not participate in the Charter Forum, all hope is not lost. It would be suffice for me to declare here that the environment for the final consultation or dialogue on the constitution will be such that everyone will be granted an opportunity to make their views heard.

There is no cause for fear or concern. A free and fair consultative dialogue will be achieved. Before concluding, I would like to reinforce Governments commitment to elections in 2014 and the constitutional process. A few weeks ago representatives and delegates of the diplomatic corps in Fiji were briefed by the Attorney General of the developments of the Electronic Voter Registration. This announcement on the EVR is a significant step in government's commitment to elections and the constitutional process.

We believe in the peoples' faith in the developments of a new constitution for all Fijians. If the Lowy Report is anything to go by then we believe we are on the right path to a new and better future for all our people.

Thank you

Questions and Answers

Q.1: Hello, my name is Mosmi Bhim, I work at the Fiji National University. I just want to ask a question that's probably on everyone's mind, the million dollar question. Since I notice the Attorney-General is here, as we have heard that it is important to have a public participation in the formation of a new constitution and its essential for freedom of opinion and expression to exist for that to happen. So I would really like to ask the Attorney-General if he could in any way he could indicate to this forum when restrictions such as the Public and Emergency Regulations and the censorship of the media will be lifted so that it could allow freedom of opinion and expression to take place and also people to meet freely to discuss and express their ideas and opinions. Thank you.

Response: That has been said earlier on in many other forums that in order to have free and fair elections and indeed for the lead up in the formulation of the constitution there needs to be complete freedom in respect of expressing views etc. So any restrictions that would be placed in that would be removed.

Q.2 I just add a quick footnote into the discussion of the South African constitution that there is a little known story about the aftermath that constitution when it set up the elections and they held the first two elections and there was a great deal of confusion about votes which was resulted in some 10% of the votes not being entirely clear and it was a backroom agreement between the ANC and the National Party leadership in which, they decided arbitrarily that the ANC would not have 66 % of the votes and went to ensure that ANC didn't have a complete majority in Parliament. And its illustrative I think of the point he made about the political will and the consensus around the need to glue together a new process even at the cost of the little slippery dealing in the backroom which may have looked legitimate just an underscore on your point about the institutional and the writing of the constitution is itself not the end of implementation process and that there are often quite subtle measures needed to consolidate it in the end.

Response: A very exotic bit of agenda setting going on. I do remember when the outcome of elections was announced in South Africa and there wasn't a 66% whatever was majority, everybody saying, oh that's a good outcome. So, that's an interesting piece of information. Thank you.

“ In order to have free and fair elections and indeed for the leader in the formulation of the constitution there needs to be complete freedom in respect of expressing views etc...Aiyaz Sayed Khaiyum

Q.3 I would like to ask a question of Professor Saunders. I've read many of your articles and your books that you've written on constitution making etc. But what is really interesting, the point you made about once a constitution has been formulated and indeed has been accepted whether through a Parliamentary process or referendum, whichever process gives it legitimacy, I think once a constitution has been put in practice, there seems to be, in some experience, that is, the lack of constitutionalism as opposed to the actual end result which may be through the political process of the constitution. In Fijian experience for example, we have seen for example the 1997 Constitution notwithstanding the fact that there was a demarcation between the three arms of government , judiciary, executive etc, yet there were laws being presented that would have in fact overridden those provisions in the constitution. Similarly, there was an experience which you've also referred to where a constitution may make general reference to a particular principle where the parliament is then supposed to make laws pertaining to that. A case in point was, I think it under 156 of the 1997 Constitution that there were supposed to be laws made regarding public office accountability. That was never done. Now, the question I'd like to ask is how best do we implement that. If for example, the general principles that are included in the constitution, do you put up a higher frame around that? Or is better to always come up with the actual provisions within the constitution given the fact that some jurisdictions in fact have a minimalist approach to constitution making. Now for e.g. Australia and New Zealand does not have a bill of rights enshrined in their constitution. New Zealand doesn't have one. But South African for example has a bill of rights enshrined in theirs. And Fiji had its bill of rights in the 1997 Constitution. If you could please elaborate on that please.

Response: Look, exactly how much you put in a constitution is something in relation to which practise differs and totally the size of constitution seems to be expanding so that it doesn't just mean that institutions have been spelt out in greater detail, but it means that other things have been added that actually matter to people. But as a general rule, I think a constitutional lawyer would say it's important to put in one thing that really matter to the way in which this place is governed. But two, to put them in a sufficient level of generality so that they can evolve a bit as a community evolves without constantly changing the constitution which can be an unsatisfactory process as well. I mean normally, people would put a bill of rights in for example, but you wouldn't spell out every dot and tickle of it. In fact I think the South African bill of rights is actually beautifully expressed. I mean it's a very lovely part of their constitution but they did put in a few qualifications really building on the experience elsewhere in the world.

For example, we don't want a bill of rights to have affirmative action for poor people difficult. That's a judgment that needs to be made. As for the point about the bit that wasn't implemented, I mean as I said, implementation, even fairly tangible things like that, is a bit of a problem, and when you put something in a constitution and says, the parliament must do X, how do you actually make sure that the parliament does do X. Well the Kenyans are trying to do that by having a list. In Schedule 5, it says, they'll pass this law within 3 months and this law within 6 months etc. I mean that's a very mechanical sort of way of doing it. Again, I hate to keep harping about the South Africans but I do think they were very very clever. They wanted to put a section in their constitution about administrative justice but they didn't want to spell out the whole administrative law system in the constitution. So they effectively built in sort of a sanction that says, (I'm simplifying it a bit now) the administrative justice legislation needs to be passed by within 3 years and if it's not, this is what you're going to get, these principles which the Court will just interpret. So that's not a device that's possible for everything. But, I mean underlying your question, there are two really important issues, how much should you put in, and I think that comes back to the consultation about what really matters and what should be in a constitution and how do you try and make that implementation phase as effective as possible both in cultural terms and in specific terms.

Q.4 I just have a question for Professor Saunders. Is there something in international law or for example, in any other country that has gone through constitutional process for the past 15 to 20 years where it clearly states or indicates that a number or percentage of the population that should participate in the constitutional process in order to render the constitution legitimate?

Response: I don't think , I don't know of any (I could be wrong) but I don't know of any constitution that says, this number must participate in order to render it legitimate, indeed that would be a difficult sort of thing to measure because, how do you measure the quality of participation as opposed to a hundred people put our name on a petition and write in. What you do get is base requirements for turnout referendums, minimum vote referendums, those sorts of things. But I think it's hard to quantify public participation in that way.

Q. 5 My question to Professor is, the question is to do with the 21st century, from your observation, I'd like to say thank you. But I would like to ask you from your own observation about the issue of reconciliation. What it appears to me, it is a reality of the context internationally trying to be connected and if I heard you rightly, you were saying ambiguity is the language to explain the context and it sounds to me that reconciliation is integral for next process So my question is: what would be your advice on the issue, because in my own observation, I have heard and seen attempts about reconciliation. And I take South Africa as an example. That was a powerful one, but it seems to be it would go with that generation, I may be wrong when the key people who were at the forefront seem to come out of their positions where it's continuity because it's an important part, if reconciliation is very important. I think my question is to do with continuity. Would you offer some advice because this is new?

Response: But this whole reconciliation thing is one of the most difficult things. And in the end, it's actually not for me to offer advice, it's for you to decide where the balance lies I think. Countries deal with reconciliation question in very different ways. Some people in some countries, they'd say if we seek reconciliation, at least if reconciliation means retribution, then we'll never move forward. So, let's just look to the present and the future and hope that that works out, sometimes it works, and sometimes it doesn't. Others say, we are never going to lay a proper foundation for the future unless we seek reconciliation of some kind. And there are various different approaches to doing that around the world, various half way houses in fact. I mean in so far as, it depends exactly on what you mean by reconciliation. I mean, in so far as reconciliation involves getting people together, building that sort of trust that I was talking about, I think that is extraordinarily important as a base for the constitution and as a base for an effective constitution-making process. Somehow that needs to be sorted.

Q.6. Thank you Professor Saunders. For some people, they see constitutions as having a spectral life, ghostly sort of presence that never fully makes an apparition. And for those people on the fringes of society, its legal fiction. They never had the privilege of reading, or making sense of or materialising in their lives because it was not on their terms, they were never invited to this discourse but seems to sanction their lives with perpetuity until somebody who has some other ideas about the life of this constitution comes in and changes it otherwise. I remember around the 1999 election, I went to one of the remote communities and I asked this person what she thought of the 1997 Constitution and she turned around to me and said rather acerbically. And what am I suppose to eat in the evening? The constitution? And you know I had to enter her protocol. I couldn't trivialise what she was saying. It seems to be an important issue and I guess the original question about setting the agenda, this kind of situation really pre-determines the whole question of agenda and to an extent that once we have another lot of people, where would she go and set the agenda. I think they would have to sort of open up this question of how does one materialise the constitution. Or are we in agreement that it is simply going to have this spectral life feature and we should reconcile ourselves with that.

Response: Look it is really hard I agree. I mean I have very often had a journalist on the end of the phone saying, "what does a constitution mean to ordinary people, tell us you know in that small sound grab. Why does it matter?" And you and I know it's hard. You fall back on saying well, how the countries are governed matters, whether there is corruption matters, whether the country is officially run matters, whether the economy is okay matters, whether you are at school matters, all of that till the very end comes back to a good government to come out of a constitution but by that stage, we've long since lost them. I mean ironically at the agenda setting stage, you are actually talking about the big picture might be in some ways, the best stage to start involving people. It's really hard to do it at that stage for all sorts of reasons. But much more likely that people are going to come to grips with: do you want corruption in government? Well No. Then with what you think about section 105 (c) so I think that to try to get that discussion going even if you talk to people about what they hope to get out of the constitution and the answers have got nothing to do with specific constitutional provisions. You can get a lot of insight into what matters and that is sort of the Icelandic example of crowd-sourcing that I gave you, I think came up with some of those ideas.

Q.7 My question is directed to the government representative. Carry on from what you've confirmed and what we've heard in the media in regards to elections to be held in 2014. Could you please specifically expand on who will compose or who will be the people that will make up the constitution review committee? And what would the composition be, would it be local, would it be overseas people and who would be representing the people in the review or towards the new constitution.

Response: Attorney-General, you want to answer this, or? Ok. As I noted in my presentation eh just a while ago, Government is fully aware of the environment that will make the constitution process legitimate. Through the people's charter, the timeline that we have set ourselves to start the process. There are other things to do in between to try and cause the process to be acceptable as per what Professor Saunders is saying. We are mindful of all of these at the moment. We do not have yet people appointed to that process yet, not yet. Thank you. But I think what is important at this stage is that we are mindful of the processes that need to be undertaken acknowledging the processes of the charter and what it has brought in to bear that people are already concerned with, that people are already looking at, and this is going to be all practise considered when ultimately that group or forum of people is going to sit and the principles that we need to be consider, be considered, to make sure that whoever it's going to be, whether local or from abroad is going to make the process legitimate, so that's sort of a long way around to answer your questions away. We haven't brought anyone yet, we are within the timeline to get it done, and we are mindful of the principles that need to be considered when dealing with this issue.

Q.8. My question is to the government representative, and it is somehow related to the comment that was just made. It is with respect to that agenda setting stage as Professor Saunders mentioned as one of the critical stages and it is the first stage of the constitution making process. In your presentation, you identified September 2012 as the timeline from which the drafting of the new constitution and consultation with stakeholders will start taking place. What I'm wondering is whether the agenda setting stage or the process has already started and if it has, who are involved in this process, and if it hasn't started, when do you expect for it to be started and would the general public be involved in this process? Thank you.

Response: Thank you for the question, just to go back on what I said, I noted in my presentation, that government is already talking to a lot of people in different forums and dialogues. I'm noting, I'm not actually noting those forums now, but I'm mindful that there is not that framework yet that would implement a process that would determine the agenda setting. But Rev Yabaki has noted in his opening speech that the NPCAC, it's the group that evolved from the Peoples Charter that's carrying the work of the Charter forward and the quality checks that want government to make sure that the outcomes of the Charter is captured in government's plan. NPCAC has made recommendations to government with regards to bringing this process forward. And as I said earlier, we are mindful of the process in terms of the three major stages and what it would constitute to make it legitimate, but it's nothing to say that, yeah we are setting ourselves 2012, its nothing there to say that it cannot start before then and I think we are already starting. Only forums that are at the moment quite ad hoc but are discussing issues in different ways leading to, we actually hope it would be the setting of an agenda looking at the constitution or writing the new constitution including the process, the review. So I hope I've answered your question, is that ok, or?

Q.9. Thank you very much both for the wonderful presentation. Thank you. Col Tikoduadua, mentioned somehow a hope that in 40 years time, people will be looking back to what we have created now. I wonder whether there is anyway we can insert or put into any constitution to guarantee that we can at least have a constitution to last that long in this country, because in 40 years we will have 4. So I wonder whether there is some sort of guarantee that Professor Saunders can help us with because you know the change is so much that we have gone through some difficult times. Thank you.

Response: Well a guarantee is pretty hard in this matter. And there's a sense that once you've had a coup or two, it looks as if it might be easy to have another one. But my only real answer to that. At the moment it is in this process, you know really laying good foundations it might even take a while making sure that, going back to the point that was made down there, the people who were on the fringe who really don't know anything about this stuff making sure that efforts are made to sort of help anybody who is interested to understand what's going on particularly with young people I think and there's a term that's used in constitution making. People talk about spoilers. You need to identify the spoilers and try and bring them in if you can or at least neutralise them in some way by the process you use as well as by the things you put in place in the constitution. And I'm not trying to denigrate the importance of content. And to go back to the point that the Attorney-General made earlier about do you instil a constitutional culture. At the end of the day, I think it can only be done through sense of openness and just insisting. You know political parties is no reason why they shouldn't be open and democratic. Parliamentary processes is no reason why they shouldn't involve the public then too. You know there are other ways of doing things that we can foreshadow in constitutions. You can't produce guarantees but you can have a go at trying to anticipate problems and deal with them.

Q.10 First of all, I'd like to thank Professor Saunders for a well-documented presentation. Thank you for that. You mentioned about the South African model of the constitution although not perfect but was internationally acclaimed, apart from being internally acclaimed, provided a model for other countries to look at it in developing policy measures. My question is in any constitutional processes or procedures, public participation is important as you have highlighted in your presentation. Now even after having wide public consultation, is it necessary to have a referendum after doing the constitution because although you mentioned that referendum gives legitimacy to the constitution, but is it necessary to have a referendum despite having a wide public consultation on the constitution process? Thank you.

Response: Is it necessary to have a referendum after public consultation? Look, the question of a referendum is a bit vexed for the reasons that I was trying to explain, you know, people sometimes don't vote about the constitution, they vote about a whole range of other things. I think one of the questions that you need to think about is how this constitution is going to become law. Consulting doesn't make a constitution law, you need a body that is able to bring a constitution into law. And generally, that's an elected body and in the absence of an elected body, then maybe it's some sort of a direct popular vote. So that's the way in which you need to sort of start thinking about these things, I mean Fiji, as far as I am aware hasn't used a referendum in the past so it would be an interesting experiment. But its part and parcel of the whole package as I said. How you are going to set this package up both so that it has all the public participation that produces good outcomes and that it's law. Not only law, but fundamental law.

Q. 11 Professor Saunders, once again, thank you very much for the wonderful lecture. So much has been said about the South African constitution, I was just out of curiosity in relation to the stages of constitution making, would you be able to inform us of the timeframe in South Africa for the first two stages of constitution making, that is agenda setting and design and approval.

Response: I mean the process for drafting the final constitution went from '93, '94 to '96 as I recall. Quite a nice sort of about sizable period. But the actual preliminaries, would you remind me? It started about the early 1990's was it? The Codesa 1, Codesa 2, multi-party negotiating forum, about 3, 4 years? It's complicated, the South African thing. Because you remember Nelson Mandela came out of prison, and then there were and even before that, there were discussions beginning to happen across the very divided social lines to try and provide some foundation and there were many occasions when it was one step forward and two steps back so my impression was that early talking about talking phase went on for a while, two years the early stage. OK, but then the actual constitution writing and design stage, was also a couple of years. A nice period I think. You can drag on too long with this stuff but you can also make it too short. I mean the Moroccans recently voted on a new constitution within 3 months after it was first sort of appeared. That seems to me to be a very short period of time.

Q.12. Thank you very Professor Saunders, it was lovely very particular, the two stages of constitution making, the agenda setting stage and the implementation stage, one of the sort of key issues in Fiji in those stages in the agenda setting and implementation stage is of course the role of the army. I wonder if you have anything to say about the way in which constitutions in the 21st century dealt with the army and recognised the role of the army and if you have any personal things to say about how they are involved.

Response: Good question. Thanks. Look, it's interesting, this whole question of the army and constitution making, it's a pretty hot potato, not just in Fiji, but elsewhere. I mean, I was in Egypt recently where again, people were talking about it. A lot of people are talking to the Indonesians where as you would be aware where the army had a very heavy involvement in parliament with in the government, with reserved seats in parliament and the Indonesian constitution making process by four constitutional amendments actually managed to make it a purely civilian government even at the time the final amendment came into effect. Elsewhere, sometimes these things are phased in. I think you need to be clear that you're moving towards a civil government at some stage. But Fiji certainly won't be alone in grappling with this question because it's a big issue for everybody, not for everybody, a lot of people, but not for the Icelanders.

Q.13 Professor Saunders, considering the timeframe that has been given during the presentation this afternoon, my question is do the public have the right to be informed, and at least be aware of the process of the formulation or the making the constitution and if your answer is yes, when does this awarness begin.

Response: I think it comes back to the legitimacy question. I mean in the end, particularly, if you're not, if you're making a constitution that is not using the old constitutional amendment process, then the new process needs to be accepted as legitimate. And for that to happen, people need to know about it. So that would be my answer in short on that.

Can I just come back to the army? I just remembered there's something I actually meant to tell you all. The other place of course where they're dealing with the question of the army in some what different way is Nepal. And one of the issues there has been that one of the parties is very heavily armed and demilitarisation is needed and employment for those people is needed. And it's been a big sticking point in Nepal that's really been holding up. As I understand that holding up a final decisions on some of the constitutional questions and I just got an email this morning saying that it looks like there's been an agreement on the demilitarisation stuff and that was going to enable Nepal to move forward. The person who sent me the email thought, maybe within a month or so which remains to be seen and that's another development and another place that's thinking about this issue.

Vote of Thanks

Tessa Mackenzie, CCF Board Chair

Your excellencies, ladies and gentlemen, friends, it my honor to propose the vote of thanks. I would first of all like to thank our partners in producing this event tonight, the USP School of Government, Development and International Affairs, Faculty of Business and Economics. I'd also like to thank our funders for their generous support that they give us, in particularly the European Union, DFID, AusAid, Miserior, EED, we do appreciate their support.

But of course the thanks tonight must really go in very big measure to Professor Cheryl Saunders, she has given us so much to think about. I think we have all learnt a lot even those of us who already know quite a lot about constitutions around the world. But she has put it all together in such a way that we can really I think grasp a lot of things that are going to be very useful for us in this country as we try to move forward.

She has set before us some ideals, as well as many practical ideas and we really appreciate all your contribution Cheryl . I would also like to thank Pio Tikoduadua for his contribution and perhaps a little thank you to the Attorney General for also contributing so we have some idea of where we might be going from the government point of view. And I would like to give a big thank you to all those of you who have asked questions and broadened our discussion just a little bit and a very big thank you to all of you who have turned up tonight to support us.

So please, would you put your hands together, especially for Professor Saunders but for everyone.

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