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Analysis of the Draft Constitution of Fiji released by the Interim Government of Fiji on 21 March 2013

1. Introduction

This report analyses the Draft Constitution of Fiji released by the interim government of Fiji on 21 March. This draft constitution replaces a draft prepared by a Constitution Commission appointed by the government last year.

The interim government that prepared the Draft came into power in December 2006 through a coup that its leader, the Commander of the Fiji Military Forces, Commodore Frank Bainimarama, likes to hear justified as a "good governance" coup. It was intended to be "a coup to end all coups" and necessary because "Fiji's overall governance situation had regressed to a catastrophic level". [1]

A number of promises to hold elections and revert to democracy were not met, but finally, in March 2012 with a declining economy and under considerable pressure from the international community, Commodore Bainimarama made a media statement in which he set out a process for drafting a new constitution in preparation for elections in late 2014 and a list of "non-negotiable principles" to which the constitution was to adhere. The process, the statement said, was "to give every Fijian a voice". It was to start with two months of civic education in which the people were to be given information on matters that they need to consider in order to contribute meaningfully to the process. Following that, a commission was to conduct public consultations for a period of three months and then, over the next three months, draft a constitution. Next a constituent assembly made up of representative civil society groups was to consider the commission's draft constitution "in an inclusive and open process". The President would assent to the constitution that emerged from the constituent assembly and it would become law. Finally, elections under the new constitution would return a democratically elected government in 2014.

The non-negotiable principles (described as "universally recognized" in the media statement) were:

[1] "Statement of the Prime Minister of the Republic of the Fiji Islands to the 62nd Session of the United Nations General Assembly New York - Friday 28 September 2007," n.d http://www.un.org/webcast/ga/62/2007/pdfs/fiji-en.pdf.

- A common and equal citizenry;
- A secular state;
- The removal of systemic corruption;
- An independent judiciary;
- Elimination of discrimination;
- Good and transparent governance;
- Social justice;
- One person, one vote, one value;
- The elimination of ethnic voting;
- Proportional representation; and
- A voting age of 18.

When, in mid-July 2012, the two Fiji Constitutional Process Decrees that governed the process were promulgated, a further element had been added: the new constitution was to include broad immunity provisions covering the military, police, prisons service, and members of the public service and extending up to the elections.

Although the interim government provided little public education, the Constitution Commission was established and started work in July 2012 with a substantial programme of public hearings and other opportunities for Fijians to submit their views to it. (It received over 7000 submissions.) On 21 December, it submitted a draft constitution to the President as required in the decree under which it operated, but by this point the relationship between the Commission and the interim government had broken down badly. The Prime Minister appears to have been dissatisfied with the way in which the Commission operated, including the fact that it allowed the public to make submissions on the non-negotiable principles and that its chair, Professor Yash Ghai, frequently briefed the press on what the public was saying. On 31 October, Decree 64 of 2012 amended Decree 57 to remove the Commission's mandate to consult with the people of Fiji on the Commission's draft constitution. The Draft Constitution presented to the President by the Commission was not ever made public officially. (The Constitution Commission Draft (CCD) and its explanatory report were leaked on the web.)

On 10 January, the President announced that, although the CCD contained some good features (such as social and economic rights), it "neglected many of the fundamental principles of true democratic representation". So, he had asked the Prime Minister to produce a new draft that captured the key elements of People's Charter (a document produced by the Interim government in 2008) and retained the good parts of the CCD.[2] The Prime Minister promised a draft constitution by the end of January and that the Constituent Assembly would be appointed in February. January and February passed with no further public action by the interim government. On March 21, the Prime Minister made a further announcement stating that there would be no Constituent Assembly and that the government was releasing its draft constitution directly to the public for comment. The initial comment period was two weeks. It has since been extended to just over five weeks.

The Draft Constitution of Fiji (Government Draft Constitution – GDC) that is the subject of this analysis is the result of this changed process. The interim government's current plan is that after the period for public submissions, the GDC will be revised and then promulgated.

[2] Ministry of Information, "The President Ratu Epeli Nailatikau's address on Fiji's constitution and Constituent Assembly", *Fiji Times Online*, 10 January 2010, http://www.fijitimes.com/story.aspx?id=222129.

The primary focus of this report is not the process of constitution-making. However, a constitution cannot be properly understood in the abstract, divorced from its political and social context. Because the government's stated intention is to return the country to democracy with this constitution, the process by which it is being produced is a relevant aspect of the context in which it should be understood.

The process initially set out, involving the Constitution Commission and a Constituent Assembly, was not ideal: both bodies were to be appointed by the Interim Prime Minister; the environment in which they were to work, including constraints on freedom of expression, the media and trade unions, among other things, did not allow robust debate of issues; and the imposition of non-negotiable principles and the requirement of a blanket amnesty removed some of the most important national issues from the debate. Nonetheless, had it proceeded in a manner that genuinely permitted citizens to engage in discussion about the future of the country, it may have provided a starting point for a full constitutional settlement in due course.

However, the President's statement on 10 January and the Prime Minister's 21 March announcement remove any illusion that there is to be genuine public engagement on the new constitution. The absence of transparency in the public submission process merely confirms this. (All the submissions received by the Commission were put on its website.) Whatever the public may say in the consultation process currently underway, it is abundantly clear that the government will make the final decisions.

2. An overview of the Government Draft Constitution (GDC)

Part 3 of this Report discusses each chapter of the GDC in some detail and in so doing draws attention to the many provisions that are incompatible with an intention to establish a constitutional democracy or that provide opportunities for political abuse. Although that discussion tries to indicate the way in which various provisions relate to one another, inevitably a chapter-by-chapter approach does not provide an overall sense of the GDC. To fill that gap, sections (a) and (b) of this Part focus on the two broad issues that are fundamental to a transition to democracy in Fiji: (i) the likelihood that the institutional framework of the GDC will establish a constitutional democracy in Fiji and (ii) the GDC's approach to the historical problems Fiji has faced as a multi-ethnic state. Section (c) then briefly discusses the GDC's approach to the participation of citizens in public life. Finally, (d) deals with the implementation of the GDC, explaining how significant parts of it do not come into force on its adoption. The CCD and 1997 Constitution are used as points of reference in the discussion because these are documents from which the drafters of the GDC drew.

At the outset it must be noted that that the GDC contains many provisions that would be expected in the constitution of a democratic country. It opens with a strong set of founding values drawn from the CCD, including "a common and equal citizenry", "respect for human rights", "the principles of good governance", and "transparency and accountability"; it includes a long Bill of Rights which extends to social and economic rights; it establishes a parliamentary system of government with a Cabinet accountable to Parliament; it asserts the independence of the judiciary; and it establishes a number of special institutions such as an anti-corruption commission and an Accountability and Transparency Commission.

However, despite provisions such as these, below it is argued that the GDC is not designed to establish a stable constitutional democracy in Fiji. It is the GDC and not the CCD that "neglects fundamental principles of true democratic representation".[3] The GDC takes no account of the need to establish institutions and practices that mark a clear shift from an undemocratic regime with power centralized in a single person towards an open and responsive democratic government that is accountable to the people it serves. In addition, the GDC fails to address the deep divisions in Fijian society that have contributed to the instability of Fiji for the past century. Insofar as the GDC can be said to address the divisions, it does so by ignoring them – by insisting on ethnically blind constitutional arrangements.

At best, the GDC seems to treat constitutional design as an abstract exercise. It does not deal with the particular needs of a country with limited experience of democracy and emerging from a period of undemocratic rule, nor the historical causes of Fiji's instability. At worst it is a constitution designed to secure legitimacy for a situation in which a government closely tied to the military retains tight control of all aspects of the state. On either view, the GDC does not secure democracy or address adequately the instability caused by the legacy of ethnic communalism.

(a) The GDC and constitutional democracy in Fiji

By providing for regular elections to Parliament, the provisions of the GDC add a democratic gloss to the arrangements that have been in place since the 2006 coup.

First, the military is given "overall responsibility … to ensure at all times the security, defence and well-being of Fiji and all its residents." (GDC 130)[4] This provision, demanded by the military in its submission to the Constitution Commission, is taken from the 1990 Constitution. It is not compatible with a system of constitutional democracy, which requires proper civilian control of the military and careful delineation of the role of the military. No attempt is made in the GDC to check the power of the military – the GDC omits the Security Council of the CCD, which brought the commanders of the security forces and political leaders from the executive and legislature, there are no provisions securing Parliament's ability to conduct proper oversight of the military, and there are no provisions ensuring reasonable public access to information about the military, etc. The fact that the elected Prime Minister is to be Commander-in-Chief does not address the problem. Most dangerously, these provisions create the impression of the military overseeing the elected government. Even if this is not the case at a particular time, the relationship between the Prime Minister and the military envisaged in the GDC combined with the military's "overall responsibility" suggest that the government and military are to work together or that the government (and particularly the Prime Minister) will be backed up by the military.

Second, power is concentrated in the Prime Minister. The usual checks on the concentration of executive power, such as early elections when the government loses the confidence of Parliament and a new government cannot be formed, Cabinet oversight of the Prime Minister's authority, control of executive action by an independent legal system (including courts, prosecuting authorities

[3] See at footnote 2 above.

[4] The 1990 Constitution of Sovereign Democratic Republic of Fiji stated in section 94(3): "It shall be the overall responsibility of the Republic of Fiji Military Forces to ensure at all times the security, defence and well-being of Fiji and all its residents."

and the legal profession), and robust protection on freedom of expression and a free media, among others, are either excluded or open to political abuse.

Third, there is no guarantee of free and fair elections. Although GDC 23 asserts the right to "free, fair and regular elections", at least the first elections will be run under decrees promulgated by the interim government. A number of these decrees limit the free expression of ideas and rights to organize that are essential for free and fair elections. These decrees cannot be challenged for being inconsistent with the GDC (see GDC 169(4)). They remain in force until amended by Parliament. Moreover, the GDC itself would bar people forever from voting or standing for election for even the most minor election offences under an electoral law.

Fourth, although the Bill of Rights lists an impressive number of rights, many are very weakly protected. In many cases the grounds on which the rights can be limited are extremely broad. In some, the rights are not protected from limitation (or total abrogation) at all. For example, some of the rights most closely linked to democracy, the rights to freedom of expression, association and assembly, may be limited for a wide range of very broadly stated reasons and, unlike the 1997 Constitution, there is no requirement that such limitations must be justifiable in a democracy.

Fifth, the independence of the judiciary and various other institutions which might be expected to provide some kind of check on executive power is not adequately protected. The two most senior judges are chosen by the Prime Minister. Other judges are selected by a Judicial Service Commission (JSC) but the Commission itself is made up of government appointees. The appointment processes for other offices that would usually be considered to provide checks on government is equally problematic. For example, the Commissioner of the Fiji Independent Commission against Corruption is chosen by the Attorney-General (AG), who is a politician (GDC 114); the Auditor-General (AuG) is appointed by the Prime Minister (GDC 143); and the special appointments commission for these positions adopted in 1997 and followed in the CCD is abandoned.

Together these and other arrangements in the GDC provide the framework for what might be called an illiberal democracy in which elections are held but democratic freedoms are not assured by balances of power and independent institutions.

(b) National unity and a common identity: ethnic politics and the GDC

The *Explanatory Report* of the Constitution Commission comments that:

> "There is wide acceptance among scholars and the public that the most fundamental causes of Fiji's contemporary problems lie in history and in its various constitutions shaped by that history (a point noted by both the Reeves' Commission and the NCBBF). At the root of the problems is the organization of politics, state and economy on the basis of ethnic communalism—the colonial legacy." (p 13)

Interim Prime Minister Bainimarama appears to agree. The non-negotiable principles for the constitution-making process include "a common and equal citizenry" and the "elimination of ethnic voting".

But the responses of the CCD and the GDC to this issue are diametrically opposed. For the Commission, in the context of a country such as Fiji, a constitution plays a nation-building role:

> "In established societies with long common histories, there is substantial agreement on national values, the relationship of the state to society, and the proper limits of state power.

> This kind of social consensus does not exist in new multi-ethnic states, as is obvious from Fiji's own history. An option for such countries is to use the constitution as the source of consensus—on values and institutions." (*Explanatory Report* p 12)

On the approach of the Constitution Commission, nation building requires the construction of a common identity. The CCD seeks to do this through recognizing and valuing diversity, securing the role of civil society in public life and protecting cultural rights. More controversially perhaps, it protects indigenous land rights.

As noted above, the GDC's approach to Fiji's ethnic history is to ignore it. In this regard there are matters of particular concern in the GDC.

First, the GDC refuses to acknowledge or value cultural diversity in any positive way. The Bill of Rights does prohibit discrimination and the advocacy of hatred based on culture or ethnicity and allows legislation to prevent attacks on the dignity of people that are "likely to promote ill will between ethnic groups" (GDC 17 and 26). But the internationally accepted rights to cultural development and to take part in cultural life that are enshrined in the International Covenant on Social, Economic and Cultural Rights are not included in the otherwise comprehensive Bill. The only positive cultural right is the right of cultural communities to establish schools (GDC 22). The right to take part in cultural life need not give priority to cultural practices over other rights. It is often circumscribed with relation to other rights as in CCD 47(2) which says that the right may not be exercised in a way that infringes any other right in the Bill of Rights. But the absence of any reference to cultural rights means that practices that may carry great meaning for individuals (such as wearing certain types of clothes) can be prohibited at the whim of a majority.

Second, despite its commitment to national unity, the GDC makes no attempt to ensure that all groups in Fijian society are included in national institutions. It discards CCD 1's constitutional value of "representation of the diversity of the nation in public bodies" as well as provisions that require diversity to be taken into account in appointing Cabinet members, judges and office holders in other constitutional offices and commissions (CCD 117, 130 and 149). Nor does the GDC require the composition of either the public service or security services to reflect Fiji's diverse population. In many well-established democracies practices have developed that secure representation of the diversity of the population in national institutions. Many younger democracies that are ethnically diverse (like Nigeria) and some older ones (like Switzerland) do not leave this to chance, and Fijians are unlikely to be reassured by the fact that in some other countries political conventions have ensured that, to some extent at least, government reflects national diversity. It is the Indo-Fijian community that is likely to be most concerned about the GDC's silence in this regard as, over the past 10 years or so, the representation of that community in the public service has declined steadily and attempts to make the military more representative have failed badly.

In relation to the public service, the GDC seems to suggest that a merit-based system obviates the need to pay attention to diversity but this is simply wrong. First, assessments of merit are seldom neutral but, more importantly, "characteristics of merit" while essential in building a good public service are not the only relevant characteristics if the service is to serve all Fijians well. In any event, under the GDC, "characteristics of merit" is not a criterion for appointing Cabinet members or other constitutional officers, nor could it be.

Third, the GDC removes all protection that has been given in the past to indigenous ownership of land, to special arrangements for the administration of the iTaukei and to the Great Council of Chiefs (Bose Levu Vakaturaga). The question whether these protections should be retained is controversial, but their summary removal will surely build resentment and is unlikely to contribute to national unity. How to approach these arrangements is, of course, very difficult. Noting that many people, including people from outside the iTaukei community, support the current arrangement that prohibits the alienation of iTaukei land,[5] the CCD chose to constitutionalize the principle of the non-alienability of iTaukei land in the constitution for the first time. But it also puts in place an inclusive consultative process intended to address the flawed system of managing land and leases on land.[6] Then, consistently with its intention to shift the country to "non-racial state values", the CCD proposes the wholesale revision of the ethnically based system of administration, replacing it with an integrated system of local government. But, its proposal contains provisions that might offer some reassurance to communities for whom the old system of administration is seen as a mechanism for protecting a way of life: it sets out principles with which the new system must comply, emphasizing that it should give individuals a voice in matters that affect them locally. The CCD also takes a somewhat conciliatory approach to the Great Council of Chiefs. Its disestablishment some years ago caused great bitterness. The CCD responds to this by reinstating it but making it a civil society institution and removing its political functions.

The removal of any protection of iTaukei rights to land in the GDC is of particular concern. To change a system as deeply entrenched as the Fiji system of land tenure risks causing a great deal of anger in Fiji and economic destabilization. Permitting alienation of iTaukei land will clearly introduce a radical change to social and economic arrangements. Among the many dangers are that it will simply involve a shift of ownership from indigenous communities to a small wealthy elite and fail to benefit the communities that suffer most from lack of access to land. From the perspective of the iTaukei landowners, if the current arrangements for the management of iTaukei land are not carefully dismantled, communities may find themselves driven to alienate their land without any future security.

The AG has attempted to address iTaukei fears by arguing that the freedom from arbitrary expropriation in GDC 27 means that iTaukei lands cannot be sold or alienated against the will of its current owners.[7] But this obviously addresses only a small part of the issue and ignores the social ramifications of such a change in economic arrangements. A transformation of this nature needs to be managed properly and openly and to be based on a fully democratic, consultative process. The GDC allows a simple majority in Parliament – or, before the elections, a decree – to expropriate or otherwise alienate these previously protected lands. Inevitably, there is suspicion that the process will serve to enrich powerful individuals. Other responses by the government on the land question are similarly disingenuous. For instance, the interim Prime Minister has been reported as saying that the controversial "land swaps" of the past could no longer happen.[8] The GDC does not ensure that.

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[5] Ibid., 55.
[6] Constitution Commission, *Draft Constitution: The Explanatory Report* (Suva, Fiji, December 2012), 102.
[7] Losirene Chand, "AG: Land Secure", *Fiji Sun*, 9 April 2013, http://www.fijisun.com.fj/2013/04/09/ag-land-secure/.
[8] Maika Bolatiki, "Land swap probe", *Fiji Sun*, 12 April 2013, http://www.fijisun.com.fj/2013/04/12/land-swap-probe/.

Even if the provision on arbitrary expropriation (which, it should be noted, is substantially the same as the equivalent provision in the 1997 Constitution) makes such swaps difficult, other mechanisms can be constructed to change land relations. The Land Use Decree of 2010, which allows the government to lease iTaukei land on 99-year leases and excludes review by the courts, is an example of the kind of far-reaching action possible under the GDC.[9]

But, again, the broader point here is not what kind of change may be appropriate in Fiji but the fact that, first, many changes have been and can still be made by decree before the elections, and, second, that the GDC gives no assurance that if change is to occur it will be managed in a way that respects the interests and concerns of citizens and is the result of a proper process.

The failure of the GDC to embrace the CCD's proposals for local government is simply puzzling – or ominous. As noted above, the CCD proposal would end the ethnic administrative system, replacing it with a democratic one with an emphasis on democratic local government. But, the *Explanatory Report* repeatedly shows that the Commission was alert to a great sense of vulnerability among the iTaukei about the new approach to ethnicity. This sensitivity to iTaukei concerns is reflected in its radical proposals for restructuring the administrative system, too. Although the current system is to be dismantled under the CCD, the CCD demands that new arrangements be adopted in accordance with a set of principles that demand openness, inclusivity and responsive government. These principles should provide some reassurance to people about the changes.

As ending ethnic forms of government is what the interim government claims to wish to achieve (it is also reflected in Pillar 7 of the Charter), one might expect the GDC to embrace these CCD proposals. Its failure to do so raises the concern that it is unhappy with the CCD's democratic demands, a concern that is bolstered by the interim government's current policy of not allowing elections for representatives to provincial councils and its suspension of municipal councils.

The CCD's specific proposals on diversity and on indigenous land rights, other indigenous institutions and so on are not the only way of addressing these issues, and others may have different ideas. However, its decision to deal with historical problems directly and to recognize the diversity of Fijian society as a strength in constructing a united country is surely right. The apparent belief of the drafters of the GDC that the problems of a society that is deeply divided along ethnic lines can be dealt with by writing diversity out of the constitution is likely to leave Fiji fragmented and plagued by racism and insecurity.

(c) The GDC and active citizenship

The participation of citizens in public life is a recurrent theme of the CCD. Some of its proposals are controversial. For instance, it has been argued that the National People's Assembly, which brings together elected politicians with representatives of civil society and which is to debate matters of national interest on an annual basis and to select the President, is undemocratic because not all its members are elected. But the CCD's emphasis on avenues through which citizens can participate in public life is consistent with a desire to build a responsive and accountable democratic order.

[9] Under GDC 15, laws enacted after the elections may not exclude judicial review. However, judicial review is not possible in relation to action taken under any law adopted between 2006 and the elections (GDC 169).

The GDC discards virtually all of the provisions in the CCD that facilitate public participation in democratic processes, retaining just two provisions that promote public participation in law-making (GDC 47 and 71). For instance, the CCD asserts public participation as a founding value (CCD 1). This is dropped from the GDC. The CCD also expressly recognizes that it is through participation in public life that people exercise their democratic rights and provides a set of principles for public bodies to ensure proper participation in decision making (CCD 55). Again, this is not included in the GDC. Similarly, as noted above, the system of local government in the CCD is intended to draw individuals into decision making on many of the matters that concern them most immediately in their day-to-day lives. But this proposal is not included in the GDC. The GDC also does not include either the ombudsman, an office which gives the public an opportunity to raise complaints about government administration (CCD 170), or the broad right of standing to bring cases concerning infringements of the constitution in CCD 120.

The failure of the GDC to provide mechanisms that promote responsive and accountable government through increased public engagement in public life is compounded by the absence of provisions concerning the responsibilities of people who hold public office. Drawing on the Kenyan Constitution, CCD 3(2) says "Public office is a trust conferred by the people through the Constitution, which vests in the holder the responsibility to serve, rather than the power to rule." Chapter 5 builds on this by spelling out leadership principles, binding public officials to a code of conduct, and protecting whistle-blowers, among other things. Again, these provisions are entirely consistent with the stated goals of the interim government's constitutional project. It is not clear why these principles, as well as the specific provisions to achieve them, are excluded from the GDC.

(d) When does the GDC really come into force?

Formally, the GDC comes into force on a date determined by the President (GDC 158). The reality is more complicated because GDC 169(2) stipulates that, with five exceptions only, all decrees and other laws of the interim government remain in force irrespective of their incompatibility with the constitution, and GDC 169(4) immunizes these laws from challenge in the courts. The only way that they can be removed is by parliamentary amendment.

This has two particularly significant implications. First, despite provisions in the constitution, many institutions will continue to operate under decrees that are not necessarily in line with the GDC. The provisions of the GDC that relate to those institutions will, in effect, be suspended until Parliament acts. (The discussion of the Human Rights and Anti-Discrimination Commission in Part 3 illustrates the effect of this in just one case.)

Second, an enormous number of laws has been adopted since the coup in 2006. Some will surely contain provisions that are inconsistent with the GDC. Nonetheless, these laws will prevail over the provisions of the GDC. The 2010 Land Use Decree mentioned above is an example. It gives the Prime Minister total discretion to designate any iTaukei land for the new Land Use Unit, which may then lease the land for renewable 99-year periods, and, contrary to GDC 15, the jurisdiction of the courts over such action is excluded.

But GDC 169 not only means that the constitution itself will not be a real reflection of the law. It also means that the regime is left a period (until the new Parliament meets) to adopt laws that will be permanently protected from constitutional challenge in the courts, and that elections may be conducted under decrees and promulgations that are inconsistent with free and fair elections,

irrespective of what the constitutional provisions concerning free and fair elections say. Indeed, until the elections, decrees and other laws issued by the interim government will be "higher law" than the constitution itself.

3. Chapter-by-chapter

Chapter 1 – The State

Chapter 1 opens the constitution with a set of values. It then asserts the supremacy of the constitution; declares coups to be unlawful; requires the interpretation of the constitution to promote "the values that underlie a democratic society based on human dignity, equality and freedom", among other things; makes religious liberty a founding principle of the State and spells out what it means to separate State and religion; and sets out some aspects of the law relating to citizenship. Read in the abstract it is, all in all, a bold and promising opening statement for the establishment of a constitutional democracy.

However, constitutions do not operate in the abstract, and, read in the context of Fiji's history, GDC Chapter 1 raises concerns illustrated by contrasting both its tone and content with Chapter 1 of the CCD. The CCD seeks to embrace all the people of Fiji in accessible and inclusive language. Its first chapter emphasizes shared values in a united nation. And, it speaks personally to Fijians. For instance, CCD 7(2) encourages citizens to "enrich their communities by behaving with integrity…; caring for the children, teaching and nurturing the youth, and helping them to find their own place within the nation…". Avoiding the formal legal language of previous constitutions, these provisions offer rich possibilities of nation, society and citizenship. By contrast, the tone of the GDC is that of a traditionally drafted legal document, focused on provisions with formal legal implications.

Some people will prefer the formal approach of the GDC; others will regret the loss of the aspirational tone of the CCD. But, although the different tones also reflect different attitudes towards the role of a constitution in society and nation-building, this difference is not as important as the differences in content of the first chapters. The most striking difference between the two opening chapters is the GDC's meticulous purging of all references in the CCD to diversity, tolerance among different communities and mutual respect. The difference is signaled in the very first words of the first provision of each draft. The CCD opens with the words "We, the people of Fiji, are one united, multicultural nation, sharing the values of …". By contrast, GDC states "The Republic of Fiji is a sovereign democratic state…".

The rest of GDC 1 tracks CCD 1 closely but with two telling omissions. The CCD's values of "national unity and common identity, appreciation of diversity, tolerance, and the inclusion of all communities in the life of the nation" and "participation of the people, and representation of the diversity of the nation in public bodies" do not appear in GDC 1. Linguistic diversity receives similar treatment. Following many recent constitutions adopted in divided societies, the CCD protects it (CCD 5 recognizes English, Hindustani, iTaukei and Rotuman). By contrast, the closest that the GDC comes to acknowledging languages other than English is in requiring translations of the constitution "in the vernacular" (GDC 3(3)). The refusal of GDC 1 to value or even recognize diversity signals the GDC's silence on ethnic issues.

In addition, as noted in Part 2, the GDC omits the CCD's provisions that articulate the role of the people in Fiji's public life and the responsibility of government to the people. This is clear in GDC 1 which omits "participation of the people … in public bodies" as a national value (CCD 1(2)(c)). And, the democratic principle in CCD 3(2) which states that "public office is a trust conferred by the people through the Constitution, which vests in the holder the responsibility to serve, rather than the power to rule" is not included here or elsewhere in the GDC.

Chapter 2 – Bill of Rights

Democracy and the rule of law require the effective protection of rights. GDC Chapter 2 purports to protect rights. Its list of rights is comprehensive. Moreover, not only the State but also ordinary people must observe the rights (GDC 6(3)).[10] Those interpreting rights ("a court, tribunal or other authority") must "promote the values that underlie a democratic society based on human dignity, equality and freedom" (GDC 7(1)); the common law must be applied in a way that respects rights (GDC 7(3)); and courts must think about the context in which laws operate when scrutinising them in the light of the rights in the Bill (GDC 7(5)).

However, despite these provisions, the Bill of Rights does not give adequate protection to rights.

First, in the case of virtually every right, the promise of the right is undermined by a list of permissible limitations. Limitations on rights are not necessarily objectionable. Many rights need to be limited in certain circumstances. The problem with the GDC is the wide latitude it gives Parliament to limit rights. The 1997 Constitution also allowed relatively substantial limitations on rights but in significant cases such as the right to freedom of expression, it required all limitations to be "reasonable and justifiable in a democratic society". The GDC discards this constraint. Moreover, on occasion the list of permissible limitations in the GDC is open-ended or Parliament is simply given a right to limit the rights as it feels fit. For example, there are no constraints on laws limiting the right to executive and administrative justice (GDC 16), the right to privacy (GDC 24), or the right to access to information (GDC 25). This nullifies those rights entirely.

In its weak protection of rights, the GDC Bill of Rights departs fundamentally from the CCD.[11] The CCD takes a different conceptual approach. It does not list permissible limitations of rights. Instead, following the Canadian Charter and the South African Bill of Rights, it allows only those limitations that are set out in law and that meet the test of being "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" (CCD 48(1)). CCD 48(2) lists factors to be taken into account in determining whether a limitation is acceptable or not. Together these factors capture the proportionality test that is now widely used (and perhaps considered international best practice) to test the legality of government action. It is an approach that sees the constitutional review of law as a process that is engaged with foundational constitutional values on a principled basis and not tied to slotting limits on rights into predetermined categories. It also

[10] In legal terms this means that the Bill of Rights may apply horizontally between individuals. The *Companion to the Draft Constitution* uses the example of environmental rights being asserted by individuals against a mining company (p 28).

[11] It also departs from the 1997 Constitution because, although that constitution listed particular limits on the rights it protected, when those limits were broad it usually also included a requirement that any limitation be "reasonable and justifiable in an open and democratic society".

requires the government to justify every limitation that is placed on a right against the values of a democratic society.

A second weakness in the GDC's protection of rights lies in its enforcement provision. This is another significant departure from the CCD. CCD 120 allows anyone to institute proceedings in court alleging that a law or act infringes the constitution (including the Bill of Rights). CCD 120 (2) proceeds to spell out that it is not only people acting in their own interest who may bring such actions but also, among others, people acting in the public interest. This generous standing provision departs from the restrictive approach in the 1997 Constitution (s 41) which granted only those people who had a direct interest in a matter the right to go to court.[12] It recognises that effective enforcement of the constitution cannot rely entirely on those individuals who are affected by infringements and that everyone has an interest in all the provisions of the constitution being upheld. The CCD provision is similar to the standing provision in the Kenyan Constitution. The GDC adopts the narrow 1997 approach: GDC 40 simply copies section 41 of the 1997 Constitution.

Courts might overcome these impediments to the proper implementation of rights by creative interpretation. For instance, GDC 1 establishes "respect for human rights, freedom and the rule of law" and "human dignity" as values on which the State is founded. GDC 7 states that courts and other bodies "must promote the values that underlie a democratic society based on human dignity, equality and freedom" when they interpret the Bill of Rights. Human dignity is a particularly powerful idea in the protection of rights, and it is arguable, for instance, that some limitations on rights will be incompatible with these provisions and thus unconstitutional even if the Bill of Rights permits any limitation of the right. But, this is not the point. If the GDC intended to protect rights properly, restricting the circumstances in which they may be limited, it would do so directly and not leave it to the ingenuity of lawyers and judges to protect Fijians from the infringement of their rights.

The rights

The GDC Bill of Rights draws on the 1997 Constitution and the CCD and, particularly in limiting rights, adds some new provisions. Not every right is discussed here. Instead, the focus is on the way that the GDC deals with a set of critical political rights (administrative justice, expression, assembly and so on) and the GDC's guarantee of social and economic rights.

GDC 16: Executive and administrative justice

The right to executive and administrative justice is, in practice, a right to be treated legally and fairly by government. In common-law countries, control over administrative action was developed principally by the courts. The CCD's right to administrative justice entrenches the principles of judicial review of executive and administrative action, securing them primarily against laws that grant unlimited discretion to public officials and that permit the state to disregard the principles of natural justice. For instance, the right to written reasons for executive or administrative action that affects one adversely provides individuals with the necessary information to challenge such action, increases the transparency of government, and ensures that action is not arbitrary but can be substantiated by sound reasons.

[12] Court rules or legislation could provide access to court to a broader group of people, but, in practice, the courts did not take a particularly generous approach.

GDC 16 uses the language of CCD 39 to define the right to executive and administrative justice but undermines the provision's status as a right by giving the government unfettered discretion to adopt laws that limit its scope and effect. Moreover, under GDC 16(2) the provision does not apply to companies. This means that, for instance, under the GDC, companies are not entitled to be given reasons for decisions relating to their activities. Thus, a company does not have the right to be given reasons for losing a tender bid, for licensing decisions, or for decisions relating to special taxes and tax exemptions that are currently common. Finally, GDC 16(3) protects the current government from any action under this provision. It comes into effect only after the elections.

The constitutional commitment to the rule of law in GDC 1 may provide some limit on the degree to which this right can be abused or overridden by the government, but anyone relying on the principle of the rule of law would have to contend with the express statement in GDC 16 allowing apparently unlimited limitations on the right.

GDC 17, 18, 19 and 20: Freedom of expression, freedom of assembly, freedom of association and employment relations

The opening statements of the rights to freedom of expression, freedom of assembly, and freedom of association, and rights concerning employment relations in the GDC are strong. Moreover, GDC 17 expands the 1997 provision (s 30) on freedom of expression, adding, among other things, "freedom of imagination and creativity; and academic freedom and freedom of scientific research". Similarly, GDC 18 on freedom of assembly supplements the 1997 rights to assemble and demonstrate with the CCD 30 rights to picket and to present petitions. On employment relations GDC 20(1) – (4) tracks CCD 36 very closely.

However, in each case there is a broadly worded list of exceptions. In addition, for the freedom of association and employment relations provisions, the 1997 list of permissible limitations is expanded upon to allow laws that regulate trade unions and collective bargaining. Moreover, GDC 17, 18, 19 and 20 do not include the 1997 requirement for each of these rights that any limitation must be "reasonable and justifiable in a free and democratic society". In other words, as long as a limit on a right falls within a listed category it will be constitutional regardless of its reasonableness. Thus, the rights are very weak indeed. It is also likely that under the GDC Fiji will continue to be in contravention of significant International Labour Organization conventions.

GDC 17 also contains a new item: the right to freedom of expression may be limited by a law "making provisions for the enforcement of media standards and providing for the regulation, registration and conduct of media organisations" (GDC 17(3)(h)). Such laws are apparently totally unconstrained: they need not be enacted "in the interests of national security, public order, public morality", etc. (If that were the case, paragraph (h) would not be necessary, as those justifications are already covered in paragraph (a).) So, for instance, the media "standards" protected in paragraph (h) need have nothing to do with national security, public order or morality. Permitting limitations unconstrained by even those generous and vague criteria is to remove all protection from the media.

GDC 23: Political rights

GDC 23 follows the earlier provisions by opening with a strong statement of the generally accepted political rights and also extending the right to vote to 18 year olds. But, next is an excessively broad

list of circumstances in which the rights may be limited. The most alarming aspect of the formulation relates to the apparent intention to prevent people from voting, from joining political parties and from standing for election. Read with GDC 53(2) and 54(2), these provisions signal an intention to disbar people for, among other things, infringing electoral laws. Under GDC 54(2)(h), one is permanently disbarred from standing for election for any conviction under an electoral law or laws relating to the registration of parties and voters. These provisions provide little protection of political freedom and when implemented by institutions that have little or no independence, they could be seriously abused.

In addition, the rights to expression, assembly, association and freedom of movement, as well as rights relating to labour, may be limited "in the interests of the orderly conduct of elections". Regulating these matters in so far as that is necessary to secure free and fair elections would usually not be controversial. However, the only "principle" against which such limitations can be tested under the GDC is the very weak one of whether the limitation is "in the interests of" orderly elections. Compare the 1997 Constitution, which permitted such limitation on the rights to expression and assembly only and which, in each case, permitted the limitation "only to the extent that [it] is reasonable and justifiable in a free and democratic society" (sections 31(2) and 32(2)).

GDC 25: Access to information

Again, the right to access to information is formulated strongly, covering access to information held by the state as well as that held by private individuals when access to such information is necessary to exercise or protect another right. But, it is immediately undercut by unconstrained possibilities for its limitation.

GDC 142 is a related provision. It stipulates that a law must "make provision for the exercise by the member of the public of the rights to access official information and documents held by the State and other public entities". This provision, which is based on section 174 of the 1997 Constitution, addresses the well-known fact that constitutional rights to access to information are weak unless backed up by legislation providing procedures to enable people to secure the information that they need. However, section 174 was more emphatic, stating that the law must be enacted "as soon as practicable after the commencement of the Constitution". Despite that requirement, the law promised then was not ever enacted. No attempt is made in the GDC to ensure the enactment of the law. So, the main questions are: (i) when, if ever, it will be passed, and (ii) to what extent will the law in fact provide access to information? The wide limitation clause in GDC 25(3) allows Parliament to restrict access to information as it feels fit.

The Constitution Commission considered proper access to information held by the State so important that it appended an Access to Information Law to the CCD.

Social and economic rights

GDC 27 – 37 sets out social and economic rights including freedom from arbitrary expropriation of property; education; economic participation; work and a just minimum wage; access to transportation; housing and sanitation; food and water; social security schemes; health; freedom from arbitrary evictions; and environmental rights. The right to transportation deserves special note. This unusual right will be particularly important for Fijians for whom adequate transport by land and sea is very important.

For each of the social and economic rights, with the exception of the right to be protected from arbitrary expropriation of property and from evictions, the state is obliged to take "reasonable measures within its available resources to achieve the progressive realization of the right".

If these rights were to be properly protected, Fijians would be moving towards achieving important aspects of social justice. But there are possible problems with the formulation. The language of "progressive realization" and "available resources", which is drawn from the 1966 International Covenant on Economic, Social and Cultural Rights, is not a problem. It recognizes that states cannot necessarily implement these rights fully immediately. Nonetheless, since the adoption of the Covenant, principles have emerged that emphasize that although the reference to progressive realization and available resources gives states some leeway in implementing the rights, they do not relieve a State of the obligation to do what it can. In addition, there is an international obligation on rights to provide a "minimum core" in relation to each right. The minimum core is not subject to progressive realization.

The question about the formulation in the GDC is whether the minimum core is guaranteed. Its formulation fails to establish the rights directly. They are entirely dependent on reasonable measures taken by the State.

What is not in the Bill of Rights

As noted in the introduction, the GDC resolutely refuses to take culture or ethnicity into account in any positive way. This is as evident in the Bill of Rights as elsewhere. So, CCD 47 on "cultural, religious and linguistic communities", which protects the right of individuals to "enjoy their culture" and to be part of cultural organizations, is not included. There is one exception: under GDC 22 (freedom of religion), a cultural community has a right to run schools. This provision is taken from section 39(2) of the 1997 Constitution.

In addition, the CCD provisions on women, men and families (CCD 45) and the elderly (CCD 46) are omitted. These provisions appear (with the provision on cultural communities) in a part of the CCD chapter on human rights that sought to better explain rights in relation to these particular groups. It is arguable that those provisions are not necessary, as they are explanatory and do not guarantee new rights. However, by expressly addressing the interests of vulnerable groups (women and the elderly), the CCD underscored its character as a constitution for all Fijians. The *Companion to the Draft Constitution* notes that "many submissions to the Commission voiced concerns about the elderly" (p 31). Similarly, concerns about gender discrimination and inequality within families are common in Fiji. Moreover, Fiji is a signatory to the Convention on the Elimination of All Forms of Discrimination against Women.

Human Rights and Anti-Discrimination Commission

Human rights commissions have become important bodies for monitoring adherence to rights, investigating allegations of abuses and providing advice to governments on human rights matters, among other things. Because in large part their role is to monitor and report on the behavior of government, it is recognized that they need independence from government. This is perhaps the main reason for establishing human rights commissions in constitutions rather than ordinary law. Constitutional provisions can give them the independence that they need to fulfill their responsibilities properly and protect them from being undermined by the governments that they must monitor.

GDC 42 gives the Human Rights and Anti-Discrimination Commission, established by decree, constitutional status. The role of the Commission is drawn from the CCD. However, as with other commissions established in the GDC, and notwithstanding GDC 147(5), which stipulates that commissioners are not to be "subject to direction or control by any person", the Human Rights and Anti-Discrimination Commission is not likely to be an independent body because other provisions place it firmly in the control of the government.

First, under GDC 169(2), all provisions of the decree remain in force, effectively overriding the GDC, until amended by Parliament, and so it is the decree and not the constitution that will govern the Commission until Parliament decides to act.

Second, currently section 6 of the decree applies to appointments. It requires the President to appoint the chair of the commission, "acting in his or her own judgment following consultation with the Prime Minister". Under the decree, other commissioners are to be appointed by the President on the advice of the Prime Minister. Perhaps the grant of discretion to the President in the appointment of the chairperson is intended to provide some distance from the government for the Commission, but it is clearly very limited if any other commissioners are government appointees. Moreover, should Parliament decide to amend the decree, there are no provisions in the GDC that require any revised appointment process for commissioners to secure the independence of the Commission. By contrast, the CCD followed the 1997 Constitution for appointments to commissions that were intended to be independent, giving a Constitutional Offices Commission responsibility for them.

The GDC does offer some limited security of tenure to commissioners, stipulating that, like judges, commissioners "may be removed from office for inability to perform the functions of his or her office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and may not otherwise be removed" (GDC 149(1)). GDC 149 continues to set out a procedure for removal from office, involving a tribunal or board appointed by the Prime Minister. This provision is weakened as a mechanism for securing independence of the Commission by the fact that only the Prime Minister can initiate the procedure that it prescribes and that he or she appoints the board or tribunal. In any event, at the moment these provisions are of academic interest only. As noted above, the Commission will operate under the decree until Parliament decides to amend it. Under the decree, commissioners may be removed on various grounds or by being given one month's notice or a month's pay in lieu of notice (s 10). Removal is by the President on the instruction of the Prime Minister.

Chapters 3 and 4 – Parliament and the Executive

Together these two Chapters establish a form of parliamentary government based on an open list system of proportional representation.

The Prime Minister is either the leader of the party with more than 50 percent of the seats in Parliament or, if there is no such party, is elected by Parliament from among its members. Cabinet ministers are chosen by the Prime Minister again from among the MPs. GDC 89 stipulates that "the Government must have the confidence of Parliament". However, the standard accountability

mechanisms are weak. Forcing an early election because the government no longer commands the confidence of Parliament is perhaps the main accountability mechanism in parliamentary systems. As noted in Part 2, the availability of this is reduced by provisions that allow early elections only with the support of two-thirds of the MPs. In addition, the fact that many executive functions are allocated to the Prime Minister alone and not Cabinet concentrates power and removes the element of shared responsibility that characterizes parliamentary Cabinet government. In so doing, it excludes diverse voices from the process of executive decision making that parliamentary government assumes. As described in Part 2 and below, other institutions that may have promoted accountable government are weak because of the control that the executive, and particularly the Prime Minister and AG have over them.

The electoral system

Constitutions include provisions on the system of representation and elections because these are matters that should not be subject to the interests of transient majorities seeking to entrench their power. Thus, one expects those parts of a constitution that deal with the electoral system to secure the rights to vote and to stand for election and to seek to ensure that the management of elections is not subject to partisan interests. In addition, because the system of representation is likely to have a direct impact on the party system and political relations and governance in a country, constitution makers seek to secure in the constitution a system that is likely to promote the overall values and goals of the nation.

Above, this Report explains how the GDC weakens the rights to vote and stand for election. A further concern about the electoral system is the choice of an open list system of proportional representation because this threatens to entrench ethnic voting and to undermine the claimed commitment to bringing an end to ethnic politics in Fiji.

The system of representation

The GDC establishes a 45-member Parliament with a 4-year term. Under its open list system of proportional representation, members of Parliament will be chosen in four multi-member constituencies. The main departures from the CCD proposals lie in the size of Parliament (CCD 85 proposes a 71 member Parliament); the requirement that members be elected on open lists (CCD 79 proposes closed lists); the absence of what are known as "compensatory seats" in the GDC proposal; and the absence of any provisions securing the representation of women in the GDC (CCD 80 requires parties to include women on their lists).

Each of these departures from the CCD reflects the GDC's overall lack of concern for inclusiveness, and they threaten to decrease the diversity and thus representativeness of Parliament. First, obviously, in a smaller Parliament there is less space for diverse interests to be represented. Second, open lists mean that voters are not tied to the party's decisions about the priority in which the seats that they win should be awarded to their candidates. Giving voters more choice introduces greater accountability, but, in divided societies, allowing voters to rank candidates often means that voting occurs along ethnic lines. As the *Companion to the Draft Constitution* says of the CCD:

> "Adopting the closed list system involved rejecting a system in which the voters may affect the content of the list (an open list system). Most important in this decision was the fact that research shows that open list systems tend to encourage voting on ethnic lines. People

identify members of their ethnic group and choose them. Attempts by parties to secure ethnically diverse representation in Parliament would be undermined." (p 49)

Third, eliminating compensatory seats reduces proportionality and, at the same time, representativeness, particularly when the numbers are so small. This will have most impact on smaller parties representing minority interests. It is unlikely that "greens" will have a voice in Parliament and Rotumans may not see any MPs from their community. Fourth, the elimination of special provisions for women will make it considerably more difficult for women to be elected, and this will also decrease the representativeness of Parliament.

There is no right electoral system or correct way to represent voters – each system of representation has different implications. However, as already noted, in Fiji, it seems unwise to choose a system that may entrench ethnic voting.

Elections

Although the right to vote and other political rights are included in the Bill of Rights, Parliament has considerable control over them because it can pass laws creating electoral offences and, under GDC 53(2)(c), a person can be disqualified from voting by a law relating to electoral offences. Similarly, a person may not stand for election if they have been "found guilty of any offence under a law relating to elections, registration of political parties or registration of voters" (GDC 54(2)(h)). For the first election, these laws will be decrees issued by the interim government.

Under GDC 74, voter registration and elections will be conducted by an Electoral Commission. Like the other commissions established by the GDC, there is limited provision for its independence. For the first election, its members will be selected by the Prime Minister. GDC 74(8) envisages that for future elections, one of the five members will be selected by the leader of the opposition. Moreover, the chief executive officer of the Electoral Commission, the Supervisor of Elections, is not chosen by the Commission but by the Prime Minister (GDC 75).

These arrangements give the government of the day too much power over the conduct of elections, particularly as there are few established democratic traditions in Fiji.

The system of government

Under the GDC, the President is head of state and, nominally, executive power vests in him or her, but, as in the case of many other parliamentary systems, the President may act only as directed by the Cabinet (or another prescribed authority). The traditional Westminster terminology of acting only "on the advice of" is used.

Although, like the 1997 Constitution, the GDC bases its provisions on the legislature and executive on the Westminster system, it introduces two fairly significant departures from the traditional model.

First, section 92 demands the rapid identification of a Prime Minister after an election. The leader of a party that has more than 50 percent of the total number of MPs is automatically Prime Minister. If no such party exists, voting takes place to see if there is anyone who can command the support of 50 percent of the MPs. Three votes may be taken but only 48 hours is allowed for the entire process. If no MP achieves 50 percent, new elections will be called. There may be sound motives behind this unusual procedure: to end uncertainty in political leadership speedily and to ensure that the person

who does lead the government has a majority vote. But, in situations in which a single party does not win more than half the seats, the process puts great pressure on MPs. They may support the strongest candidate to avoid new elections, but if their support is reluctant, it may be unreliable. Moreover, the tight time frame not only makes it harder to form a coalition but also introduces the risk that any coalition that is formed will be operating on a rather flimsy agreement (and perhaps merely a desire to avoid elections). As experience in Europe has demonstrated recently, concluding a strong coalition agreement can take time. Entering government on a hurried agreement can cause instability later.

The second significant departure from the standard Westminster model is in constraints placed on the early dissolution of Parliament. These constraints presumably respond to a fear that the introduction of a proportional representation electoral system will result in a fragmented party system that causes unstable governments and frequent elections. However, the rigidity that the proposal introduces reduces the ability of Parliament to hold the executive to account and, contrary to the presumed intention of increasing stability, may result in deadlocks that, in the worst case scenario, could provide a catalyst for unconstitutional action.

Usually Parliament will serve a four-year term once a Prime Minister has been chosen (GDC 56). In two sets of circumstances it may serve a shorter period. First, the Prime Minister may require the President to dissolve Parliament during the last six months of its term. This is a somewhat puzzling provision. One of the reasons that countries like Canada and the UK have considered restraining the Prime Minister's traditional power to call an election at will is to remove the ability to choose an election date favourable to the incumbent government. GDC 56 may achieve this to some extent but leaves considerable leeway for the Prime Minister to select dates favourable to the governing party during the very period that an election is most likely to be called.

Second, in very limited circumstances, Parliament may be dissolved in conjunction with a vote of no confidence in the government. The process (drawn largely from CCD 88) is elaborate. First a vote of no confidence in the government must be moved. As in certain other parliamentary systems (including Germany and Spain), the vote of no confidence must be accompanied by a motion proposing the name of another Prime Minister (GDC 93). (The support of at least 50 percent of the MPs is required for a successful vote of no confidence (GDC 93(3)). If in this process it emerges that the Prime Minister does not have the confidence of Parliament but that Parliament cannot agree on a replacement, a resolution for the early dissolution of Parliament may be moved. Only the leader of the opposition may move the resolution; it may not be moved in the first 18 months of Parliament's term or in the last 9 months of the term; and it requires the support of two-thirds of the MPs to pass.

As noted, the procedure for early dissolution by Parliament is adapted from the proposal in the CCD. The Commission's *Explanatory Report* explains it thus: "The idea is to avoid having a divided and dysfunctional Parliament being required to continue, but to prevent the government choosing a moment for election when it expects to win – a common cause of early, expensive dissolutions of Parliament." Whether the Commission's proposal would have achieved its aim of avoiding dysfunctional Parliaments is not clear. The blackout periods in which a resolution to dissolve Parliament may not be called meant that there could be periods in which there was no remedy for a "divided and dysfunctional Parliament". During these periods, despite its lack of support in

Parliament, the government would stay in place but might be unable to pass any of the legislation necessary to implement its programmes. The intention presumably was to encourage elected representatives to work together and, in a small country like Fiji, this may have worked. However, by requiring a two-thirds majority for an early dissolution, the GDC changes the arrangement in a fundamental way, making the system a great deal more rigid than the Commission proposed. It means that a small percentage of MPs can block a motion for dissolution and a government might stay in power for an entire 4-year parliamentary term without commanding enough votes to have any legislation adopted. This contradicts the usual meaning of the statement in GDC 89 that "Government must have the confidence of Parliament" and means that the principal way of holding the government to account in a parliamentary system – requiring it to have the confidence of Parliament – is removed.

As with the unorthodox method of choosing a Prime Minister, the provisions effectively preventing early dissolution may work. The unique conditions in every country determine how a political system plays out, and the implications of particular design choices are notoriously hard to predict. In particular, if the party system is strong and if the government's majority is solid, problems need not arise. When the Prime Minister does not control the legislature the situation would mirror that in a presidential system. But, of course, it is not a presidential system. A Prime Minister would continue in office with neither the support of a majority in Parliament or the legitimacy bestowed on a President in a presidential system by victory at the polls.

The proposal does allow a government to be replaced midterm. As noted above, this can be done if Parliament approves another person to replace the Prime Minster. But, there is notably a lack of consistency in the rules for electing a Prime Minister at the beginning of a Parliament (requiring an absolute majority within 48 hours) and replacing one mid-way (letting one carry on with no majority indefinitely unless replaced).

This system may not be described formally as undemocratic: Parliament is elected and serves limited terms. But the security in office given to the person who is elected to be Prime Minister at the beginning of Parliament's term is likely to weaken what accountability mechanisms there are. Concerns about the lack of accountability are heightened by the constitutional arrangements that tie the Parliament and military closely together.

Chapter 3 – Parliament

The GDC provisions concerning the legislative process and management of Parliament are by and large unremarkable. They provide for a legislative procedure that is standard in parliamentary systems. An exception is the elaboration of the role and status of the Speaker in GDC 76(6) (carried over from CCD 90(3)), which asserts the independence and responsibility of the position in strong terms and which, at the same time, conveys a sense of the dignity and responsibility of Parliament itself. However, the CCD's emphasis on Parliament as a representative body, exercising authority derived from the people, and its statement of the role of MPs as public representatives (who must "diligently represent the people living in [their] electoral districts" (84(2)) are absent. In addition, the GDC ignores well-recognized problems that have confronted Parliaments around the world to which some other new constitutions have responded.

One problem in Westminster-style parliamentary systems is that the executive dominates the business of Parliament, determining its agenda and allowing few opportunities for the discussion of matters not introduced by the government. Proper oversight of government is the most obvious casualty. The CCD includes a number of provisions aimed at limiting this problem and empowering backbenchers, such as requiring committee membership to reflect the party membership of the house (CCD 94(2)); requiring a key oversight committee, the Public Accounts Committee, to be chaired by a member of the opposition (CCD 94(3)); requiring the Rules to ensure all members full opportunities for participation (CCD 95(2)); providing for financial and administrative support for MPs (CCD 95(2)(d)); and requiring Parliament to give sufficient time to consider bills, allowing "fast tracking" of bills only with the agreement of a majority of MPs (CCD 106(3) and (4)). Of these provisions only the last is included in the GDC in a watered-down form (GDC 44(2) and (3)). In addition, the GDC does not adopt the provisions in CCD 110 that would secure parliamentary oversight of subordinate legislation.

An extraordinarily sympathetic reader, unaware of the political context in Fiji, might read the approach of the GDC as conservative and inattentive to real problems in parliamentary systems but nonetheless benign until reaching section 78 on the Secretary-General of Parliament. This provision leaves little doubt about the drafters' vision of Parliament as a body controlled by the executive. It stipulates that the Secretary-General is to be selected by the Prime Minister. The 1997 Constitution gave responsibility for appointing the Secretary-General to the independent Constitutional Offices Commission. The CCD gives Parliament control over the appointment. Each of these approaches recognizes a separation between Parliament and the executive and the importance of permitting Parliament to control its own business. In many parliamentary systems, members of the executive would not participate in decisions relating to the management of Parliament such as this appointment. Parliaments around the world, including the Fiji Parliament, have struggled to achieve institutional independence from the executive. In many, constitutional protection of the Secretary-General (or Clerk of Parliament) was a milestone in the process. Section 78 wipes out that important achievement.

Finally, remarkably for a document ostensibly intended to be designed to assist in curbing corruption, the GDC also omits CCD 99(3) which stipulates that a MP may not vote on a matter on which he or she has a pecuniary interest.

Chapter 4 – The Executive

Provisions relating to the formation of the government are discussed above. In addition, Chapter 4 provides for the President, the Cabinet and the AG and stipulates that the Prime Minister is Commander-in-Chief.

The President is head of state but, like the Prime Minister, he or she is elected by Parliament, leading to the rather unusual situation of essentially the same mechanism for choosing the President and the Prime Minister. Executive authority is vested in the President, but, as noted above, in most cases he or she must act on the advice of another body, usually the Cabinet. There are two exceptions only: the President may act on his or her own initiative in appointing two members to the Mercy Commission (GDC 117) and appointing members of the Accountability and Transparency Commission (GDC 141(2)).

Provisions relating to Cabinet are orthodox but, like the provisions on Parliament, make little attempt to address well-known concerns about parliamentary government or concerns specific to Fiji. Thus, the Prime Minister is designated head of government and chairs the Cabinet; he or she may appoint (any number) of Ministers to the Cabinet and may dismiss them (GDC 94); and Cabinet members are collectively responsible to Parliament and must report to Parliament if so requested (GDC 90); and so on. No attention is paid to limiting the number of ministers, which means that the Prime Minister's control over Parliament can be tightened by the familiar tactic of appointing many MPs to Cabinet posts, thus reducing the number of potentially troublesome backbenchers and weakening Parliament. This is a particular concern in a Parliament of only 45 members, which, even if only a small number of ministers were appointed, would be hard-pressed to fulfill all its legislative and oversight responsibilities. For instance, if the Cabinet has 11 members, only 34 MPs are left to fulfill the functions of Parliament. Also, unlike CCD 117, there is no suggestion in the GDC that attention should be paid to diversity in constituting the Cabinet despite Fiji's history of division and exclusion.

However, the most troubling provision in this chapter is GDC 91(2) which states that "The Prime Minister is the Commander-in-Chief of the Republic of Fiji Military Forces". Read in the abstract this might be understood to put the military under civilian control. However, the provision itself appears to take responsibility for the military away from Cabinet and to grant it to the Prime Minister alone. (Although GDC 90 asserts the collective responsibility of the Cabinet to Parliament, it is not at all clear that the Cabinet shares responsibility for the military with the Prime Minister.) Vesting this power in the head of government – rather than the head of state, as is customary in parliamentary systems on the Westminster model – with no other checks, gives the impression of a Prime Minister protected by an army. This impression is strengthened by Fiji's recent history and the fact that institutions in the CCD intended to strengthen civilian control over the military such as the National Security Council, which under CCD 175 brought civilians and members of the disciplined forces together on security matters, are not included in the GDC.

The treatment of the AG is also problematic. The AG has considerable authority under the GDC. He or she is, in effect, a minister of justice serving as a Cabinet member (GDC 95) and acts as chief legal advisor to the government. In addition he or she has influence over the appointment of judicial officers and incumbents of other constitutional offices in the legal system. For instance, the AG selects the only two members of the JSC who do not act *ex officio* (GDC 103(1)); the Prime Minister must consult the AG in the appointment of the Chief Justice and President of the Court of Appeals (GDC 105); the JSC must consult the AG in making other appointments to the judiciary (GDC 105 and 106) and in appointing the Solicitor-General (SG) (GDC 115) and the Director of Public Prosecutions (GDC 116); and the AG selects the Commissioners of the Independent Legal Services Commission (GDC 113) and the Fiji Independent Commission against Corruption (GDC 114). The AG also chairs the Mercy Commission (GDC 117) and must be consulted on remuneration of judicial officers (GDC 112). Thus the AG, a politician, wields influence over virtually all aspects of the legal system.

It is possible that the AG will be hand-picked by the Prime Minister: if no MP fulfills the criteria set for an AG, another qualified person may be appointed by the Prime Minister. Drawing Cabinet members from outside Parliament is not unusual, and CCD 117 provides that up to 4 of 14 ministers could be from outside Parliament. But, usually in such cases, parliamentary confirmation of the

outside appointments is required (as in CCD 117(2)). No confirmation of the Prime Minister's choice of AG is required by the GDC.

Chapter 5 – Judiciary

An effective legal system is central to constitutional democracy and the rule of law. Without an independent judiciary, citizens cannot expect impartial decision making in the many matters that affect their lives and work and there is no mechanism for upholding the provisions of the Constitution and, particularly, for protecting citizens from abuses of power. Without proper state institutions implementing laws and providing adequate access to the law, the rule of law remains an abstract principle. And without an independent legal profession, people's access to the justice system is limited, and independent courts cannot carry out their responsibility properly.

The opening provisions of GDC Chapter 5 recognize the importance of judicial independence. GDC 96 is a strong statement of judicial independence and includes a provision giving the judiciary control of its "own budget and finances" (GDC 96(6)). The Chapter also establishes a coherent system of courts based on the system in the 1997 Constitution. Finally, extending well beyond its announced area of concern (the judiciary), Chapter 5 deals with five institutions which relate to the legal system: the Independent Legal Services Commission; the Fiji Independent Commission against Corruption; the Solicitor-General; the Director of Public Prosecutions; and the Mercy Commission.

But, despite the promising introduction, the Chapter does considerably less than it could to translate the principles in GDC 96 into reality and in some cases undermines the possibility of an independent judiciary and a legal system that can secure the rule of law.

An independent judiciary

Judicial independence is secured through a combination of institutional arrangements and professional and cultural practices that protect the judiciary and foster its independence. Constitutional arrangements concerning the judiciary are the starting point, and here four issues are particularly important: (i) judicial appointments; (ii) the terms judges serve; (iii) security of tenure and procedures for removing judges; and (iv) institutional autonomy. As explained below, on all but institutional autonomy, the GDC provisions are wanting.

(i) *Judicial appointments*

Under the GDC the Prime Minister and the AG play a dominating role in the appointment of judges. The Chief Justice and the President of the Court of Appeal are appointed by the Prime Minister after he or she has consulted the AG. Therefore, not only is the decision entirely in the hands of the government, but there is not even a requirement that another body, outside government, such as the JSC that is responsible for other judicial appointments, or Parliament be consulted.

Following the 1997 Constitution and the CCD, under the GDC other judicial appointments are made on the advice of the JSC. It is not clear that this is to be an independent body – on this the GDC is at best ambivalent and presumably chose not to assert its independence. So, no direct mention is made of the JSC's independence. GDC 150(4) suggests independence by stating that commissions are not subject to "the direction or control of any other person". However, the JSC is composed entirely of government appointees. The chairperson is the Chief Justice, who, as noted above, is chosen by the Prime Minister. The second judge on the JSC, the President of the Court of Appeal, is

similarly an appointee of the Prime Minister. The remaining members of the JSC are the Permanent Secretary for Justice (whose appointment under GDC 122(1) must be approved by the Prime Minister) and a lawyer and a layperson chosen by the AG.[13] Control over the JSC is increased by the fact that the two members who do not serve *ex officio* serve for just three years so the government runs limited risks in their appointment. A requirement that the JSC must consult with the AG before recommending judges for appointment exacerbates the situation. There is, of course, no principled objection in giving the government an opportunity to voice opinions on judicial appointments or even a role in their selection. The problem in these provisions lies in the fact that no truly outside voice has a right to be heard (in 1997, the leader of the opposition was to be consulted). Nor is there any requirement for the JSC to act in a transparent manner or to report to Parliament, for instance (see CCD 148(7) – (10)). Instead it appears to be expected to act as an advisory body to the AG (GDC 103(9)).

The JSC does have the authority to make its own rules. These rules might introduce good practices from elsewhere, such as advertising for candidates for judicial positions; making the names of applicants public and soliciting submissions on their suitability; holding interviews in public; actively seeking to secure diversity on the bench, and so on. But this is not required and so, again, the GDC misses an opportunity to demand open and accountable procedures with appropriate democratic participation.

It is no defence of the GDC provisions to say that they mirror (or improve upon) procedures in a number of older democracies in the Commonwealth. As already noted, a constitution should respond to the particular needs of the country for which it is designed. In Fiji, those concerns include the current lack of legitimacy of the judiciary and a lack of transparency in all the activities of the state. Second, the GDC fails even to meet the standard set in the 1997 Constitution, which included the President of the Law Society of Fiji in the 3-member JSC and required that the JSC consult with both the Minister of Justice and the relevant parliamentary committee before making proposals for judicial appointment (s 132). The GDC's government-appointed JSC, which is expected to consult the AG alone, is a retrogressive step that belies the bold statement of judicial independence in the opening provisions of the Chapter.

(ii) *Terms of appointment*

Under GDC 109(2), Fiji nationals appointed as judges have security of tenure, usually serving until a determined retirement age. But foreign judges are treated very differently.

Foreign judges have been part of Fiji's system for decades, and the practice of using foreign judges is widely supported by Fijians. The legal community is tiny, and appointing foreign judges broadens the pool from which judges can be drawn. Moreover, some distinguished foreign lawyers have served on Fiji courts, enriching its jurisprudence and, in the past at least, contributing to the sound reputation of its judiciary.

[13] The assertions in GDC 96 (on the independence of judges) and 147 (on the members of the JSC chosen by the AG) that these officers are not subject to control by the government does not remedy this defect nor does the fact that the two members of the commission who do not serve *ex officio*, the lawyer and layperson, have some security of tenure (their removal is governed by GDC 149).

The frequent use of foreign judges makes the question of the term of their appointment most important. GDC 109(1) stipulates that foreign judges may be appointed for a renewable period not longer than three years. There are obvious problems with this arrangement. It allows the JSC to pick judges for particular cases and, if a particular person is interested in serving on the Fiji bench in the longer term, sends a signal that it would be advisable not to displease the government. The CCD deals with the issue of the tenure of foreign judges by permitting them to serve for one term only. The length of the term is to be determined by the JSC (CCD 133(1)). The *Companion to the Constitution Commission Draft* explains:

> "In the past [foreign judges] were appointed on contracts which were often renewed (but sometimes not). Judges who are subject to reappraisal for the continuation of their tenure may be tempted to decide cases in a manner that will be approved by the appointing body or, equally problematically, they may be perceived by the public to be deciding cases for that reason. … The arrangement in Article 133(1) allows the JSC to appoint a largish panel of judges for each court from which that court can draw from time to time. If a particular judge is not available, another can be used. Time periods given to these judges will be determined by the JSC and may be long. The Commission was not persuaded by arguments that foreign judges should be on short but renewable contracts so that their suitability could be determined. It considered justice is too important to have judges hearing cases on what is essentially a probationary basis. Instead, it believed that with thorough investigation the JSC can appoint suitable people first time round."[14]

There is no standard international "good practice" for the use of foreign judges, and it raises admittedly difficult questions. Clearly, however, it should not undermine the general principles of judicial independence. The short, renewable terms envisaged in the GDC threaten to do just that.

(iii) *Security of tenure and procedures for removing judges*

GDC 111 establishes a clear process for the removal of judges. The Prime Minister alone may initiate proceedings for the removal of the Chief Justice and the President of the Court of Appeal, and the Prime Minister selects the members of the board or tribunal that enquires into the matter and makes the final decision. The JSC plays the role of the Prime Minister when it comes to the removal of other judges, magistrates and other judicial officials.

Again, the absence of an independent body in the removal process raises concerns. Its integrity depends entirely on the integrity of the Prime Minister or the government-appointed JSC and their ability to step back from the many direct interests they will have in the decisions judges make. Even if the Prime Minister or the JSC acts with total integrity, the absence of checks on the process will provide little assurance to skeptical citizens. The single concession to the interests of the public in the process is in the requirement that the report of the board or tribunal that enquires into the matter of the removal of a judicial officer must be made public (GDC 111(6)).

By contrast, the CCD uses a broadly-based JSC to initiate the process of a removal of a judicial officer and proposes a panel composed of two judges, two members of independent commissions and two lay people (Schedule 5 ss 3 and 5).

[14] P 58

One further issue is relevant to security of tenure – remuneration. GDC 112 protects the remuneration of judicial officers (it may not be "varied to [their] disadvantage … except as part of an overall austerity reduction similarly applicable to all officers of the State"). Although the GDC discards the Salaries and Benefits Commission of the CCD, it signals some distance from government in setting the remuneration of judicial officers, which is to be determined by the JSC "following consultation with the Prime Minister and the Attorney-General" (but not, it appears, the Minister of Finance).

(iv) *Institutional autonomy*

GDC 96(5) and (6) require Parliament to ensure that the judiciary has adequate funds and give the judiciary control over its budget and finances. These are important provisions as judiciaries around the world are weakened by inadequate funding and bad management that they do not control.

The legal profession

Although it is acknowledged that an independent legal profession is essential for maintaining the rule of law and protecting rights, not every constitution protects the legal profession.[15] CCD 136 did so by describing the role of the profession (among other things to "fearlessly protect the rule of law") and by setting limits on state regulation of the profession. In some democracies, legislative provisions protect the profession and realise the right of lawyers to form self-governing professional bodies.

GDC 113 takes a completely different tack. It states that the Independent Legal Services Commission established by decree "continues in existence". That decree recognises the Fiji Law Society and gives it a long list of functions but in effect undermines the Society by establishing the Independent Legal Services Commission as a one-person commission (appointed by the AG) and channelling to it funds previously received by the Law Society.[16] At the same time, continuing professional education has been taken over by a Board not affiliated to the Law Society and the AG's annual conferences have replaced professional education run by the Law Society.

Despite its name, the Legal Services Commission is not independent. As noted, the single commissioner is selected by the AG. He or she may be removed on a month's notice.[17] The appointment of staff by the Commissioner is to be "with the approval of the Attorney-General" (Decree s 94). Moreover, the constitution gives the Commission no mandate; the decree establishes it as a disciplinary body to deal with complaints against lawyers but allows it to be given other functions. Then, the Commission does not control its docket. Cases are brought to it by the Chief Registrar of the High Court who may act even if a complaint is not made. It may be that the Law Society was not managing complaints against lawyers effectively but this cannot justify a situation in which, in effect, an interested party, the government, has overall control of these disciplinary matters.

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[15] See the UN *Basic Principles on the Role of Lawyers* (September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990)) and the International Bar Association's 1990 *Standards for Independence of the Legal Profession*.

[16] See also s 13 of the Trust Accounts (Amendment) Decree 20 of 2009 inserting a new s 30 into the Trust Accounts Act.

[17] Section 89 Legal Practitioners Decree. Concern here is justified by the fact that in 2012 the first Commissioner, Justice Connors, who was widely believed to be supportive of the regime, was summarily removed from office with no explanation.

Fiji Independent Commission Against Corruption

Concerns about the role of the AG in selection of the commissioner for the Legal Services Commission are multiplied in relation to the Fiji Independent Commission Against Corruption (FICAC). FICAC is constitutionalized by a provision that states that the Commission established by decree continues in existence (GDC 114(1)). Like the Legal Services Commission, its commissioner and deputy commissioner are chosen by the AG. GDC 114(7) also declares FICAC independent and that it "not be subject to the direction or control of any person or authority, except by a court of law or as otherwise prescribed by written law". But, the written law exists: under the Fiji Independent Commission Against Corruption Promulgation of 2007, the Commissioner is subject to the direction and control of the President (s 5(2)). As the President must act as directed by the Prime Minister, in effect then, the Prime Minister controls FICAC. In ordinary circumstances, a more charitable reading of GDC 114(7) would be possible. One would say that the assertion of FICAC's independence in that subsection invalidates section 5(2) of the Promulgation. But that reading is precluded by GDC 169(2), which protects all existing decrees from constitutional challenge.

FICAC has immense powers: to appoint people to act as police (Promulgation s 10); to investigate alleged crimes; to prosecute; to take over prosecutions; and to discontinue prosecutions at any point in the proceedings. The question of whether an anti-corruption body should or should not have prosecutorial powers is a difficult one, and there is no agreed position on it. However, the way in which FICAC has been set up allows it to interfere with the work of the Director of Public Prosecutions (DPP), an institution intended to have greater independence. Thus the government will have influence over those prosecutions that potentially have the greatest direct political implications.

Solicitor-General

It has already been noted that the GDC makes the AG something of a "super minister" – a politician with special constitutional powers. The way in which the office of the SG has been constitutionalised adds to that impression: in the SG, the AG has a specially defined Permanent Secretary. There is possibly a sting in the tail: unlike other Permanent Secretaries (who are on performance contracts (GDC 126)), the SG has the same tenure as a judge and so is not easy to remove from office (GDC 115(5) and (6)). Some of the provisions relating to the SG are drawn directly from CCD 137. There the SG was to be an independent office, responsible for representing the state in legal proceedings, preparing legislation, giving legal advice and fulfilling other functions assigned by law or the Cabinet. That list is itself problematic as there is a real tension between preparing legislation and giving "independent" advice, perhaps on that very legislation. In any event, those functions remain in the GDC alongside the responsibilities the SG holds as the AG's Permanent Secretary and others acquired if "any other functions" are assigned to him or her by the AG (GDC 115(12)). It is likely to be a difficult job.

Director of Public Prosecutions

The 1990 Constitution established an independent Director of Public Prosecutions (DPP), and that approach is carried through in the CCD and, to some extent, in the GDC.

As with other public offices, under the CCD, the independence of the DPP is protected by mechanisms for his or her appointment, tenure and removal. Under the GDC, like other office holders established in Chapter 5, the DPP is to be selected by the JSC after it has consulted the AG

(GDC 116(3)) and may be removed only by the process established for the removal of judges. Concerns with this process are discussed above. But, the DPP is in the exceptional position of being granted a renewable term of seven years rather than the term of five or three years for other offices (GDC 116(5)).

Of equal concern as the provisions relating to the appointment, term and tenure of the DPP are the power of FICAC to intervene in prosecutions discussed above and those setting out his or her powers.

In addition to giving the DPP the power to institute and conduct criminal proceedings, GDC 116(8) allows the DPP to discontinue criminal proceedings at any point before judgment and to take over any proceedings instituted by someone else (except FICAC). Both of these powers are open to considerable abuse and do not measure up to sound prosecutorial practices elsewhere.

The right to discontinue a prosecution at any point up to judgment undermines the concept of a fair trial for many reasons, including because it allows the prosecution to "test" its case in court and to withdraw and start again if things are going badly. The accused person may then live under the shadow of the charge indefinitely. The better practice is set out in CCD 138(4), which allows a charge to be withdrawn before plea only. After that, to stop the trial, the prosecution would have to announce its intention and the court would either convict or discharge the accused. In this context, it should be noted that in many common-law jurisdictions, even if the charge is withdrawn before the accused is asked to plead (i.e. before the case has started in court), the prosecution can restart the case only in carefully circumscribed circumstances.

The right to take over a prosecution encompasses a right to take over prosecutions launched by private individuals. These are, of course, rare and are most likely to occur when the State has decided not to prosecute. The common-law right to launch a private prosecution allows individuals to prosecute even where the DPP has exercised his or her discretion not to prosecute for reasons that may include a decision that the case is too weak, that other, more important cases need to take priority, or because there is political pressure on the DPP not to prosecute. The right to launch a private prosecution serves an important safety value both where a complaint feels very strongly about a case that the DPP considers less important and might resort to other means of revenge if a prosecution does not occur,[18] and where the DPP has made a decision on political grounds. Giving the DPP an unlimited constitutional power to take over such prosecutions negates the right to conduct a private prosecution. Combined with the right to stop prosecutions at any point, it effectively gives the DPP a right to stop private prosecutions. Again, the CCD offered a more balanced approach. CCD 138(3) requires the consent of either the person or authority conducting the prosecution or a court before the DPP may take over a prosecution.

These matters may seem technical, dealing with the details of prosecutorial policy. However, first, the power to prosecute is easily abused and often used to further partisan political interests and, second, the role of a prosecutor is notoriously difficult and prosecutors are frequently subject to immense political pressure. The GDC provisions do not adequately safeguard the public against the misuse of prosecutorial power or provide adequate protection for the DPP against political and other pressures.

[18] The court concerned can of course dismiss a private prosecution brought on inadequate evidence.

Mercy Commission

The Mercy Commission may grant pardons, postpone the execution of a sentence or remit part or all of a sentence. The provisions in the GDC are the same as those in the CCD except for the composition of the Commission itself. Under the GDC, the AG chairs the Commission and two other members are chosen by the President. The distance from the government gained in the CCD by having the lay members of the Commission appointed by the Constitutional Offices Commission is lost, but, in the unusual decision to grant the President discretion in appointing lay members to the Commission, the GDC may have secured more independence for this body than for most of the other commissions.

Chapter 6 – State Service

Part A – Public service

Chapter 6 starts, uncharacteristically, with principles of state service drawn from the CCD but presented more succinctly. The omissions from the set of principles proposed in the CCD are consistent with the overall absence of provisions that encourage democratic engagement by the people and that deal with diversity: the CCD principles of "involvement of the people in the process of policy making" and putting the need for diversity in the public service as a factor in recruitment to the public service (CCD 164(2)(d) and (h)) do not appear in GDC 119.

Like the CCD, the GDC establishes a Public Service Commission (GDC 121 and 122). However, there appears to be no purpose in including it in the Constitution in the form envisaged by the GDC – it is little more than a recruitment agency for the Prime Minister. The usual reason for establishing a Public Service Commission in a constitution is to foster an independent and impartial professional civil service that will implement the laws of successive government properly. But, under the GDC, the Public Service Commission is entirely a tool of the Prime Minister and the governing party. It operates under the State Service Decree. That can be amended by an ordinary law. Its members are chosen by the Prime Minister. The most senior appointments it makes are of permanent secretaries, and these are subject to the agreement of the Prime Minister, as is the removal of permanent secretaries. Other functions are to be prescribed by law, which may, of course, also subject these to approval by the Prime Minister or another minister. Lest its limited authority not be sufficiently clear, the GDC adds a list of functions that the Commission may not fulfill, including any function allocated to another body by any law (GDC 122(2)).

Three other aspects of the provisions relating to the public service deserve mention. First, under GDC 123(6) and (7), individual ministers and their permanent secretaries are given unusual autonomy over the public service in their respective departments. They set the terms and conditions of employment, qualifications, etc. This appears to remove control over these matters from Parliament and invites competition for staff among departments.

Second, the retirement age of 55 imposed by the current regime is purportedly constitutionalised. However, at the same time, all public service appointments are to be on fixed term contracts (GDC 126) and people may be contracted after their retirement age (GDC 125). These somewhat puzzling provisions (the requirement of fixed term contracts seems to render the reference to a retirement age redundant) are presumably to ensure that there is no question of expectations of employment beyond 55. They also assure the Prime Minister (who controls the Public Service Commission) of a compliant public service.

Third, GDC 127 establishes a Public Service Disciplinary Tribunal whose members will be appointed by the Prime Minister. Again the only purpose of establishing this in the Constitution appears to be to prevent a law providing a more independent mechanism for managing public service discipline. Decisions of the Tribunal are reviewable by the High Court.

Part B – Disciplined forces

Strikingly, this Part of Chapter 6 does not start with principles. It simply sets out institutional arrangements for the police, corrections service and military. As already noted, the National Security Council of the CCD, which sought to strengthen civilian control over the military by bringing together the commanding officers of the security services and their counterparts in the Cabinet and Parliament, including a member of the opposition, is omitted.

The GDC deals with the Fiji Police Force and Corrections Service in identical provisions (GDC 128 and 129). The Prime Minister appoints both commissioners. The term of their appointment is governed by GDC 147, which sets a five-year, renewable term but also stipulates that no one may serve beyond the age of 65. The Prime Minister also determines the remuneration of both commissioners (GDC 148) but in so doing must first seek the advice of an independent committee (GDC 148(2)). The commissioners are "not subject to direction or control by any other person" in relation to their responsibilities with the exception that the relevant Minister may issue "general directions" (GDC 128(5) and (6)). These important provisions, carried over from provisions in the 1997 Constitution relating to the police (s 111(4) and (5)) and State Services Decree 2009 sections 21 and 22), are presumably intended to prevent political interference in the way the Police Force and Corrections Service fulfill their functions and disallow directions from government on specific cases.

The military is dealt with in GDC 130, which, as noted above, states in a provision drawn from the 1990 (military imposed) Constitution that "It shall be the overall responsibility of the Republic of Fiji Military Forces to ensure at all times the security, defence and well-being of Fiji and all its residents."[19] The remaining four subsections deal with the appointment of the Commander (by the Prime Minister); powers of the Commander (appointments, dismissals and discipline); retirement age for the military (55 years, but under GDC 147(3) the Commander may serve until the age of 65); and allow a law to prescribe further detail.

Constitutions take different approaches to the military. The Reeves Report (para 12.88) proposed that the military should not be dealt with in the constitution at all. Provision for the military should be made by an act of Parliament to emphasise that the military is entirely subject to Parliament. The CCD draft approaches the military differently, using the constitution to put firm limits on the role of the military. Under that draft, the military (and other security institutions) are subject to civilian control, and a number of mechanisms for securing this are established: a minister has "direct oversight" of the military (CCD 173(3)); members of the security forces may not obey manifestly illegal orders (CCD 174(4)); as mentioned above, the National Security Council, comprised of members drawn from the civilian sector and the disciplined forces provides a forum for discussing

[19] The 1990 Constitution of Sovereign Democratic Republic of Fiji stated in section 94(3): "It shall be the overall responsibility of the Republic of Fiji Military Forces to ensure at all times the security, defence and well-being of Fiji and all its residents." This Constitution was imposed by the military regime established after the 1987 coup. See Yash Ghai and Jill Cottrell, "A Tale of Three Constitutions: Ethnicity and Politics in Fiji," *International Journal of Constitutional Law* 5, no. 4 (October 1, 2007).

security matters, and its approval is required for certain actions of the military; and the role of the military is restricted to defence, and its deployment within Fiji is strictly controlled (CCD 176(1)); etc.

The GDC takes a different approach altogether. It is not left to Parliament to establish its role nor are checks established. As the force with "the overall responsibility" for "the security, defence and well-being of Fiji", it is to have authority over all matters. In another context one might assume that this overstatement of the role of a military would be subject to parliamentary control and that law would determine exactly how the authority would be exercised. In Fiji it is unlikely that that will be the case. Consider paragraph 42 of the Republic of Fiji Military Force's submission to the Constitution Commission:

> "The Forces cannot and will not be complacent in dealing with situations that undermine national interest. The developments that have occurred since 2006 cannot be abandoned or derailed. We need to move forward in a constructive manner with national interest at heart. The RFMF will not allow any individual, group and organizations or another State to sabotage the efforts of 2006. This new course will continue. The RFMF will ensure it continues, not only to 2014 but beyond."

The RFMF, the submission asserts, has a "vision" for Fiji (para 46), and it will "continue to be responsible in ensuring at all times the security, defense and well-being of Fiji and its people. It does not intend to diverse [sic] from this commitment" (para 47).

The RFMF's submission demanded the grant of overall responsibility now found in GDC 130(2). Its understanding of its role, signalled by the provision, leaves little space for free democratic decision making about the future of the country and effectively gives the RFMF a tacit veto over all government laws and actions.

Chapter 7 – Revenue and Expenditure

With a few exceptions, the provisions of Chapter 7 reproduce Chapter 12 of the 1997 Constitution. The overall result is that, read together with provisions on the Auditor-General (AuG), the chapter adopts many of the orthodox controls on public finance. But, there are some worrying departures from international best practice in the GDC's approach to public finance. First, although the GDC respects the principle of budget unity (there is a single annual budget), the principle of "authoritativeness", which requires Parliament to be the final authority on revenue raising and expenditure, is undermined by the provision that requires the budget to be approved by the Cabinet before it is enacted (see below). Second, the relationship of the AuG to the government compromises the ability of that office to give independent assessments of the public financial management (see discussion under Chapter 8).

In addition, this chapter fails to embrace an approach that would secure responsibility, openness and accountability in matters of public finance. So, the modern principles of public finance of accountability, transparency, stability[20] and performance are not included. Of course, the detail of financial management does not belong in a constitution. However, principles that would secure good practices do. It is also now acknowledged internationally that to deepen democracy, to enable

[20] Matters concerning stability might include short-term policy stability, anchoring commitments to achieve targets for revenues, total expenditures, fiscal balance or public debt, specified in the context of a regularly updated medium-term budget framework. Medium–term fiscal sustainability is also another important aspect of stability. The CCD included some of these in its provisions concerning the content of budgets (CCD 154) and the provision underpinning the fact that borrowing may be authorized by Parliament (CCD s 157).

the public to engage fully in public life, to fight corruption and to increase controls and accountability, a system of public finance must be open and promote public participation and accountability. Public finance legislation in Fiji, adopted before the 2006 coup, was moving towards achieving these goals. The GDC generally disregards them.

The GDC does supplement the 1997 provisions by drawing from the CCD in two positive ways:

(i) Section 131(2) – (4) puts constraints on ad hoc imposition and waiver of taxes requiring, among other things, a public record of waivers and variations of taxes and for the AuG to be notified. Subsection (4) prohibits any special treatment of public officers based on the position that they hold and the work they do. So, for instance, a law may not exempt MPs from particular taxes.
(ii) Section 137(2) expands Parliament's control over government guarantees and loans by spelling out that the Minister of Finance must present certain information to Parliament about loans and guarantees within seven days after a resolution requesting such information.

What the chapter loses from the CCD is, first, as in other chapters, a set of principles to underpin the system of public finance management and expand on the very broad principles of good governance in GDC 1. Here, as already noted, the most significant loss is the insistence that public financial management must be open and accountable. (Note, too, that the Accountability and Transparency Commission in GDC 141 appears to be intended to police public servants but does not have a role in securing open government.)

Second, as noted above, by retaining section 179 of the 1997 Constitution in GDC 135, Parliament's control over the government is significantly reduced. GDC 135 deals with certain "money Bills" – those bills that concern the appropriation of revenue, imposition of taxes and the national debt. The CCD requires such bills to be introduced by the Cabinet but did not constrain Parliament's power to amend such bills. By contrast, the GDC makes the passage of such bills subject to Cabinet approval. The CCD approach (a) recognizes that, if MPs have no control over budgetary decisions whatsoever, the "checks" that Parliament might exercise over the executive are severely circumscribed – government's decisions about how to spend and on what are virtually unconstrained; and (b) relies on the ordinary workings of a parliamentary system in which the government by and large controls the legislative process, to safeguard against arbitrary actions by MPs that might harm the national economy. GDC 135 may reflect practice in some Westminster-style parliamentary systems, but it is certainly not a characteristic of all parliamentary systems. In effect it removes control of the budget from Parliament.[21]

Third, the Salaries and Benefits Commission in CCD 161, which was to control the remuneration of senior officers of the state, is not in the GDC. The Commission was to meet only once every four years to set a framework for remuneration. In setting the framework it would both curb a tendency of state officials (including MPs) to increase their income and protect the remuneration of judges and members of other watchdog institutions that the government may have a desire to undermine. Instead, under GDC 148, the Prime Minister determines the remuneration and benefits of

[21] It should be noted that the process proposed under GDC 135 cannot be justified by reference to the veto power executives often have (through the president) in presidential systems of government. Those systems balance and control power in very different ways. Most importantly, the President and legislature have separate sources of legitimacy as both are directly elected.

constitutional office holders.[22] In so doing the Prime Minister must take the advice of an "independent committee" which he or she establishes for this purpose. In addition, remuneration of these office holders may not be reduced during their tenure. As noted above, under GDC 112, the salaries of judicial officers are also protected, although a reduction in judicial salaries is contemplated in exceptional circumstances. (GDC 112 and 148 seem inconsistent with one another.) GDC 79 stipulates that the remuneration of politicians is to be set by law. Intriguingly, however, although in the body of the GDC this section is headed "Remunerations", in the contents it is referred to as "Remunerations Committee". Perhaps the initial idea was to retain the Parliamentary Emoluments Commission of the 1997 Constitution in some form.

A number of other smaller departures from the CCD are worth noting:

- Details specifying the content of budgets are removed. These details are often prescribed in national law and not in a constitution. If a goal of the constitution is to increase accountability and to facilitate public participation in democratic processes, including them is appropriate.
- Authorization of expenditure in advance of appropriation (GDC 134) is limited to the withdrawal of funds for "ordinary" government services. The meaning of "ordinary services" is unclear but, following traditional interpretations, this appears to imply that funds may not be withdrawn for capital projects. Any other interpretation would seem to render the phrase meaningless. The problem here is that if capital programmes are suspended because of a failure to approve the budget before the beginning of the financial year, the State may incur substantial expenses relating to breached contractual obligations. This is unwise, especially taking into account that (i) a failure to approve the budget may be a result of matters outside the control of Parliament (e.g. a cyclone), and (ii) suspending capital projects but not everyday services puts little pressure on MPs to agree to the budget.
- CCD 160, requiring sound procurement practices, is omitted.

Chapter 8 – Accountability and Transparency

Chapter 8 provides for a Code of Conduct for public officials; establishes two institutions concerned with accountability, an Accountability and Transparency Commission and the AuG; provides for an access to information law; establishes the Reserve Bank; and stipulates some operational matters relating to certain state officials.

Part A – Code of Conduct

This part establishes the Accountability and Transparency Commission (ATC) and specifies in some detail what the law that will govern it must prescribe. As noted above, the GDC divides the functions of the CCD's Ethics and Integrity Commission between two commissions: this one and the Fiji Independent Commission Against Corruption (FICAC). The ATC is responsible for implementing a Code of Conduct for public officials including the President, the Prime Minister, MPs, ministers and others who hold office under the Constitution or a law.

[22] Here the following are referred to: the Supervisor of Elections; the Secretary-General to Parliament; the Commissioner of Police; the Commissioner of Fiji Corrections Service; the Commander of the Republic of Fiji Military Forces; the Auditor-General; the members of the Human Rights and Anti-Discrimination Commission; the members of the Electoral Commission; the members of the JSC referred to in section 103(1)(d) and (e); the members of the Mercy Commission; the members of the Public Service Commission; and the members of the Accountability and Transparency Commission (GDC 146).

The appointment of the members of the ATC is one of only two functions that the President may fulfill independently. (The other is the appointment of two members of the Mercy Commission.) Despite GDC 81 (which states that the President always acts on the instruction of another), GDC 141(2) expressly merely requires the President to consult with the Prime Minister and the Chief Justice before making the appointments. So, there is potentially some distance between the members of the ATC and the Prime Minister. Whether this will work in practice will depend on political factors. In addition, GDC 141(6) asserts that the ATC must act independently and "not be subject to the direction or control of any person or authority, except by a court of law or as otherwise prescribed by written law". The last phrase adds some ambiguity to the assertion of independence, but, read in context, it must mean that any "direction or control" authorized by a law may not interfere with the constitutional commitment to the independence of the ATC.

The ATC's focus, as noted, is implementing a Code of Conduct. The Code is to be established in a law not by the constitution (as in CCD Schedule 4) or within a framework established by an independent commission (CCD 66(3)). The obvious weakness here is that the Code is to be drafted by the very people to whom it will apply.

Under GDC 141, a law will also provide for the ATC to monitor adherence to the Code, investigate alleged breaches and other complaints against office holders (GDC 141(5)), and collect annual declarations of interest which the law will require. Importantly, the public is to have access to the declarations.

GDC 141(4)(e) – in a provision rarely found in a constitution – promises to contribute significantly to attempts to combat corruption by requiring a law to protect whistle blowers.

An unfortunate omission is a mandate for the ATC to conduct education about corruption, as education has proved one of the most effective weapons in the fight against corruption.

Part B – Freedom of Information

This provision is discussed above together with the right to access to information (GDC 25).

Part C – Auditor-General

A well-resourced, independent audit institution is a central element of any constitutional democracy. Most importantly, by providing reports on the government's financial statements, an audit institution allows proper oversight of government spending. Overall, the GDC provisions concerning the AuG do not meet international standards and do not contribute as they should to accountable and honest government.

The GDC retains the existing office of the AuG but includes limited provisions for its independence. Experience in many countries shows that independence is best secured when the audit institution primarily serves Parliament. Parliament then follows up on the recommendations in the AuG's report and requires action by the government to improve accounting or financial management practices. Instead, GDC 143 stipulates that the AuG is appointed by the Prime Minister with no input whatsoever from Parliament, contrary to good practices for assuring the independence of the AuG. The GDC provides for security of tenure (GDC 149) but presents no mechanism for anyone but the Prime Minister to initiate inquiries into alleged "misbehavior" by the AuG.

Moreover, the AuG's report is presented in Parliament by the Minister of Finance (GDC 144(8)), giving the government the first word on it and allowing no distance between the government and the AuG's reports. Good practice in this regard is for reports to be submitted to Parliament and for Parliament (usually the Public Accounts Committee) to call on the government to explain any aspects of the report that concern it.

Rather than being an institution that empowers Parliament to hold the government to account, under the GDC, the AuG seems likely to become an institution used by the government to defend itself against potential criticism. However, GDC 71 which requires Parliament to conduct its business in an open manner should mean that the public will have access to AuG reports once they have been presented to Parliament.

It should also be noted that a strongly criticized provision of the 1997 Constitution that allows a law to withdraw the accounts of "specified bodies corporate" from the scrutiny of the AuG is retained (GDC 144(5) – (6)).

Part D – Reserve Bank of Fiji

GDC 145 deals with the Reserve Bank. The best relationship between a central (or reserve) bank and the government is not settled, but there is a need to recognize the importance of protecting the independence of such a bank. This provision stipulates that the Bank must act independently but that there must be "regular consultation" with the minister of finance. This arrangement seems sound. The choice of the Governor of the Bank is by the Minister of Finance.[23]

Part E– General provisions relating to public offices

This part contains some operational provisions relating to various public offices (including the Supervisor of Elections, the heads of the security forces, the AuG and members of commissions).

In each case, the term in office is fixed (for commission members it is three years and for others five years) but in some cases, the incumbent leaves office at the age of 65 even if the fixed term has not expired. Appointments are renewable. Removal before the end of the term may be initiated by the Prime Minister alone. Then, a tribunal or board, appointed by the Prime Minister, must enquire into the matter and make a recommendation to the Prime Minister. The Prime Minister is obliged to act on the recommendation. Under these arrangements, removal from office cannot be by the stroke of a pen and so there is some security of tenure. On the other hand, the short but renewable term served by commission members and the fact that the Parliament is responsible for most appointments is likely to reduce the legitimacy of the commissions. Suspicions that commission members are attempting to please the government to secure their chances of reappointment are most likely. This arrangement defeats the purpose of having independent bodies and, ironically, it will also harm the government because commission reports that reflect well on the government will have limited credibility.

The question of how to appoint members of bodies that are intended to be independent of government is a difficult one. Sometimes appointments are subject to approval by Parliament and perhaps by a super-majority in Parliament to ensure that there is broad support and confidence in the appointments. The 1997 Constitution and CCD take a different approach and establish a special

[23] The governor is appointed by the Prime Minister "on the advice of" the Minister, which means that the Minister makes the decision although the arrangement does not usually apply between Cabinet colleagues.

body to make such appointments and to deal with removals etc. The GDC's rejection of an approach that has worked in the past raises questions about its intentions in relation to these positions.

Chapter 9 – Emergency Powers

Like the 1997 Constitution and the CCD, the GDC permits the declaration of a state of emergency, but it departs from the 1997 Constitution by giving the Prime Minister the power to issue the declaration. The 1997 Constitution required the President to declare a state of emergency. CCD 181(1) grants the power to Cabinet, on the recommendation of the National Security Council. Granting the power directly to the Prime Minister once again undermines the concept of cabinet government asserted in GDC 89 and 90.

GDC Chapter 9 also departs from the CCD proposals for parliamentary control over emergencies in a number of ways:

- On the declaration of a state of emergency, CCD 181(2) requires Parliament to convene immediately and to decide on the validity of the declaration within 10 days. GDC 151 stipulates that if Parliament is sitting, the declaration must be referred to it within 24 hours for confirmation. If Parliament is not sitting, it need not be convened but confirmation of the declaration can be obtained from members by "necessary" communication measures.

  Allowing approval of a state of emergency without a meeting of Parliament takes account of distances in Fiji and the likelihood that an emergency will block travel. However, taking decisions without the opportunity of face-to-face discussion is not ideal, particularly in times of stress, so this should surely be a most exceptional measure limited to situations in which it is impossible to convene Parliament. The communication measures used when Parliament is not sitting should be determined in advance in a democratic manner and provision should be made to ensure that the process is as transparent as possible and that sufficient publicity is given to views on the emergency. Overall, the process should be subject to strict guidelines and not left vague.

- CCD 181(3) requires a two-thirds majority for a declaration to remain in force. GDC 151(3) reduces the majority required for approval of a declaration to a majority of the members of Parliament.
- CCD 181(4) allows a declaration approved by Parliament to remain in effect for three months. By contrast, GDC 151(4) stipulates that parliamentary confirmation of a declaration lasts for one month only. The shorter period in GDC 151 is a desirable change.
- CCD 181(7) states that Parliament may terminate a state of emergency at any time. No such power is given to Parliament in the GDC.

In addition, GDC makes no provision for parliamentary oversight of states of emergency when Parliament has been dissolved for an election. The CCD did not include such a provision because, under CCD 87 Parliament continues to exist until new members are sworn in after an election. In other words, under the CCD there is no period in which the country is without a Parliament. GDC 56 does not adopt this arrangement, and so there will be periods in which there is no Parliament.

CCD 181(5) (taken from 1997 Constitution s 187(4)) stipulates that regulations made under a state of emergency must be consistent with Fiji's international obligations. This provision is omitted from the GDC draft.

Finally, the right of a court to review the declaration of a state of emergency is not stated expressly in the GDC. CCD 181(7)(b) gives the Supreme Court jurisdiction. Under GDC 99(4) the declaration of a state of emergency would fall within the jurisdiction of the High Court. That may be desirable especially as the proposal in the CCD giving the Supreme Court what appears to be exclusive jurisdiction may be impractical if that court includes foreign judges who are not resident in Fiji. However, failure to assert the right of a court to review the Declaration is an unfortunate omission as an express statement of the jurisdiction of the courts would confirm not only that this, like all other issues covered in the constitution, is justiciable, but also that it is within the power of a court to declare a state of emergency unconstitutional, for instance because it is not "necessary" as required by GDC 151(1).

States of emergency and rights

Two other provisions in the GDC concern states of emergencies: GDC 9(3)-(4) on personal liberty and detentions under a state of emergency, and GDC 40, on the limitation of rights under a state of emergency.

GDC 40 permits the limitation of rights pursuant to a state of emergency in very limited circumstances only. For instance, the limitation must be "strictly required" by the emergency. GDC 9(3) and (4) provide a minimum of rights that a person detained pursuant to a state of emergency must be granted – in other words, these rights may not be limited. GDC 9(3) supplements CCD 49(3) by requiring monthly reappraisals of detentions under a state of emergency by a court.

Chapter 10 – Immunity

Chapter 10 grants a possibly indeterminate group of people unconditional immunity for a wide range of acts. In so doing it complies with the requirement of the decree that established the Constitution Commission. It also offers a strange contrast to GDC 2(4)(b), which prohibits immunity for any future coups.

Blanket immunities such as this are deeply problematic because they are unjust, lack transparency and leave political and social problems unresolved, among other things. Moreover, in contexts similar to that in Fiji, broad (or blanket) immunity provisions have seldom worked in the way intended. Usually they are relatively rapidly replaced by some procedure for prosecuting a previous regime. Even securing the amnesty in an 'unamendable' constitutional provision (like GDC 155) is unlikely to be safe. Instead, rather than serving to stabilize the country, such an approach may have the very opposite effect and provoke a desire to abrogate the constitution or change it in an unconstitutional manner. This means that there is a significant risk in adopting an immunity provision unilaterally without some popular endorsement. Even if there is general acceptance of such a measure at the time of a transition to democracy, it is likely that, as politics returns to normal, feelings will change.

Under international law the extent of permissible amnesties is limited:

> "Amnesties are now regulated by a substantial body of international law that sets limits on their permissible scope. Most importantly, amnesties that prevent the prosecution of

> individuals who may be legally responsible for war crimes, genocide, crimes against humanity and other gross violations of human rights are inconsistent with States' obligations under various sources of international law as well as with United Nations policy. In addition, amnesties may not restrict the right of victims of violations of human rights or of war crimes to an effective remedy and reparations; nor may they impede either victims' or societies' right to know the truth about such violations."[24]

Thus, the provisions of Chapter 10 are not only ill-considered from a political perspective but also too broad.

Working within the constraints of Decree 57 of 2012 (Fiji Constitutional Process (Constitution Commission) CCD Schedule 6, section 27 confers immunity on the people listed in the decree, subject to their renouncing their past actions in an oath or affirmation set out in Schedule 3.

Chapter 11 – Amendment of the Constitution

The GDC may be amended with the support of 75 percent of the members of Parliament and 75 percent of the voters in a referendum (GDC 157).

This is an unusually difficult procedure with undesirable consequences. First, it will be virtually impossible to correct errors in the Constitution. This may not be a concern in short constitutions that deal primarily with matters of principle. However, the GDC contains much technical detail (see, for instance, provisions on the system of representation), which may need amendment for technical reasons, particularly as it was drafted in haste. In addition, the difficulty of amending the constitution removes any opportunity for citizens to make it their own over time. At least those provisions which do not protect fundamental constitutional principles should be easier to amend.

Second, the tough amendment process will make it difficult to expand constitutional rights and properly establish the rule of law by, for instance, removing some of the extraordinary powers given to Parliament to infringe basic human rights.

But, of course, the main objection to this amendment procedure relates to the provenance of the constitution itself. It is to be imposed by an unelected regime. The short opportunity for the people to "provide feedback" which may or may not be taken into account is no compensation of the lack of any open democratic process in the adoption of the constitution. The amendment procedure all but removes opportunities for democratic engagement with it in the future.

Chapter 12 – Commencement, Interpretation, Repeals and Transitional

GDC Chapter 12 is a combination of technical material and highly political provisions.

Parts A and B are a compilation of technical provisions drawn from the 1997 Constitution and the CCD.

Part C repeals five decrees relating to institutions of government which would be superseded by the GDC. It makes no attempt to repeal laws which may be contrary to the Bill of Rights or although perhaps permissible under the broad allowance for the limitation of rights in the Bill, would undermine the promise of democracy in GDC 1. Moreover, as noted in Part 2, GDC 169 protects all

[24] http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf

promulgations, decrees and declarations made after the coup (5 December 2006) from the challenge that they are inconsistent with the constitution. They "continue to be in force in their entirety". GDC 169(3) does permit amendments of such laws by the new Parliament but such amendments will not have retrospective effect. This provision contradicts the idea of a constitutional democracy in many ways. Perhaps the two most egregious conflicts with the notion of constitutional democracy are (i) that the regime is left a period (until the new Parliament meets) to adopt laws that will be permanently protected from constitutional challenge in the courts, and (ii) elections may be conducted under decrees and promulgations that are inconsistent with conducting free and fair elections irrespective of what the constitutional provisions concerning free and fair elections say.

Part D contains transitional provisions. They make no concessions to the nature of the current government and the oppressive legal regime and simply give constitutional authority to the current government.

By contrast, the CCD puts in place a considered process for the transition from military rule to democratic governance and the arrangements are explained clearly in the *Explanatory Report* (at p 98ff). In summary, the CCD requires a caretaker government for six months before the elections and an independent Interim Electoral Commission (IEC) to run those elections. CCD Schedule 7 repeals laws that stand in the way of free and fair elections and secures the independence of the courts. Under CCD Schedule 6 s 17, the caretaker government and IEC are to be set up by a Transitional Advisory Council (TAC) comprised of members drawn from different sectors of society and selected by different groups (including the interim Prime Minister, the Law Society, and the three university chancellors). The goal is to create a body that has the confidence of different sectors and that is not linked to government. As in other jurisdictions, the caretaker government has a limited role. Under CCD Schedule 6 section 10(6) it manages the transition and responds to emergencies, but it does not make and implement new policies.

The GDC rejects any idea of a caretaker government. Not even the more modest arrangements found in many Commonwealth countries, where, by convention, after an election is called the government goes into caretaker mode, are contemplated.