COMPANION TO THE DRAFT CONSTITUTION FOR FIJI AS PRODUCED BY THE CONSTITUTION COMMISSION

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PART I: INTRODUCTION

ABOUT THIS DOCUMENT

The purpose of this document is mainly to explain the Draft Constitution for those who feel they need to have a more detailed understanding of the Draft than available from reading Commission's *Explanatory Report*. However, it is recommended that the *Explanatory Report* is read first. The reader is referred, especially, to the section in that Report on the Commission's approach (Part 1 Section 4).

The current document is designed to be read with the Draft Constitution. There are constant cross references to the actual text, and the reader would get most out of this document by having the two documents side by side.

The Commission was instructed in Decree 57 –

> (2) The Explanatory Report …shall—
>
> *(a)* summarise, as concisely as possible and in a way that the people of Fiji shall understand –
>
> *(i)* the recommendations embodied in the draft Constitution;
>
> *(ii)* the reasons for those recommendations;
>
> *(iii)* how those recommendations relate to section 3 of this Decree; and
>
> *(iv)* the views received from the people;
>
> *(b)* describe how the Commission has carried out its work.

Because of the direction – "in a way that the people of Fiji shall understand", the Commission could not go into great detail in the *Explanatory Report*. And it could not be very technical. The CA needs some of that detail, and some of that technicality. The CA needs to understand how a constitution works, how this draft constitution would work. It needs to understand the intentions of the Commission. And it needs to understand how the whole document hangs together.

This document, unlike the *Explanatory Report*, is organised in the same way as the Draft Constitution itself. It is not an "article by article" analysis, but it does look at each chapter, in the same order as the Draft Constitution. Sometimes it does indeed explain the detailed wording of specific articles.

SOURCES FOR THE DRAFT CONSTITUTION

The Draft Constitution naturally reflects many influences, and some constraints. The Decree setting up the Commission said its purpose was a Constitution that:

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

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

The Decree also underlined that the Draft Constitution was to be based on:

(i) the purposes and the guiding constitutional principles for the Constitution;
(ii) the wishes of the people of Fiji;
(iii) the lessons of the past; and
(iv) best relevant practice.

This *Companion* to the Draft Constitution tries to explain, in relation to provisions that are a departure from the past, or where a clear choice was made. But many provisions in a constitution are necessarily similar to those from elsewhere and it is not possible or indeed helpful to refer to all foreign experience.

UNDERSTANDING HOW A CONSTITUTION WORKS[1]

A Constitution is a law: the country's basic law. Lawyers argue about it, the public relies on it to protect their freedoms, by going to court, and the courts apply it, and if necessary decide what it means.

This means that it must be as clear as possible from a legal point of view. Some words and expressions have developed legal meanings. Some have been used in previous constitutions of Fiji. If the intention is that the courts should continue to understand the constitution in the same way as in the past, it makes sense to use the same language as in the past. If there has been a change of language, the courts and lawyers will assume that there is a difference in meaning.

A constitution is both a guide – and, more than that, a framework – for the way government operates. The constitution often says how government bodies must behave if they wish their actions to be valid: a body must be composed in a certain way, it must carry out certain consultation etc. If these requirements are not complied with, a challenge may be taken to court, and the court is likely to say the action is invalid.

Constitutions often contain statements of principles that are more general than you would find in an ordinary law. The courts can still use these, but will not be expecting the same precise analysis of the language.

Sometimes courts are reluctant to get involved in matters that they consider political. Some matters they think are better decided by politicians, and are not easily decided by

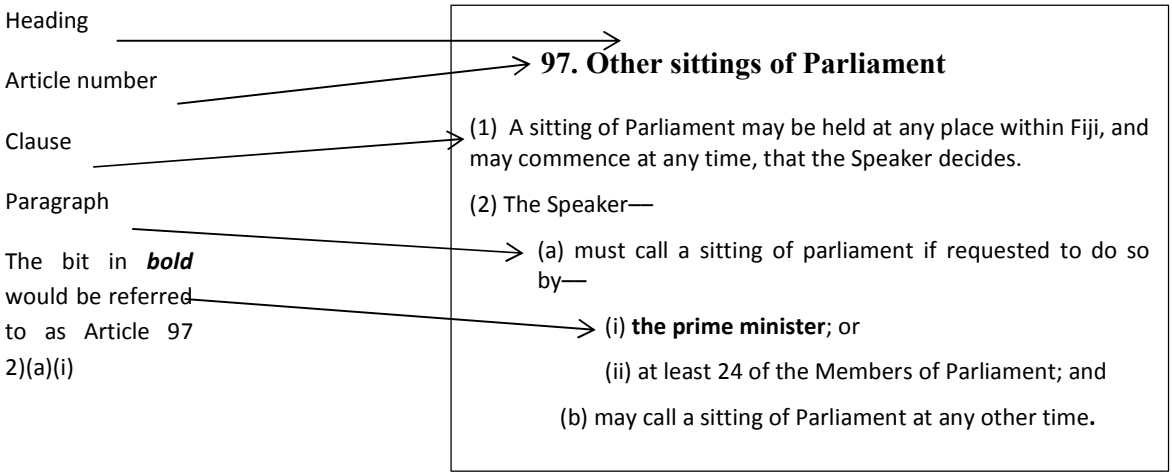
[1] Lawyers can pass over this section!

the use of legal rules. Modern courts in many countries have become more willing to inquire into decisions of politicians. The Draft Constitution assumes that its provisions will be suitable for application by the courts. And the Draft also ensures effective remedies in the courts for failure to apply and respect the Constitution.

But it is very important to realise that a constitution is political as well as a legal document. Political and other leaders and the people will look at the wording of the constitution, but if they feel that there has been a failure to follow it they will not necessarily be rushing to court (which is expensive and often time-consuming). They will point to the constitutional language as the guide to proper behaviour. They may use it as a reason for making or not making political alliances. They may use it as a reason for voting or not voting for a particular person or party. People may organise around particular provisions of the Constitution (in Hong Kong for example, there was a "Movement" named after a particular article of the Basic Law).

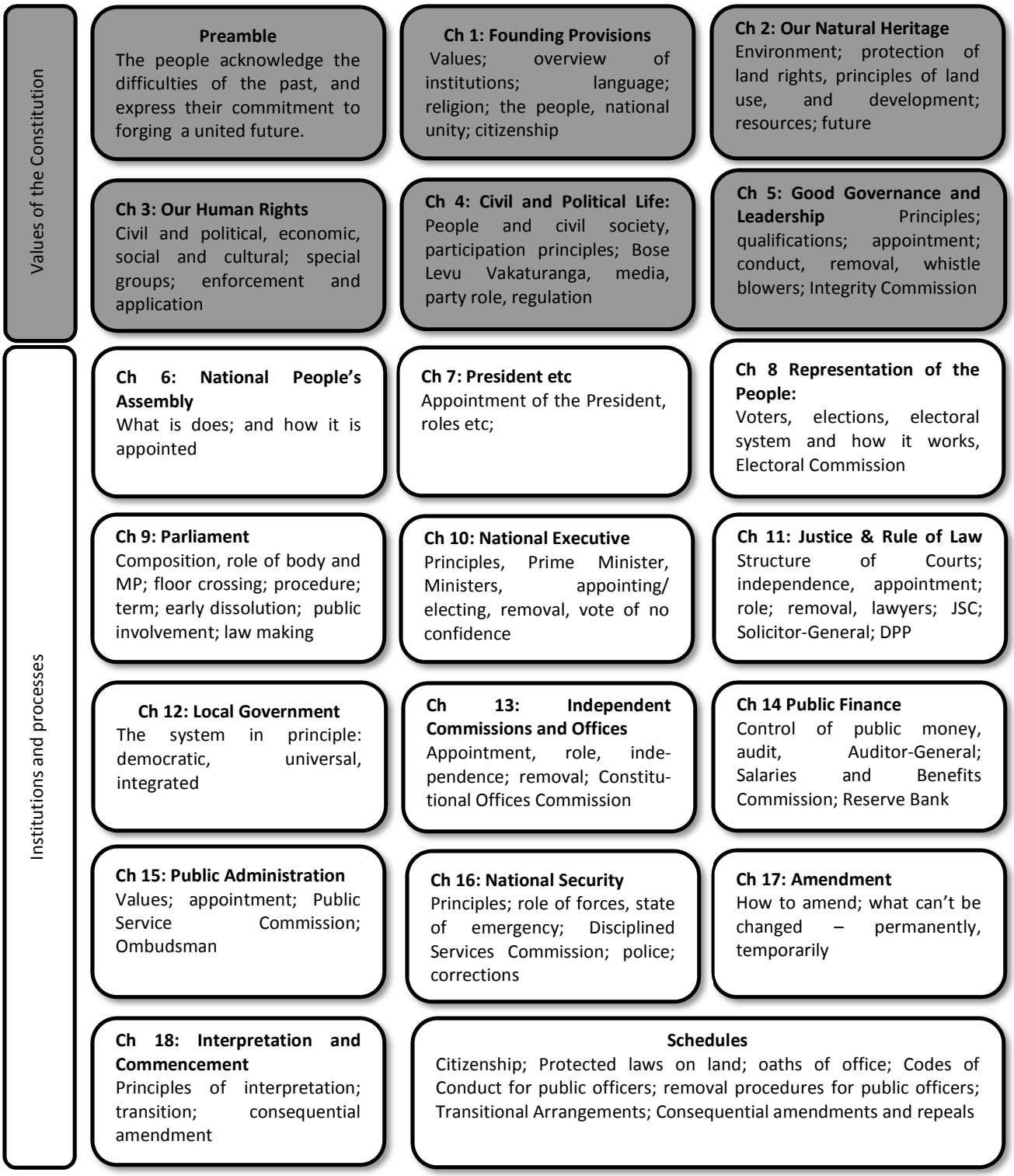
HOW TO READ THE CONSTITUTION

The Draft Constitution is quite long: 198 pages in its current form. It begins with a Preamble and ends with the Schedules. It is divided into 17 chapters, as you will see from the Chart below. Some are very short and some quite long. Within each chapter are Articles. The numbering of Articles runs right the way through (the last is number 188). Here is a specimen Article (from Chapter 9 on Parliament):



TAKING THE OVERALL VIEW

If you want to understand a complicated document like the Draft Constitution, you do need to have a sense of its overall structure. Often you cannot understand one bit without reading others. And sometimes one bit may be affected by what another bit says. An important example is the human rights provisions; you should never read one of the rights (e.g. the right to privacy (Article 25), or freedom of movement (Article 27)) without


Values of the Constitution
Preamble
The people acknowledge the difficulties of the past, and express their commitment to forging a united future.
Ch 1: Founding Provisions
Values; overview of institutions; language; religion; the people, national unity; citizenship
Ch 2: Our Natural Heritage
Environment; protection of land rights, principles of land use, and development; resources; future
Ch 3: Our Human Rights
Civil and political, economic, social and cultural; special groups; enforcement and application
Ch 4: Civil and Political Life:
People and civil society, participation principles; Bose Levu Vakaturanga, media, party role, regulation
Ch 5: Good Governance and Leadership
Principles; qualifications; appointment; conduct, removal, whistle blowers; Integrity Commission
Institutions and processes
Ch 6: National People's Assembly
What is does; and how it is appointed
Ch 7: President etc
Appointment of the President, roles etc;
Ch 8 Representation of the People:
Voters, elections, electoral system and how it works, Electoral Commission
Ch 9: Parliament
Composition, role of body and MP; floor crossing; procedure; term; early dissolution; public involvement; law making
Ch 10: National Executive
Principles, Prime Minister, Ministers, appointing/ electing, removal, vote of no confidence
Ch 11: Justice & Rule of Law
Structure of Courts; independence, appointment; role; removal, lawyers; JSC; Solicitor-General; DPP
Ch 12: Local Government
The system in principle: democratic, universal, integrated
Ch 13: Independent Commissions and Offices
Appointment, role, independence; removal; Constitutional Offices Commission
Ch 14 Public Finance
Control of public money, audit, Auditor-General; Salaries and Benefits Commission; Reserve Bank
Ch 15: Public Administration
Values; appointment; Public Service Commission; Ombudsman
Ch 16: National Security
Principles; role of forces, state of emergency; Disciplined Services Commission; police; corrections
Ch 17: Amendment
How to amend; what can't be changed – permanently, temporarily
Ch 18: Interpretation and Commencement
Principles of interpretation; transition; consequential amendment
Schedules
Citizenship; Protected laws on land; oaths of office; Codes of Conduct for public officers; removal procedures for public officers; Transitional Arrangements; Consequential amendments and repeals

being aware of Article 48, which explains that rights may be limited for good reason and if there is no other way of achieving the good purpose.

Two other very important things to be aware of are Article 185 with definitions of words, and Schedule 6 on “Transitions”. Sometimes part of the Constitution is simply not operating at first, and a provision in Schedule 6 may operate instead of it

PART II ANALYSIS

THE PREAMBLE

Preambles are increasingly used as an aid to interpreting other parts of a constitution. Art 184(1) states "*interpreting or applying this Constitution must promote the spirit, purport and objects of this Constitution*" (Article 184(1)). The Preamble is one place in which the spirit of the Constitution is set out.[2]

The Preamble to the Draft Constitution is an expression of some regret for the past "*our failure to create a single nation*" and determination for the future "*we resolve to create a modern, progressive, multicultural nation*".

It is designed to be inclusive, recognising all communities, but also showing appreciation of the longer presence in Fiji of certain communities. And it opens the Constitution with a strong statement of Fiji as a single, united nation.

CHAPTER 1: FOUNDING PROVISIONS

This Chapter sets out fundamental issues about the nature of the country and the state (meaning its government and governance). In doing so it captures the two main goals of the Constitution: nation building and democratic governance.

The provisions establishing democratic government in the Constitution are familiar, although they are tailored to the needs and desires of the people of Fiji. What is different about them from the standard Westminster model constitution is that democratic institutions and processes are value (or principle) driven. Chapter 1 sets out these values. Later chapters develop them.

[2] South African Constitutional Court judge, Justice O'Regan, used that country's preamble in *Bernstein v Bester* para. 150 (1996) to develop her judgment and said "It acknowledges the need to develop a new society in which all citizens can exercise their fundamental rights and freedoms."

Fijians will be less familiar with a constitution that contributes to nation building but this is an important aspect of the Constitution as a founding document of the nation. The values and goals in Chapter 1 are phrased in such a way that, in addition to informing decision making, they would bring Fijians together by articulating what Fijians are agreed upon. Moreover, a constitution that is more than a set of rules, but reflects a sense of shared nationhood, is more likely to become a document that is broadly respected and defended, and not subject to easy abrogation.

The key values of the Draft Constitution:

human dignity
freedom
human rights
equality
care for the less fortunate
tolerance
representing diversity
sustainable relationship with nature
rule of law
independent, impartial, competent and accessible justice
participation of the people
limitation and separation of powers
checks and balances
integrity, transparency, and accountability

ARTICLE 1 THE REPUBLIC OF FIJI

These values underpin the Constitution and provide the framework for its interpretation. The rest of the Constitution spells out in some detail the implications of these values. They serve two purposes:

(i) Addressed to the people and politicians and public office holders and employees they provide a clear and memorable list of the basic values and remind them that the Constitution is not merely about rules but also about building a country with a particular vision.

(ii) Addressed to courts they state unambiguously the values (or principles) that must underpin all governmental decisions.[3] Acts that infringe these principles as read in the context of the Constitution as a whole would be unconstitutional.

Describing Fiji as multicultural in the opening words of Article 1 emphasises the inclusion of all citizens in the nation (a common citizenry).

The inclusion of the concept "rule of law" is particularly important for good governance and law. The Constitution refers to the rule of law in a number of other places but it is Article 1 which asserts that the state is founded on the rule of law. This reference to the rule of law incorporates the principle of legality into Fiji's legal order and has various concrete implications for the exercise of governmental power including that all decisions of public officials (including decisions of all members of the government and the President) must have

[3] Kenyan courts have relied on the values set out in their Constitution, for example,
"Consultation set out in Article 89(7)(a) [about constituency boundaries] must not be read in isolation. It draws its life from the provisions of Article 10(2) which lays out the national values and principles of governance": *Republic v Independent Electoral and Boundaries Commission* (2012) para. 271.

legal authorisation and that all governmental decisions and actions (including the decision of Parliament) must be rational.

ARTICLE 2 THE CONSTITUTION

Article 2 establishes the supremacy of the Constitution and that any law or any act that goes against the Constitution is invalid. In response to the requirement for "true democracy" (see Decree No. 57), which includes "sustainable democracy" and "no more coups", Article 2 states that coups are illegal, "*any attempt to establish a government other than in compliance with this Constitution is unlawful*", that nothing done under the supposed authority of a coup is lawful and that no future immunity for coups is to be given.

If there is a successful coup, the whole Constitution – including this provision – would be abrogated. But this provision signals to any future coup plotters, and reminds those who would support coups, that they are illegal.

ARTICLE 3 VALUES GOVERNING POWER AND AUTHORITY UNDER THE CONSTITUTION

This focusses on the use of public power, which must be exercised only in accordance with the Constitution. Clause (2) captures a theme of the Constitution –

> *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.*

ARTICLE 4 DISTRIBUTION OF SOVEREIGN AUTHORITY

Article 4 recognises that true democracy means that the exercise of power must be authorised by the people and distributes power to the institutions created in the Constitution.

ARTICLE 5 LANGUAGES

The protection of the languages spoken in Fiji, and the special recognition of the iTaukei and Rotuman languages confirm the commitment to multiculturalism and respect for history.

No language is designated "national" or "official" because neither word has a precise meaning. Decisions about the use of language in particular situations need common sense and respect. All three mainly used languages (referring to "Hindustani" as in previous constitutions) are of "equal status" This is clearer that the idea of an "official" or "national" language which should mean it is applied in a principled way and government and courts will ensure that, although the use of only one or two languages may be appropriate in some contexts, none of the three languages is marginalised.

ARTICLE 6 RELIGION

Decree 57 required a "secular state". A secular state is not a state hostile to religion but a state that does not identify with and privilege a particular religion. Article 6 makes this clear, recognising the importance of religion but emphasising the separation of the state from religion, the personal nature of religion and the equal respect for all religions. It provides the legal framework for dealing with matters of religion and state which will include schools and hospitals run by religious institutions; zoning laws concerning churches, mosques and temples etc; religious dress codes in places of work etc. ➢See Article 26 on freedom of religion

ARTICLE 7 THE PEOPLE OF FIJI

Article 7 contributes to nation building by setting out shared values.

ARTICLE 8 NATIONAL UNITY

This is self-explanatory. Its legal role is to provide underlying values (see above).

ARTICLE 9 CITIZENS OF FIJI

Citizens are people who hold Fijian nationality. Not everyone affected by the constitution is a citizen. But who is or may be a citizen is an important issue and has usually been dealt with in Fiji's constitutions.

Article 9 deals only with a few basic points and most of the citizenship provisions are in Schedule 1. The provisions are consistent with the Citizenship Decree. The main points are:

- being born in Fiji usually makes a person a citizen (the only exception being a child of a foreign diplomatic, unless the other parent is a Fiji citizen;
- a person born abroad has a right to be a citizen if either parent was citizen;
- children adopted by citizens or whose parents become citizens while the children are under 18 have the right to be citizens ;
- it is possible to hold Fiji citizenship and foreign citizenship at the same time;
- someone who used to be a citizen may become a citizen again;
- a spouse of a citizen, or someone who is in a relationship equivalent to marriage but not formally married can become a citizen, provided they are living in the country and have been for the three years before applying;
- any other person who has been living in the country for 5 out of the previous 10 years may apply to be a citizen; laws can impose conditions.

ON THE DETAIL:

Schedule 1 section 2(2) deals with abandoned children. It is slightly different from its predecessor in the 1997 Constitution which applied to "infants" (defined in the Interpretation

Act as anyone under 21). The Draft Constitution reduces the age to 14: any child found who seems to be under 14, and whose parents and nationality are unknown, is assumed to be a Fiji citizen. This fulfils Fiji's international obligation to avoid statelessness and ensures that people do belong somewhere.

Schedule 1 section 3(1)(a) (like the 1997 Constitution) allows a person to become a citizen by registration if either of their parents was a citizen irrespective of where they are born or living. This could mean that children of families who have not lived in Fiji for many generations would remain citizens. Sch. 1 section 3(3) allows Parliament to put a limit on this.

Schedule 1 section 3(4) further regulates the possibility of people not living in Fiji claiming citizenship by registration: A person born overseas, or adopted, or whose parents became citizens when they were children, or who are reclaiming lost Fiji citizenship cannot claim or reclaim that citizenship indefinitely: they can do so until they are aged 25, but if they want to claim that citizenship when they are older than 25 they cannot do so unless they have been living in the country for at least 3 of the 5 years before they apply.

CHAPTER 2 OUR NATURAL HERITAGE

Chapter 2 turns from the people to the land and environment. Certain principles recur in this Chapter:

- Security
- Consultation
- Public benefit and
- Environmental responsibility.

Security underpins the provisions that protect the existing basic structure of land law in Fiji which continue the system of indigenous land ownership but also intend to make tenants and freehold land owners more secure. (The basic structure is that land is either state (formerly crown) land, indigenous land or land held in freehold title.) The Chapter also constitutionalizes the fundamental principle of Fijian land law that generally iTaukei land is unalienable.

Consultation is important because matters relating to land and land ownership are frequently misunderstood.

Public benefit and environmental responsibility: Many people – in Fiji and elsewhere – believe that land is "entrusted" to them: they must not abuse it and must hand it on to future generations, and use it in a manner that benefits the entire community.[4] This approach is

[4] The Chiefs of Ife in Nigeria told a land commission: "I conceive that the land belongs to a vast family of whom many are dead, some are living and countless numbers are yet unborn."

reflected in the Draft Constitution: land must be used responsibly, the interests of future generations must be respected, including through environmentally responsible policies, the public benefit must be taken into account and the public means the entire nation.

ARTICLE 10 THE NATURAL ENVIRONMENT

Article 10 sets out the principles underpinning the constitutional arrangements relating to environment.

ARTICLE 11 SECURITY OF EXISTING LAND RIGHTS

Article 11 secures the basic structure of land ownership in Fiji in the Constitution and as well as existing rights in land including leases etc.

Article 11(1) secures all existing "rights and interests" in land. But Article 11(2) goes further. The use of the phrase "ultimate ownership" emphasises two main things: (i) that owners of customary land may not sell the land permanently or transfer it permanently in any other way (subject to a single exception*) and (ii) that the state is not in any sense the owner of land held under customary law. Land owners may (unless a law prevents them) dispose of some of their rights. For example, they may lease their land (part with the land for a certain time so that someone else has exclusive possession during that time). Similarly, the state may limit ownership rights by, for example, imposing restrictions on the way land is used (for example to stop environmental degradation or to disallow industry in certain places). It would take a constitutional amendment to change the rule that landowners may not sell land permanently: a very strong protection.

*The exception is in the Bill of Rights and is very narrow. Article 37 on the Expropriation of Property allows expropriation only (i) as a last resort; (ii) when necessary for a public purpose; and (iii) with compensation.

Article 11(5) also includes an important principle in relation to public land: the state holds it in trust for the people; how it is used must be guided by the interests of the people as a whole.

ARTICLE 12 PRINCIPLES OF LAND USE AND ENVIRONMENTAL PROTECTION

Article 12 mainly contains statements of principles mentioned earlier. These are clear and government policies and legislation will have to comply with them. To remove any doubt, the Article also makes it clear that government may regulate land and its use.

Two points of particular importance are:

- Clause (2) is a statement of existing law: that the foreshore belongs to the people (it is public land held in trust for the people).[5] Putting it in the Constitution means that ordinary law cannot change it ➢***Important***: This provision should be read with the right to freedom of movement (Article 28(5) and (6).
- Clause (6) says that those who occupy land must be required by planning laws to give notice to their neighbours (in the broad sense of those who may be affected) of plans to make particular use of their land. This is intended to ensure good neighbourliness in land use; and to avoid the ongoing problem of lack of communication between the state and state bodies and citizens as well as between citizens which leads to misunderstanding and, often, racial tensions. ➢This Article should be read with Article 38 on environmental rights.

ARTICLE 13 FISHING GROUNDS AND MARINE AREAS

This marks the importance of fishing and marine areas generally.

ARTICLE 14 NATURAL RESOURCES

Article 14 sets out binding principles for the management of natural resources. Clause (1) deals with governance. Clauses (2) – (4) deal with minerals. The principles in clause (1) are of particular importance to the regime governing minerals as a combination of mistrust and misunderstanding pervades people's understanding of mineral rights.

Article 14 must be read with the definition of minerals in Article 185 ("'minerals' does not include clay, sand, gravel, stone, or other common mineral substances, except those that are in rivers or under water"). This is taken from the existing Mining Act .

Clause (2) incorporates existing law (Mining Act s. 3) into the Constitution in stipulating that minerals are not owned by land owners but by the State. Clause (3) reiterates the provisions in section 186 of the 1997 Constitution which provided that owners of land in which minerals are found have a right to a share of the benefit. It revises and clarifies the 1997 wording by clearly articulating the right hidden in s 186(3) of that Constitution.

ARTICLE 15 DUTY TO CONSULT WITH RESPECT TO LAND AND RESOURCES

Some iTaukei relied upon the UN Declaration on the Rights of Indigenous Peoples which includes the concept of "prior informed consent" to measures that affect indigenous peoples. While in principle it is desirable that everyone is able to understand and consent to government actions that affect them, an absolute requirement of this sort is not realistic as there may be situations in which the national interest reasonably demands land use which a local community is not happy with. Nonetheless, consultation and discussion are likely to

[5] State (Crown) Lands Act S. 21 (1) No lease of any Crown foreshore land or of any soil under the waters of Fiji shall be made without the express approval of the Minister and such approval shall not be granted unless the Minister declares that such lease does not create a substantial infringement of public rights.

produce greater agreement, especially if they lead to more carefully thought-through projects. This is the objective of these provisions.

The provisions also draw some inspiration from Canada where first nations must be consulted if developments are likely to affect their interests.

ARTICLES 16 NATIONAL CONSULTATIVE LAND FORUM AND 17 PROTECTION AND REFORM OF LAND LAWS

In the past is has been very hard to change the law about land. This was intentional, designed mainly to protect iTaukei communities' land rights and the procedures of the Native (iTaukei) Land Trust Board. Certain laws related to land could be changed only if the changes received the approval of two-thirds of both houses of Parliament as well as the approval of nine of the fourteen Senate members nominated by the Bose Levu Vakaturaga.

The Constitution includes these laws as a protected category of laws (Schedule 2) but changes the mechanisms for amending them. The absence of a Senate makes it impossible to use the methods in the 1997 Constitution. Instead, to ensure that no small group can either force a change in the land laws or block a change completely, and that no change can take place without a serious, truly national, dialogue, the Constitution establishes a National Consultative Land Forum (NCLF) that participates in their amendment.

The Draft Constitution requires legislation to set up the NCLF, representing three relevant sector of society (government, owners and tenants) with an independent chair "*not the holder of any public office, and not a representative of the interests of either landowners or tenants*" (Article 16). This body is to educate people about land issues, to carry out research, and to propose laws and policies on land.

The most important responsibilities of the NCLF are set out in Article 17: if changes in the protected laws are proposed they must be discussed by the NCLF. If all the groups within the Forum reject the proposed changes they can go no further. If all the groups agree with the changes Parliament can pass them, but with the support of over half the members (which is more than the usual rule for passing laws – at least half of those present and voting and at least 35 must be present (Article 98).

If one sector of the NCLF opposes the change, it cannot be passed without the support of 48 members of Parliament (two-thirds).

CHAPTER 3 – OUR HUMAN RIGHTS

The chapter on rights in the Draft Constitution fits into the now normal tradition of constitutions, and most of the provisions in this chapter are not very different from those in other modern constitutions or indeed in Fiji's own previous constitutions. There are, however, some features that merit special attention:

- the detailed nature of the non-discrimination provisions,
- the approach to when and how rights may be limited,
- the spelling out of rights of certain particular groups in society,
- the inclusion of one or two unusual rights,
- the horizontal application of rights
- the enforcement mechanisms.

These points will be highlighted as they arise.

Note: The Human Rights Chapter is divided into three parts. Part A is the Bill of Rights. Part B contains an elaboration of certain rights (people with disabilities; women, men and families; the elderly; religious, cultural and linguistic communities). Part C contains the "operational provisions" that provide direction on applying the Bill of Rights.

UNDERSTANDING HUMAN RIGHTS

Before looking at the individual articles, it may be helpful to explain how human rights work. People formed societies, including the modern state, because they are human. They are not human because they live in a state. The Draft Constitution, and this Report, consistently speaks of "recognising" rights; it is not giving the people something, it is recognising their full humanity. It is saying that the government has no power to act in a way that attacks or undermines human rights. Laws and actions that do not respect human rights are not valid.

Human rights issues may arise as a matter of political and moral discussion: politicians may justify their action in terms of human rights, and citizens may support their demands in terms of rights. The Draft Constitution also requires those introducing legislation in Parliament to deal with the possible human rights implications. And the President may send a law back to Parliament if he or she believes that it is unconstitutional – which could include violating human rights.

Before the courts, human rights may arise in different ways; illustrations are:

- someone accused of a criminal offence might argue that their trial is unconstitutional because it violates human rights – e.g., they were forced to make a confession or not given a chance to question witnesses
- someone accused of an offence might argue that the act was not criminal at all, because the law was invalid because it violates a right such as freedom of speech

These people did not bring the case to court, but they use rights as a defence, or as a way of challenging the court procedure – they want not to be convicted. Other cases may be brought to court relying on human rights, such as:

- a person argues that a specific decision by the government not to grant a licence infringes the right to just administrative action (they want the decision reversed)
- someone challenges a law because it violates human rights, even if there is no person has actually suffered yet (they want the law, or part of it declared unconstitutional)
- another argues that a refusal to admit them to a school was based in discriminatory grounds, and they want compensation

Art 120(1) says: "Everyone has the right to institute court proceedings alleging that any law, act or omission is contrary to this Constitution." Art 120(2) spells this out in more detail. So in these last three examples the case might be brought to court by someone not personally affected, or by an organisation, to ensure that people are not deprived of justice by poverty, ignorance or other reasons.

The Chapter is called "Our human rights", consistently with the style of drafting, and the focus on the people. Within the Chapter, the "Bill of Rights" lists all the rights specifically recognised. No particular importance is attached to the terminology of "freedom" as opposed to "right"; it is just that traditionally some are expressed as "freedoms".

Most of the rights recognised are not restricted to citizens: "everyone" has rights if they are in Fiji. Rights to vote are restricted to citizens.

The rights are grouped into related rights, as far as possible. However, this does not imply any distinction in terms of importance or enforceability of rights. There is no use of the concept of "Directive principles" (as adopted in the Republic of Ireland, then India and various other countries) which is a list of "principles" that are not directly enforceable. Though some countries' courts have made some effective use of such principles, their impact is unpredictable. .

Rights, it has been said, are indivisible. A really democratic and rights-respecting regime cannot pick and choose among rights. Rights support each other.

ARTICLE 18 RIGHTS AND FREEDOMS

The list begins with an article making a few basic points about rights: especially that rights may be limited (for more detail see Art 48) and placing a special responsibility upon the state: to "*respect, protect, promote and fulfil the rights and freedoms*" (Clause (3)). To "respect" rights is intended to refer to the obligation not to act in a way to violate them; to "protect" them requires something more positive – to stop others violating the right; to "promote" would mean to educate people to respect rights, and to have policies that act as an incentive – for example taxation laws may include incentives to protect certain rights, tobacco tax may protect the right to health; to fulfil the right requires more positive action,

for example to spend money to provide lawyers for prisoners or food for the starving. This series of actions as a way of thinking about rights was developed by UN special rapporteurs particularly on economic social and cultural rights.[6] It is useful to think about all rights like this. The use of this language in a constitution comes from South Africa (s. 7(2)).

ARTICLE 19 RIGHT TO LIFE

This right has given rise to much discussion and litigation in some countries, for example over the death penalty. Current law in Fiji does not provide for the death penalty. Providing more detail on this right would not be very helpful..

ARTICLE 20 RIGHT TO DIGNITY

This is a fundamental right, which many people consider underlies all other rights. Famously, the German Constitution (Basic Law) opens with the words "Human dignity shall be inviolable." It is also recognised in the constitutions of South Africa and Kenya among others.

ARTICLE 21 RIGHT TO EQUALITY AND FREEDOM FROM DISCRIMINATION

Equality is demanded by Decree No 57 (see above) and generally viewed as a truly basic right: most complaints about rights violations in society derive from a sense of injustice, of like not being treated alike.

Being "*equal before the law and has the right to equal protection and benefit of the law*" implies both that the law itself must not be unfair, and the way it is applied must not be unfair.

The provision that the state may not "*discriminate directly or indirectly against anyone*" (also in the 1997 Constitution) means that discrimination in fact is not allowed whether it is intended or not or whether it is express or not. Examples would include (taking just gender and employment examples):

- Having a minimum height requirement (which would limit the eligibility of women).
- Attaching inferior benefits to "part time employment" but in practice it is women who receive those inferior benefits because most part time workers are women.

Note: Section 38(2) of the 1997 Constitution stated that "A person must not be *unfairly* discriminated against, directly or indirectly, on the ground of …." It recognized that some

[6] See for example "The right to adequate food and to be free from hunger: Updated study on the right to food, submitted by Mr. Asbjørn Eide in accordance with Sub-Commission decision 1998/106" E/CN.4/Sub.2/1999/12, 28 June 1999, which speaks of respecting, protecting, assisting and fulfilling. "Assisting" is now often expanded to "promoting".

distinctions are "fair". But, as South Africans have found, it makes the concept of discrimination difficult to understand – people do not easily get to grips with the idea of "fair" discrimination. Moreover, the context and the language "discriminate against" conveys clearly that it is discrimination that wrongly disadvantages people that is at issue. There is also no evidence that the removal of the word "unfair" would change the way the clause works or that it has become an essential part of Fiji's equality jurisprudence. Accordingly Article 21(2) of the Draft does not include it. As explained below, the fact that in some circumstances it may be reasonable to make distinctions on the grounds listed in this clause is dealt with in clause (5).

The main grounds on which discrimination might take place and is not permitted (unless there is a legitimate reason) are spelled out as *birth, age, ethnicity, social origin, race, colour, primary language, religion, conscience, belief, culture, sex, gender, gender identity, sexual orientation, pregnancy, marital status, disability, social status or economic status*". Some of these may require explanation:

> *Birth* might mean the fact that a person's parents were not married to each other, or perhaps other circumstances of their birth (born in a stable, born under a particular sign of the zodiac etc.).
>
> *Sex* refers to biological sex.
>
> *Gender* refers to the way society imposes certain roles and assumptions on people because of their actual or perceived sex.
>
> *Gender identity*– the most common gender identities are male and female but some people have characteristics of both sexes, or have a sex change operation or change of lifestyle in gender terms; the reference to gender identity provides protection to people from being discriminated against because of their particular gender identity.
>
> *Sexual orientation* refers to a person's preference in sexual relations.
>
> *Social status* would include education level or caste.

The Article provides discrimination is not allowed "*on one or more grounds, including …"* "including" means that there might be some other bases on which people discriminate against other people, and these would also not be allowed; some countries have mentioned clan or tribe or dialect. In Canada, in a particular context, discrimination on the basis of citizenship was considered contrary to the equality provision although citizenship was not mentioned expressly.

A number of people expressed opposition to gay marriages. But many of those people also said that they did not wish gays and lesbians to be discriminated against. At present the law of Fiji does not recognise the possibility of a marriage between two people of the same sex. It is not clear that there is any desire on the part of the gay community in Fiji to press for the

possibility of marriage. There are few countries in which gay marriage is possible and is completely uncontroversial. If the question of gay marriage were raised before Parliament MPs would have to decide whether or not to support it and pass a law. Under the Draft Constitution, this would involve wide public participation (see Articles 55 and 101). If an individual or group challenged in court the law that requires marriage to be between a man and woman, the case would have to be resolved like any other issue that involves a restriction on rights on the basis of this Article, Article 48 (the limitation clause) and perhaps others. The main question would be whether the law is reasonable and justifiable in a democratic society.

The Draft Constitution follows previous Fiji constitutions in saying that not only the state but others (individuals, companies etc.) must not discriminate (Article 21(4)). But it goes further than previous constitutions: they said that discrimination in access to "shops, hotels, lodging houses, public restaurants, places of public entertainment, public transport services, taxis and public places" was outlawed"; the Draft makes the prohibition on discrimination by private bodies and individuals more general.

The Draft assumes that generally discrimination on any of the listed grounds is unacceptable. However, occasionally discrimination on one of those grounds is acceptable. It is not unreasonable for example, to hire a female nurse to deal with the intimate needs of women patients. The Draft acknowledges this sort of thing in Article 21(5) which states "*Treating one person differently from another on any of the grounds set out or contemplated in clause (3) is discrimination, unless it can be established that the difference in treatment is reasonable in the circumstances.*"

The 1997 Constitution included a single-section chapter called "Social justice" which required affirmative action programmes for disadvantaged individuals and groups so that they could get access to land and housing, education and public employment etc. The Decree also mentioned "social justice", but did not indicate what it meant. However, the People's Charter is of some help (see box).

People's Charter: Preamble

We believe that social justice means equal dignity and, in our aspiration to build a just and good society, we must ensure this for all our citizens by conferring on all our members an honoured place.

Therefore, we hold that the aim of social justice and affirmative action programmes is to restore dignity to all those who are poor and disadvantaged, by ensuring that their basic needs are met.

We acknowledge and accept that while in the short term affirmative action programmes are essential, we hold that in the long run, job creation, the promotion of entrepreneurship, and the empowering of our people to take initiative and responsibility in improving their own lives and standards of living, are much more important.

The Draft deals with issues of social justice in various places in the Bill of Rights. Article 21(6) permits affirmative action, but does not require it. The main function of Article 21(6) is

to protect affirmative action programmes that Parliament decides upon from being declared to infringe the equality clause. The Draft places much more emphasis on the rights of all to health, education, housing, food and water, and the hope that a just and stable system of government, accountable to the people, will lead to a true society of social justice.

ARTICLE 22 CHILDREN

Fiji is a party to the International Convention on the Rights of the Child. Like other treaties the Convention is not automatically law in Fiji. By becoming a party, the country accepts an obligation to implement the treaty (through its laws, policies and actions) and Art 22 is an important step, making the rights recognised part of Fiji's national law.

The vision is of children growing in understanding to become adults, guided and helped by their parents, whether they are married to each other or not, exploring the world and learning to make their own decisions.

Article 22 reflects the major provisions of the Convention (though the right to education is dealt with separately – Art. 33). It expands a little on the rights in the Convention by its stress on the right to learn (perhaps a broader concept than education), while the right to ask questions is a more child-friendly way of expressing the Convention's "include freedom to seek, receive and impart information and ideas of all kinds" (see also Art 27(1)(a))

Although this Article deals with a specific group of people, it is not included in Part B of the Bill of Rights on Elaboration of Certain Rights because it does not merely elaborate on rights already expressed in the Bill of Rights. It gives children specific rights that are not covered elsewhere in the Bill of Rights, or expands on those rights, taking into account the vulnerable nature of children and Fiji's obligations under the Convention:

- the rights in Art 22 (1)(b) to basic nutrition are stronger than the rights in Art 35 about an adequate standard of living because the Art 35 rights are not always immediately enforceable rights but are subject to "progressive realisation" (see discussion of Art 35)
- Art 22(1)(h) puts an obligation on <u>everyone</u> to protect children from abuse by using the words "Every child has the right *to be protected from*…."
- Art 22(1)(i) lays down stringent requirements for the detention of children in line with Article 37(c) of the Convention
- Art 22 (1)(e) clarifies the Convention by making it clear that both parents of a child have obligations towards the child, whether they are married to each other.

Art 22(2) states "A child's best interests are the *primary consideration* in every matter concerning the child." Law sometimes says that a child's best interests are "paramount" (i.e. override everything else) – as in the Family Law Act 2003 in Fiji. However, that stringent test overlooks situations in which other interests may legitimately be important (for instance it may be legitimate to imprison a parent although this would not be in the child's best

interests). The phrase "primary consideration" ensures that the interests of a child are given considerable weight but that they may be overridden in certain cases.

Corporal punishment is dealt with in Art 24 on Right to Liberty and Personal Security.

ARTICLE 23 FREEDOM FROM SLAVERY, SERVITUDE FORCED LABOUR AND TRAFFICKING

A similar provision is found in most constitutions. Human trafficking is explicitly included, recognising that there have been instances in Fiji and that it is a growing problem internationally.

Clause (2) on customary and communal obligations is retained from earlier constitutions in recognition of the concerns expressed about declining respect for village traditions and rules. It makes it absolutely clear that obligations to contribute to a community are not defined as forced labour and means that people will not be able to say "It is against my human rights to have to join in keeping the village clean and tidy", provided the village obligations are reasonable.

ARTICLE 24 RIGHT TO LIBERTY AND PERSONAL SECURITY

This Article groups a number of rights concerned with physical and psychological security. The threats to security come not just from the state. Mental torture, for example, could occur within a family (clause (2)). It is important to note that the duty of the state to protect (Article 18(3)) means that the state may be legally liable if it fails to take reasonable steps to protect people from, for example, violence, including violence against women. In some countries human rights have been used by courts to hold the police liable for failing to protect people from violence.

ARTICLE 25 RIGHT TO PRIVACY

The right to privacy may be infringed by state action and by private action (unnecessarily and unreasonably intrusive media reports or the interception of telephone calls may be examples). This right is particularly important in the light of the recognition of the right to information (see Article 32 and also the Access to Information Law appended to the Draft Constitution). Fulfilling a right to information may infringe a person's privacy. On the other hand, respecting the right to privacy may prevent the giving of information. The principles of Article 48 are the way to approach this possible dilemma. (See the discussion of Article 48.)

ARTICLE 26 FREEDOM OF RELIGION, BELIEF AND OPINION

Clause (2) protects mainly religious belief, and its manifestation through worship and teaching, while clause (3) protects people from being compelled to do things, including taking oaths, contrary to their belief.

The Article protects absence of religious belief also, and any other sort of belief and opinion, which might be political, philosophical or scientific, for example.

ARTICLE 27 FREEDOM OF EXPRESSION, PUBLICATION AND MEDIA

Every form of expression is protected, and many are spelled out: this clarifies the breadth of this important right, for both those who may wish to express themselves, and those who may be tempted to suppress expression.

Under clause (2) no constitutional protection is given to certain sorts of expression, including advocating war and insurrection against the Constitution (another anti-coup measure), or advocating violence based on hatred because of religion, ethnicity disability or other grounds covered by Article 21. (The word "contemplated" in (2)(c)(i) is important because Article 21 does not provide a complete list of the kinds of discrimination that are impermissible.) Clause (2) does not make any of these forms of expression legal wrongs: that needs to be done by law. Article 27(2) means (to take one example) that a person who is accused of a crime established by law for saying something like "Kill all Muslims" cannot defend him or herself by saying "I was exercising my freedom of speech." In fact such a person would probably be committing sedition – see Crimes Decree s. 66.

Clause (2) does not use the expression "hate speech", because it is vague (does it mean speech showing hatred or speech inciting hatred?). It is only speech inciting violence that has no constitutional protection at all. This does not prevent law being passed which penalises speech expressing or inciting hatred short of violence. Such a law would be permissible if it met the test set out in Article 48.

ARTICLE 28 FREEDOM OF MOVEMENT AND RESIDENCE

These rights may be relevant to family, work and personal life or even political concerns. Clause (4) is a provision from the 1997 Constitution (s 16). It states: "*Every citizen or former citizen, and any foreign spouse, widow, widower or child of a citizen, has the right to enter Fiji and to remain and reside in Fiji.*" It is put here because it is a right and because including it in the Bill of Rights allows it to be limited by Parliament if the limitation is reasonable (see Article 48). So a law might allow the exclusion of a convicted criminal who is a former citizen or who marries a citizen. If clause (4) was in Schedule 1 with the other provisions on citizenship, it could not be limited in any way because Article 48 applies to the Bill of Rights only. Instead, Schedule 1 itself would have had to include either the detailed reasons for excluding certain people covered by the provision or some grant a general discretion to Parliament to exclude certain people (e.g. "undesirable individuals"). Neither of these approaches is acceptable in a country that protects rights seriously – both grant too much, undefined power to the legislature.

Clause (5) (*Everyone has a right of access to foreshore land, reefs and similar marine areas*) is included here for the same reason as clause (4). There may be circumstances in which the public's right to the foreshore should be limited. Including the right here allows reasonable exceptions that meet the Article 48 test. In addition, clause (6) recognises that some of the foreshore is not currently accessible and permits the right of access to be restored gradually.

ARTICLES 29 FREEDOM OF ASSOCIATION AND 30 FREEDOM OF ASSEMBLY, DEMONSTRATION, PICKET AND PETITION

These are closely related rights. Article 29 concerns simply being associated with others and also the forming and belonging to organisations. Article 30 recognises the right to meet with others, to demonstrate in various ways, and to present petitions.

ARTICLE 31 POLITICAL RIGHTS

The rights in Articles 29 and 30 may be exercised in relation to activities not necessarily thought of as political.

Article 31 relates specifically to political activity; clause (1) relates other rights to membership of political parties or support of a cause.

Article 31 is carefully drafted: Clauses (1) and (2) apply to all citizens while clause (3), which concerns the right to vote and to be elected etc, applies to citizens over 18 only.

Clause (2) recognises that every citizen, even those under 18, has a right that fair elections should happen, even if they cannot personally take part. Fair elections are a critical aspect of good governance, and everyone has the right to good governance.

Clause (1) recognises that every citizen has the right to join a party and to campaign for a party or another cause. If Parliament thinks that children below a certain age should not be able to join a political party, it may pass a law limiting the rights of children to join a party. The law will be a valid limitation of the right if it passes the test in Article 48. But "political cause" might not involve parties: children might march for the rights of the child, or for environmental protection, for example, and it may be that a law that attempts to prohibit this will not be considered a legitimate limitation of the right.

ARTICLE 32 ACCESS TO INFORMATION.

The ability to get information, especially from public bodies, is a vital tool for ensuring democracy and accountability and for fighting corruption. The 1997 Constitution provided that law must be passed on that, but this was never done. The Draft makes this an immediate right.

Article 32 deals with information from both public sources (information held by State organs) and private sources. Everyone has access to all information held by State organs

unless that right is reasonably limited (in a way that meets the Article 48 test) by a law. People have the right to information held by private people only if that information is

necessary to implement a right. So, for example, one might need information on the way a mining company purifies the minerals that it extracts to implement the right to a clean

UNIVERSAL DECLARATION OF HUMAN RIGHTS – EXTRACTS

Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

environment. Article 32 allows one access to that information.

To make the right easier to implement immediately, the Commission appended to the Draft Constitution an Access to Information Law. This Law draws on earlier draft Access to Information Bills for Fiji, and on advice from a leading NGO in the subject and a South African expert. This Law covers access to information held by the State only. It spells out the lawful basis on which the State may withhold information. For a public record to be exempt it must clearly relate to one or more specific public interest grounds that would be served by non-disclosure, all of which are narrowly defined and set out in the Law. Moreover, all of the exemptions are subject to a public interest over-ride, which means that, where the public interest in disclosure is greater than the public interest in withholding the information, the information should be disclosed upon request. In other words, the Law spells out ways in which the right to access to information held by the State is limited. In addition, under this Law, the Ombudsman would have supervisory functions over the implementation: hearing appeals against refusals and issuing guidance on when and how public information should be released.

As noted, the Law does not deal with the right to get information from private sources if needed to protect rights. If a person claims access to information from a private source, the person holding the information might resist on the basis of existing law, for example the law about legal professional privilege, the tort of breach of confidence, or contract. If the law on which the person holding the information is justified under Article 48, the information will not be disclosed. But, if circumstances do not justify nondisclosure under the relevant law, a court would order the information to be disclosed.

Clause (3) requires the State to publish all important information. In many countries governments prefer to keep embarrassing information secret, not to publish reports that they disagree with.

SOCIO-ECONOMIC RIGHTS

Articles 33-38 deal with economic and social rights – directly connected to the achievement of social justice. Most of these reflect the International Covenant on Economic, Social and Cultural Rights, and the Universal Declaration of Human Rights. Fiji is not a party to the Covenant but, like all UN members, it is bound by the Declaration. The relevant parts of the Declaration are in the Box.

The Covenant on Economic Social and Cultural Rights expands Article 22 of the Declaration ("in accordance with the organization and resources of each State") and obliges a government to "*take steps,… to the maximum of its available resources, with a view to achieving progressively the full realization of the rights … by all appropriate means*" (Art. 2) – not to achieve miracles. The nature of the obligation has been analysed in some detail by the Committee on the Covenant and by various Special Rapporteurs. Firstly the state must

achieve "at the very least, minimum levels of each of the rights" and give priority to achieving this minimum level. Beyond that the duty is to "*respect, protect, promote and fulfil*" the rights.

ARTICLE 33 EDUCATION

Clause (3) permits progressive realisation of the right to education at various levels: but not for free primary education, to which the government is already committed.[7]

Issues of education provided by private, mainly religious, groups are dealt with here (clauses (4) and (5)): they must meet national standards, and religious observance and education must not be required of students.

Those national standards must promote the constitutional values (clause (7)).

The 1997 Constitution recognised the right to education. The Draft differs mainly in recognising that that right covers all levels of education. Unlike the 1997 Constitution, the right to education in this draft is embedded in an understanding of the international approach to socio-economic rights through the reference to the progressive realisation of the right.

ARTICLE 34 ECONOMIC PARTICIPATION

This Article does not directly mirror the Covenant, but appears here because it deals with the right to work and the ability to participate in the economy in other ways. Clause (2) reflects the demand of many people: to be part of the nation in an economic sense, able to buy and sell their produce and labour.

ARTICLE 35 RIGHT TO AN ADEQUATE STANDARD OF LIVING

This Article picks up a concept from the Declaration and the Convention: an adequate standard of living, including being able to work, having housing, food and water. A "*just minimum wage*" in clause (1)(a) reflects not only an issue raised frequently in submissions to the Commission, but also the UDHR (Article 24.3). Clause (1)(b) recognises a specific aspect of access to markets: physical access ("*transportation or other means of conveying goods*") to markets to sell goods (as opposed to the broader concept of market in Article 34). It addresses a particular problem for those producers isolated by long stretches of water or difficult terrain.

Article 35(1)(f) concerns the right to social security and explains the concept more clearly than the Covenant.

[7] As long ago as 1996 the then government reported to the Committee in the Rights of the Child "Tuition fee-free education is provided to all children in primary schools which cater mostly for ages 6 to 13. The aim is to eventually make education compulsory." (Initial Report) CRC/C/28/Add.7.

The right to health (clause (2)) is not expressed in the language of the Covenant which protects the right to the highest attainable standard of health. The language of the Covenant is intended to mean that the state is not expected to achieve the impossible: some people have physiques that limit what can be achieved. The Commission decided to omit this phrase because it is unclear and puzzling, and common sense will make the same point.

The rights in clauses (1) and (2) are to be achieved progressively (Article 35 (5)). But for all these rights the immediate obligation to respect the rights would apply: no government should positively undermine its people's rights to housing, food water and a decent wage. And, under clause (3) certain aspects of the rights are immediately realisable: emergency medical treatment or eviction from their home without a court order. Hospitals should not turn away people in dire need of emergency treatment; this applies to both public and private hospitals. The health sector will have to develop guidelines. Evictions will be possible but there must be a court order. Again, the possibility of law limiting the rights applies (Article 48), provided this is justified in a democratic society.

ARTICLE 36 EMPLOYMENT RELATIONS

This Article deals with fair working conditions. Experts on labour rights were consulted to ensure it meets international standards.

The title of Article 36, "Employment relations" is different from section 33 of the 1997 Constitution to ensure that the clause encompasses both practices in individual employment relations and collective labour relations practices.

Clause (1) is based on subsection (3) of the 1997 Constitution but it changes the language. It simply gives everyone the right to "*fair employment practices and working conditions*". By contrast, subsection (3) of the 1997 Constitution referred to "fair labour practices, including humane treatment and proper working conditions". The new provision excludes reference to "humane treatment and proper working conditions" and also does not take up suggestions that the provision should provide a fuller list spelling out in some detail what "fair employment practices" (eg reasonable practices, no discrimination, fair remuneration etc) means because this is unnecessary. Firstly, "fair" should do the work of the adjectives 'proper' or 'reasonable' and covers inhumane treatment and many other things. Secondly, discrimination in employment is best dealt with under an equality clause that will contain all the elements of discrimination (direct, indirect, justifications etc) and the grounds (ethnicity, gender, disability etc). Note also, "fair" is a proportional concept which, following international understandings, should take into account the three relevant interests: worker's, employer's and society's interests.

Subsection (2) of the 1997 Constitution gave "workers" the right to organize and to bargain. The new Draft changes this. Clause (2) gives workers the right to join unions. But, the right to bargain collectively is not given to workers individually because it is a collective right.

Instead, clause (4) gives this right to trade unions. Giving the right to bargain collectively to individual workers could be used to allow 'individual' bargaining, which would undermine collective bargaining – a stratagem used in both New Zealand and Australia (and found to be in contravention of ILO Convention 98 on collective bargaining).[8]

Clause (3) gives employers the right to form employers' organizations and clause (4) gives employers the right to organize and bargain collectively. The right to form employer organisations is fundamental to collective bargaining and the requirements under articles 2 and 3 of ILO Convention 87. The constitutional object of a clause such as this is to permit collective bargaining and if employers or their organisations can be prevented from doing so or be interfered with by government in doing so, that object will be frustrated or amount to a nullity. It is an essential requirement.

Note also that including a right to "lock out" was considered but rejected because the international practice is not to constitutionalise the right to lock out and how and what form the exercise of employer power takes should be left to Parliament without constitutional interference.

THE SIGNIFICANCE OF INTERNATIONAL STANDARDS AND EXPERIENCE

The inclusion of social and economic rights in a constitution invites reference to international law, and the interpretation of the rights by international bodies, and to the law of countries, like South Africa, with similar provisions. Comparative experience can also guide Fiji in the implementation of these rights.

A good deal of thought at the international level has also been given to the question: "a right to what?" People have a right to food – but it does not mean a right to caviar, or a right to rice when dalo would be enough. International mechanisms suggest that the food must be adequate in quantity, and in nutritional value, accessible and available, and also culturally acceptable. The idea of "education" to which there is a right has been refined and developed – the right is to accessible education that is appropriate in content and quality. And the right to health does not mean a right to be healthy – but it would include a right to health care that is reasonably accessible (geographically and financially) and of reasonable quality, as well as acceptable culturally and in other ways.[9]

The committee on ESCR has emphasised that lack of resources does not mean that a state may postpone beginning the process of realisation of rights. And cases in South Africa have

[8] New Zealand and Australia subsequently amended their legislation to bring it into line with the ILO convention.
[9] General Comment No. 12 on "The right to the highest attainable standard of health", E/C.12/2000/4.

emphasised the necessity to focus on the neediest as a matter of priority.[10] This links these rights to the issue of affirmative action and to "social justice".

ARTICLE 37 FREEDOM FROM ARBITRARY EXPROPRIATION

This concerns the right not to have property taken away. Only the government may expropriate property. It was decided not to extend this to a general "right to property", because a right to property usually includes the right to dispose of property and customary land law does not confer a right to dispose of land. However, the general rights of equality are relevant to property: everyone can own property, and use and deal with that property equally with others. The protection of customary land under Chapter 2 (Article 11(2)), discussed earlier, means that the existing restrictions on disposing of customary land still apply, and are constitutionally protected.

Article 37 does not deal only with land (a government might seize vehicles in time of crisis), but is most relevant to land. It emphasises the "last resort" nature of compulsory acquisition of land for a public purpose (clause 37 (2)(a)). In this sense it narrows the scope of compulsory acquisition law. The requirement that compensation for such acquisition must be "promptly paid" is new for Fiji.

ARTICLE 38 ENVIRONMENTAL RIGHTS

This introduces a right (belonging to everyone) to have the environment protected. The right specifically mentions the natural world and the protection of future generations. It should be read with the provisions in Articles 10 and 12 for a fuller picture of the obligations of the state. Article 38 imposes obligations on those other than the state, because of Article 50(2) on horizontal application states that the Bill of Rights may bind ordinary people. In other words, the right might be asserted against a mining company that is believed to be damaging the environment in unacceptable ways. Art 38 is similar to the South African provision so South African decisions can be used to help interpret it.

RIGHTS CONNECTED WITH JUSTICE

ARTICLE 39 EXECUTIVE AND ADMINISTRATIVE JUSTICE

Article 39 deals with the right to be treated legally and fairly when dealing with the government. It is based on South African constitutional provisions, but has been slightly changed: First, it covers executive action (by a Minister, for example) as well as administrative action. Second, it refers to action being "rational and proportionate", rather than "reasonable" (essentially it is spelling out what reasonable means and making the proportionality test which underpins modern administrative law explicit) and adds

[10] The most important case is perhaps *Government of the Republic of South Africa v Grootboom* 2001 (4) SA 46.

"reasonably prompt" as an additional factor. These additions were based on based on South Africa's experience in implementing its provision and consultation with experts.

Approaching the Ombudsman or the Human Rights Commission would be appropriate ways to seek remedies for violation of this right. In serious cases a person might go to court.

ARTICLES 40 ACCESS TO COURTS OR TRIBUNALS, 41 RIGHTS OF ARRESTED AND DETAINED PERSONS, AND 42 RIGHTS OF ACCUSED PERSONS TO A FAIR TRIAL

These three Articles deal with issues related to fair trial, in civil and criminal cases, and the fair treatment of people who are arrested or detained, whether they are being investigated for suspected crimes, sentenced to imprisonment or detained without trial. They are familiar provisions, which are well established and are found in most constitutions. A few need comment:

Article 40 mentions some specific issues in connection with access to justice, including geographical accessibility, excessive fees, and legal aid for those unable to afford lawyers; Article 41(3)(c) also recognises a right for people detained to have legal representation, if necessary at public expense, and Article 42(2)(d) does the same for those being tried. Note that this applies only "if injustice would otherwise result". In other words the courts would apply these rights to legal representation in difficult cases.

- Where the provisions require "language" that a person understands to be used, it means not only that one must speak iTaukei to a person who understands only iTaukei, for example, but also that the words used must be as simple as necessary for the person to understand (Article 41(1)(a)). When the term "a language" is used, it refers to a specific language (Hindi, iTaukei, English, Mandarin etc) as in Article 42(2)(i). Article 42(3) requires both elements of language communication.
- Article 41 (1)(f) preserves the existing rule that people must be brought before a court within 48 hours if arrested but tries to prevent the sort of abuse that occurs if a person is arrested on Thursday and the police feel they don't need to produce them in court until Monday – they must produce them on Friday. It also accommodates public holidays.
- Obligations towards those who are deprived of liberty are spelled out in some detail in Article 41.
- Article 41 (5) recognises that a person who is deprived of freedom does not cease to be citizen and a person enjoying rights. Law may limit these rights (if reasonable under Article 48), but unless the law does this a prisoner would keep rights that can be exercised as a prisoner such as the right to vote. (Later provisions prevent a person in prison from standing for public office e.g. Art 74(6) (relating to the President) and Art 80(5) (relating to MPs).

PART B ELABORATION OF RIGHTS AND FREEDOMS

It is important that people should be able to see how the Constitution relates to them, especially groups that have not previously been mentioned in the Constitution and who feel marginalised in society. It may seem that these provisions (Articles 44-47) add little to the general rights, but it is easy for people to "misunderstand" the implications of a constitution for specific groups. A further reason for this set of articles is to underline a theme of the Constitution, namely inclusion: these articles are designed to ensure that everyone is able to feel part of society. No-one is too old, too young, to unusual, too burdened with disability, to be a part of the nation.

ARTICLE 44 PERSONS WITH DISABILITIES

This Article underlines a number of issues, including human dignity ((1)(a).

Clause (1)(c) requires a questioning of arrangements that mean that children with disability are educated in schools far from home and away from other children or not at all, or that workshops for person with disabilities are segregated. This right may be limited if justifiable under Article 48, and in the case of children the "primary consideration" of the best interests of the child must also be taken into account (see Article 22).

Clause (4) recognises that persons with disability are entitled to a certain amount of positive effort on the part of others: "*reasonable adaptation of buildings, infrastructure, vehicles, working arrangements, rules, practices or procedures*". This is often known as "reasonable accommodation" – accommodating the needs of the person with disability.

ARTICLE 45 WOMEN, MEN AND FAMILIES

Men and women are entitled to the same rights in regard to property (Article 45(2)). If any law takes a different view, that law can survive if it satisfies the "reasonableness" test in Article 48.

Both parents are entitled to leave to fulfil their parental duties (Article 45(5)(b) and (6)). These are treated separately because realistically it may be easier, financially and in other ways, to give women maternity leave. "Appropriate" leave might be different for the father. But this provision flags the desirability of men having leave also.

A couple living together as though they were married have the same rights and duties as a married couple (Article 45(8)). Although the Commission heard from a few people that adultery ought to be punished, most people – even if they believe in marriage as a preferable way of life – did not want such couples, or their children, to be penalised.

ARTICLE 46 ELDERLY

Although Fiji has a fairly young population, expectation of life is reasonably high so there are significant numbers of elderly members of society. Many submissions to the Commission voiced concerns about the elderly. Article 46 recognises their rights not to be marginalised.

Specifically, Article 46(3) approves state programmes for the elderly (e.g. priority attention in a government agency or free bus passes): the implication is that these would usually satisfy the Article 48 test.

ARTICLE 47 CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES

This recognises a "group right": to participate with others in the same cultural, religious or linguistic community, in the use of language, religious and cultural activities. It is based on Article 27 of the International Covenant on Civil and Political Rights,[11] but unlike that provision is not limited to minorities.

The general requirements of the Bill of Rights apply; the activities must not demean persons with disability for example. Within the group there ought generally to be no discrimination. But issues might arise if an association based on Islam wishes to refuse membership to non-Muslims or cultural dances that are traditionally for women exclude men. A constitution cannot deal with the detail of all these. A law, such as an Equality Act may spell out circumstances in which exceptions to the right to equality are permissible to permit reasonable cultural practices. Such a law would have to meet the test in Article 48 and in deciding this, the courts would have to look at the law from the perspective of the Constitution generally, and in the light of the objective of this Article, and would also be able to benefit from international law and decisions.

PART C APPLYING THE BILL OF RIGHTS

ARTICLE 48 LIMITATION OF RIGHTS UNDER LAW

As has been indicated many times above, in some circumstances rights will be "limited" (or "restricted".) Many limitations of rights will be uncontroversial. For instance, few will object to the rights to freedom of expression and assembly being limited by regulations that forbid marches outside a hospital. In some cases, however, the questions will be more difficult. For instance, is it acceptable to limit the right to equality and freedom from discrimination to allow a cultural group to exclude members of another cultural group? The limitation clause sets out the way these questions are to be resolved.

[11] In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

So, if there is a complaint before a court that a person's right has been restricted or infringed, Article 48 is relevant. Its approach is demanding, but logical. The court (and the lawyers arguing before it) would have to ask:

- Is the right in fact limited/restricted?
- Is the limit supported by law (an Act of Parliament, or regulation etc., or customary law, or a rule of what we call the "common law" – made by the judges over the centuries)?
- If so: what is the purpose of the limiting law?
- How important is that purpose?
- How great is the limitation of the rights involved?
- Does it seem right to limit this right to this extent for this purpose?
- Could the purpose have been achieved in some other way that would have limited rights less?

This list of factors that may be considered in deciding whether or not a limitation of a right is permissible is not exhaustive: clause (1) says "including" those listed. The overall judgment of whether the limitation is justified is to be in the context of "*an open and democratic society based on human right, dignity and freedom*".

This provision requires the court to carry out a careful analysis of whether a limitation on a right is justified.

It is also important to note that when a law is brought before Parliament in the form of a Bill, the person introducing the law must also present a memorandum explaining whether the proposed law is likely to limit rights (Article 95(2)(e)).

"BALANCING" RIGHTS

Sometimes rights may be limited to protect the rights of others. Law on privacy is quite likely to limit some freedom of expression, for example. In applying Article 48 the courts would have to look at the importance of both rights and the extent of limitation of both rights: how far will freedom of expression be limited if the law is upheld, and how far will privacy be at risk of the law is not upheld? There are many other examples: protection of the environment may involve limiting freedom of movement.

Sometimes it is said that rights must be "balanced". This is a bit misleading: it rather suggests that it is always possible to deprive each person of some of their right, leaving each of them with something. Some rights in some situations may be much more important than another person's rights. The courts will have little difficulty in totally limiting a violent husband's access to his home if necessary to protect his wife's right to be free from violence. No balancing will really take place. On the other hand, freedom of expression is often

thought to be such a fundamental right and so importance to democracy that courts will be very reluctant to interfere with it.

ARTICLE 49 LIMITATION OF RIGHTS UNDER A STATE OF EMERGENCY

Article 49 deals with limiting rights when there is a state of emergency. (Provisions about how a state of emergency is declared are to be found in a Chapter 16 (Article 181) because it is a matter that primarily concerns state security.) Article 49 provides that rights may not be limited in a state of emergency unless (i) the limitation is really necessary; (ii) it satisfies the Article 48 test; and (iii) obligations under international law are respected.

Some constitutions go into great detail as to what rights may or may not be restricted if a state of emergency exists. The 1997 Constitution (s 187(3)) listed the rights that could be derogated from in a state of emergency, for instance, and set out procedural conditions for their derogation. Article 49 deals with the limitation of rights in an emergency as a matter of principle. It demands that the particular situation in each emergency is taken into account in limiting rights.

Fiji is not a party to the International Covenant on Civil and Political Rights and thus is not specifically bound by its provisions about states of emergency and rights. However, guidance on appropriate use of emergency powers can be gained from the work done on the Covenant.[12] There is a good deal of customary international law on matters of emergencies, which binds all states.[13] Clause (1)(a)(ii) brings that customary international law, and any treaty that Fiji is a party to and which imposes duties in emergencies, into Fiji's law.

Detention without trial is one of the common uses of constitutional permission to limit rights during states of emergency. Article 49 takes a firm line: no-one is to be detained without trial for more than 7 days without being brought before a court. This would allow the authorities time to set up a special court arrangement if many people were detained. The Article, like Article 41, gives detainees the right to be visited while in detention but it allows a "political representative" to visit, as well as family, and religious advisor; and, unlike the 1997 Constitution, includes a lawyer among those who may visit.

ARTICLE 50 APPLICATION OF RIGHTS

[12] See Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

[13] See e.g. Wessels, Leon, *Derogation of human rights: international law standards: a comparative study* (University of Johannesburg thesis (2001) (https://ujdigispace.uj.ac.za/bitstream/handle/10210/1827/Partthree.pdf?sequence=3) and D McGoldrick , "The interface between public emergency powers and international law" Int J Constitutional Law (2004) 2(2): 380-429.

Traditionally "rights" were enjoyed by individuals and the State was bound to observe them. As understanding of rights has developed, people have realised a number of important aspects:

- Individuals and society also violate rights
- Sometimes rights are better thought of as collective matters rather than individual
- Sometimes (though perhaps not often) it is important that the rights of artificial persons like companies are recognised
- Not violating rights sometimes involves not doing something, but sometimes requires positive action.

Some of these points are reflected in the rights this Chapter protects (rights to environment and rights to join with other members of group are a much collective rights as individual; the state must not only respect, but also protect and fulfil rights). Article 50 covers the other issues that relate to the implementation of rights:

- Individuals and groups are bound by the rights when this is appropriate
- "Legal persons" – like companies – may also be bound, and may have the benefit of rights.

Article 50 does not state blandly that individuals and groups are bound by rights or that legal persons have rights. Instead it is circumspect, providing in clause (2) that for individuals to be bound by rights the "nature of the right" and the obligations it imposes must be taken into account and, in clause (4) that legal persons will have rights only if, broadly speaking, that is appropriate (the wording is: "*to the extent required by the nature of the right or freedom, and the nature of the particular legal person*").

This caution deliberately leaves the application of rights in such circumstances to be worked out by law and the courts. This is because, although in some cases the application of these rules is readily agreed (a company does not have the right to vote and, usually also, larger businesses are expected to implement the right to equality and not to discriminate in employment practices etc), some cases are more difficult. For example, Parliament or the courts may decide that a company has the benefit of freedom of expression, but would this go so far as to protect advertising? And even if a company is generally entitled to a fair trial, can they claim the right to remain silent, which is important for individuals)? Courts in various countries have dealt with these problems, and it is not practical to deal with all the possible issues in the Constitution.

Article 50(3) refers specifically to the common law. The courts have the tool of the common law – most of the basic rules of law were originally developed by judges. This is an on-going process and the common law is constantly developing to deal with new situations and problems. In a system with a bill of rights, the question arises of what should be done when

the common law infringes a right. Some have argued that rights don't affect the common law. Article 50(3) answers this question for Fiji. Courts must "*develop the common law in a manner that respects the rights*". For instance, provisions of the common law relating to defamation may need reconsideration in light of the protection of freedom of speech. Common law rules that condone a failure to act may infringe the constitution. As mentioned above in relation to Article 24 (Right to liberty and personal security), under the Constitution the police may be obliged to take action to prevent crime in situations in which the common law does not require this. And, the common law usually accepts that it is no legal wrong to leave a child to drown (provided it is not your own child or one for which you are responsible). Is this constitutional or a violation of rights?

Article 50(5) relates to the economic and social rights, like health, housing and food, and to the obligation to realise them progressively. It is not enough for the state just to say "We could not afford it" – they must satisfy the court that indeed this was true.

ARTICLE 51 INTERPRETATION OF THIS CHAPTER

This Article is for the guidance of courts and any other "authority" which could include civil servants and all sorts of agencies especially those charged with enforcing the constitution such as the Ombudsman and the Human Rights Commission. They are required to take a positive approach to their task, trying to achieve the rights in the chapter. They are not permitted (as courts have often done in the past) to say they will ignore international law, because they are national courts. They do not have to follow international law, but if it is relevant they must consider it. They may consider foreign law (they do not have to consider it, but they will often find it helpful).

Clause (3) is found in a number of other constitutions. It says that just because a right is not listed in this chapter it does not mean that it is not recognised. Any other right that is conferred or recognised by law of any sort is also valid. The only exception would be if a right conflicted with the human rights chapter or the Constitution. Since international law is not, under the system of law applying in Fiji, automatically part of Fiji law, a right recognised under a treaty to which Fiji is not a party is not covered by the clause, and therefore is not part of Fiji law, unless it is recognised by, or otherwise specifically becomes part of, Fiji law.

ARTICLE 52 FIJI HUMAN RIGHTS COMMISSION

Previous constitutions did not include the Human Rights Commission. It was originally closely linked to the Ombudsman (who wore two hats, one being as chair of the Commission). The Constitution Commission was told that this was not a satisfactory arrangement, so it separated the two. But, conscious that more commissions create risks of confusion and overlap, the Commission provided that commissions may work together even setting up joint branches (Article 148(6)), and that they can refer cases to another body (they

should not just tell the member of the public "Take your complaint somewhere else" (Article 147(5)(b)).

Article 52 sets out the broad functions of the Human Rights Commission, and its composition. It is small – only three members, respecting the need not to multiply bodies and posts unnecessarily. Most of the work is anyway done by staff and not by commissioners. Only the chair may be a full time post.

Commissions etc. are dealt with in the chapters to which they are most relevant. But general provisions about commissions are grouped together in Chapter 13, to avoid repetition. The full role of the Human Rights Commission can therefore only be fully understood by reading Articles 145-150 as well. Article 52 refers to one important power: "to issue a notice requiring a State organ or person to take any particular action, or cease any particular practice" (elaborated in Article 147(3)(c)).

Among the specific functions mentioned is developing a human rights culture (clause (4)(a)). The Commission will interpret this in the light of its perception of the circumstances of Fiji; but a human rights culture would presumably involve a willingness on the part of the people to insist on their own rights, and the responsibilities of others towards them, and a corresponding willingness to respect and stand up for the rights of others. At the same time it would involve awareness on the part of the authorities of the rights of people, and what is sometimes called "mainstreaming" human rights: making human rights considerations part of all policy and decision making.[14]

CHAPTER 4—CIVIC AND POLITICAL LIFE

Moving from a focus mainly on the individual and his or her rights, the Draft Constitution turns to the people and their role in relation to public affairs, but not as part of government. People may have such a role as individuals and, especially, as part of organised groups, including political parties. Political parties are only a section of organised civil society; often only parties may sponsor candidates for election while groups and organisations may put forward views, protest, suggest and in many ways be involved in decision making. This chapter groups together the main ways in which the public may be involved, other than by electing their representatives.

The Chapter should be read with Chapter 3 on human rights, especially provisions on the freedoms of association, assembly and expression (Articles 27, 29 and 30) as well as those on political rights and access to information (Articles 31 and 32).

[14] See the website of the Ontario (Canada) Human Rights Commission on developing a culture of human rights: http://www.ohrc.on.ca/en/about-us/public-education-developing-culture-human-rights-2.

PART A—COMMUNITY AND CIVIL SOCIETY

ARTICLE 53 CIVIL SOCIETY

Civil society is defined in Article 185 as "the collectivity of persons and associations or other organised groups of persons, other than public officers and State organs, actively engaged in the development of the society". This is deliberately broad. It really means everyone who is active, other than in relation to their private affairs, in society. This need not be in "politics" as usually understood.

The purpose of Article 53 is to establish the importance of civil society in a truly democratic society, and to frame the obligations of the State not only to refrain from interfering with, but also to promote actively, civil society's role.

ARTICLE 54 REGULATION OF CIVIL SOCIETY

It has become common for states to require organised civil society bodies to register or in other ways to regulate them. This can become a way of discouraging opposition or even open public debate. This Article requires that such state regulation be used only if there is good reason and in as limited a way as possible.

ARTICLE 55 PARTICIPATION IN PUBLIC DECISIONS

"Democracy" is often thought to mean electing representatives. Modern democracies now have a variety of ways in which people can be involved far more actively than just voting periodically. As Article 55 says, this should actually improve the quality of public decision making.

The Article draws on experience from many other countries about what makes the participation of the people effective and valuable to lay down a set of guidelines. The reference to "the diverse ways in which different groups are accustomed to engaging in public discussion" refers to the possibility that certain communities may have different traditions from others about who may speak in what type of meeting, and that to receive the input of all may require careful planning. Persons with certain sorts of disability may be hesitant to speak at all, or may need a particularly nurturing environment to be able to make their contributions.

Clause (3) provides for a monitoring of participation: what has been done must be made public

Various other Articles provide for participation in specific contexts (Article 101 Parliament, Article 110 regulations, Article 152 Public Finance). To understand the full significance of these Articles, they should be read with Article 55.

ARTICLE 56 RECOGNITION OF BOSE LEVU VAKATURAGA

The Great Council of Chiefs has been a very important institution in the eyes of many iTaukei. Though some said it should be abolished, very many said they wanted it restored, and many people from other communities also mentioned it. But many submissions said that it should not have a political role. For these reasons the Draft Constitution does recognise the BLV but as a civil society organisation, not a political body. It has no role in appointing Senators, for example, unlike in the 1997 Constitution.

PART B –THE PUBLIC MEDIA

The importance of the media to public interaction with and understanding of public affairs is obvious. There is a detailed treatment of the freedom of expression in the Bill of Rights (Article 27) which includes "freedom of the press, including print, electronic and other media".

The Draft Constitution also says that all political parties and candidates must have equal chances to appear on private or state broadcasting media (Article 60). It would also repeal many of the provisions of the "Media Decree" (Schedule 7).

ARTICLE 57 REGULATION OF PUBLIC MEDIA

This provisions does not give rights (which is why it is not in the human rights chapter). It lays down binding requirements and principles for, and limits on regulation of the public media.

It makes it clear that licensing is only permitted for certain purposes. And regulation, when permitted, must be carried out by a body independent of government.

PART C— POLITICAL PARTIES

Political parties are not public bodies, but a very specific sort of civil society organisation. Constitutions traditionally said very little, if anything about parties . The Draft Constitution assumes that (i) regulation is necessary and (ii) regulatory powers may be excessive, and be used to restrict legitimate political activity.

ARTICLE 58. BASIC REQUIREMENTS FOR POLITICAL PARTIES

This Article lays down some clear principles for political parties.

ARTICLE 59 POLITICAL PARTY FUNDING

This lays down some strict requirement for sources of funding. A party may not receive donations from companies, trades unions or from any person or body other than a human resident of Fiji or an individual citizen not resident.

It would not prevent parties receiving assistance, such as training programmes, which may be available from local or international sources.

Many countries do provide some public funding for parties. This is used both to strengthen parties and to control them. Although such schemes may be desirable, the Commission did not feel it appropriate to mandate such an expenditure.

ARTICLE 60 CAMPAIGNING

This Article is not a full regulation of political campaigning but concerns only equality of access to public media and other public resources (for example a public meeting hall must not be made available only to a party allied to the public body that owns or controls it).

ARTICLE 61 LEGISLATION ON POLITICAL PARTIES

This Article requires that legislation be passed (which under Article 186 means that it must "be done without unreasonable delay") to regulate certain matters in connection with political parties. Chapter 5 Good Governance and Leadership

The title of this Chapter takes a lead from the Decree No. 57 which included "good and transparent governance" as one of the "non-negotiable principles" for the Draft Constitution. The concept of "leadership" should be seen in the context of the constitutional principle that is in Article 2(2): "*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"*. In other words, leadership involves service, and the relationship of the leader with the people is that of servant not that of master.

ARTICLES 62 SERVING THE PUBLIC AND 63 LEADERSHIP PRINCIPLES

These Articles are clear in language. Article 63(2) is particularly important because of its insistence that not only do public office holders behave in accordance with the Constitution, but any person appointed to public office must already be of integrity and good character. "Public officer" is defined in Article 185, and it includes not only the most prominent offices, called "State offices", but all members of the public service.

Recent cases in India, South Africa and Kenya have successfully challenged the appointment of state office holders because of doubts about their integrity.[15]

ARTICLE 64 CONDUCT OF OFFICE HOLDERS

The principal effect of this Article is to give force to Schedule 4: Code of Conduct of Office Holders. It identifies as "Officers of the State" certain listed posts; an Act of Parliament may add any other post to this list.

[15] *Democratic Alliance v President of the Republic of South Africa* Case CCT 122/11 [2012] ZACC 24 (South Africa); *Trusted Society of Human Rights Alliance v Attorney General* Petition No. 229 of 2012 (Kenya)

The Code of Conduct spells out in detail the general principles in Article 64(2). Notably the matters it covers include:

- Respectful treatment of citizens
- Commitment of MPs to constituents
- Keeping confidentiality of the private affairs of others
- Proper use of a public resources (the "prudent owner" standard)
- Prohibition of other employment, professional practice or active business management by full time Officer of the State
- What do to with gifts received
- Corrupt practices
- Use of inside information (obtained in course of work)
- How to deal with conflicts of interest
- Declarations of assets.

One of the merits of a system of codes of practice is that they can be tailored to the challenges of particular offices and professions Clause (3) allows for legislation to provide, or provide for such tailored codes for the listed Officers of the State.

ARTICLE 65 PROTECTION FOR WHISTLE BLOWERS

This protects primarily members of the public who report suspected wrongdoing by any State Organ[16] or public officer. It is designed to encourage the public to makes such reports without fear of reprisal (such as being sued civilly, prosecuted for a criminal offence or dismissed from employment).

The report must be to an Officer of State or a State organ. The person making the report must have believed the conduct complained of did amount to a violation of the Constitution or a law or caused, or was likely to cause, damage or injury to a person or the environment, and must otherwise be acting in good faith. Apart from the honest belief, good faith would mean that the person genuinely wanted to use the opportunity for its legitimate purpose (rather than for personal revenge or political advantage for example).

The principle resembles the defence of qualified privilege in the law of defamation, and cases from that area of the law would be useful. It would expand the scope of the defence to some extent, and, as indicated earlier, applies beyond the law of defamation.

If the person making the report was a public officer, the situation should be considered under Article 164(4) and (5) (Values and principles of public service) rather than this Article.

[16] A State organ is defined as "a Ministry, department, commission, office, agency or other body established under this Constitution" (Art. 185).

ARTICLE 66 ETHICS AND INTEGRITY COMMISSION

This Article established the Commission (it does not need separate legislation to come into formal existence). Its functions are clearly set out in clause (3). As with other commissions it is important to look also at Chapter 13, and specifically Article 147. As with the Human Rights Commission, Article 66(5) points to the power to issue a compliance notice under Article 147(3)(c) – a remedy that is likely to become an important tool in the armoury of commissions of this type.

In accordance with the approach generally adopted in the Draft Constitution – that there is no requirement of "standing" such as being personally affected before a remedy can be sought, whether before the courts or another body designed to enforce the Constitution – clause (4) provides that "any person" may complain to the Commission about conduct inconsistent with the Constitution or a binding Code of Practice, or corruption.

ARTICLE 67 STANDARDS AND PROCEDURES FOR REMOVAL FROM OFFICE

This provides for the operation of Schedule 5 which sets out the procedure for removing each Officer of the State, as well as the basis for such removal. The main features of Schedule 5 are:

- Fair hearing
- Distinction between procedures for removal because of incapacity (illness etc.) and for wrongdoing
- Removal for a person convicted of a certain criminal offences (see below), as well as for other types of wrongdoing
- Procedures for removal that involve investigation by Panels comprising relevant Officers of the State and also members of the public (section 5(7))
- Temporary or permanent bar to holding public office in some circumstances if removed from office (section 6).

If, in Fiji, an Officer of the State is convicted of any offence and sentenced to imprisonment, that Officer will automatically be removed from office. The removal only takes place when the decision is final (in other when no further appeal is possible). The power to trigger removal is thus given to the courts. The court, in sentencing such a person, or considering an appeal, will take into account the implications of such a sentence; in fact the court is required to report the conviction to the body that would remove the Officer. Compulsory sentences of imprisonment are rare: for example for murder the sentence is mandatory life sentence[17]; otherwise courts are usually free to give other sentences, such as a fine, probation etc.

But a court could not exempt an Officer of the State from removal, by giving a non-custodial sentence, if the offences is one of dishonesty, abuse of office, physical violence, rape or

[17] Crimes Decree s. 237.

sexual assault. In such a case, even if only a fine was imposed, removal procedures would have to be started, but removal would not be automatic: it would depend on the seriousness of the case. A non-custodial sentence for rape would of course be most unusual. But if a court was minded, from leniency or to protect a person from removal, to give such a sentence, the matter would be referred to the appropriate body to initiate removal (Parliament in the case of the President, and the appropriate Commission otherwise). The same procedure would apply to a conviction outside Fiji for any of these offences: it would not be right to delegate to a foreign court the power to initiate automatic removal. The particular circumstances of the dishonesty, physical violence, rape or sexual assault would have to be considered by the appropriate Fiji body (abuse of office in Fiji is unlikely to arise before an overseas court).

An Officer of the State who is automatically removed, or removed because of conviction for dishonesty, abuse of office, physical violence, rape or sexual assault may never hold any State office (section 6(2)).[18] Removal for conviction for any other offence entails disqualification for 10 years (s. 6(3)).

It is appropriate to note here that there is no prohibition on the President being prosecuted. Many constitutions have such a prohibition which seems to stem from ancient royal privileges, and to be inappropriate in the modern world and under a constitution enshrining the rule of law. Most prosecutions will be brought by the independent Director of Public Prosecutions who could, with the approval of the court, stop any abusive prosecution brought by anyone else.

CHAPTER 6 THE NATIONAL PEOPLE'S ASSEMBLY

In modern democracies once the people elect their representatives they often have little further role. Accountability to the people is limited to the possibility of refusing to elect those representatives next time round. The main accountability mechanisms are bodies that do not involve the people: Ministers checked by Parliament, elected officials checked by commissions and courts, commissions checked by courts, courts checked by Parliament etc. Moreover, democracy dominated by parties tends to develop a political class that does not necessarily really reflect the make-up or the views of the people.

With the requirements of participation (e.g. Article 101) the National People's Assembly is designed to reintroduce the people into the government. Of course it is not feasible to allow everyone to participate in all decisions, and though some countries, including Switzerland, have many referendums on policy issues, these are expensive, and open to manipulation.

[18] There is a numbering error in s. 5 of Schedule 6: there is no sub-section (2) so (3) must be read as (2) etc.

With one exception discussed below, the People's Assembly generally does not make final decisions but performs an accountability role, scrutinising the work of the government. And it considers proposals for amendment of the Constitution, and makes an advisory resolution (Article 183). Again it is intended to bring in the voice of the people without the expense of a referendum, and to ensure that the debate is conducted in public, and in a deliberative manner.

The Assembly has one function that involves a final decision but in which it does not act alone: the election of the President. In a parliamentary system with a largely ceremonial President, he or she is most often chosen by the legislature. This has the risk that the presidential office will be politicised. In a few countries, including the Republic of Ireland, the President is directly elected by the people. Although this seems to work well there, it may cause confusion: how can a person elected by the people have no real power? And it is certainly expensive.

Under the Draft, the President is elected by the National People's Assembly sitting with all the members of Parliament. This is intended to achieve the following:

- A President who is not beholden to any political party
- A President who has legitimacy (acceptability) in the eyes of the people
- Less expense than by holding an election.

The Assembly will meet for only one week each year. The expense involved is far less than having a second chamber in Parliament like a Senate. There is no specification of where the Assembly should meet; it would be eminently desirable if it could meet in a different part of the country each year – not just in Suva.

PART A FUNCTIONING AND COMPOSITION OF ASSEMBLY

ARTICLE 68 FUNCTIONS OF ASSEMBLY

This lists the functions of the Assembly and needs no further explanation .

ARTICLE 69 COMPOSITION OF ASSEMBLY

The Assembly is structured to include holders of senior offices of state, people with valuable experience (both chosen by the Constitutional Offices Commission and drawn from local government) and members of civil society nominated by associations and groups. The last group would be larger than the other categories of member combined, to ensure that he Assembly is really dominated by people with experience of the real concerns of Fijians across all walks of life.

Members included because of their official positions would total 22; there would be 20 local government representatives; 20 chosen by the Constitutional Offices Commission for their

qualities and experience; plus former Presidents (elected which means under the new Constitution). This comes to a minimum of 62. In addition there would be 92 civil society representatives.

PART B APPOINTMENTS OF CIVIL SOCIETY MEMBERS OF ASSEMBLY

ARTICLE 70 APPOINTMENTS BY THE CONSTITUTIONAL OFFICES COMMISSION

This Article prescribes the procedure for the appointment of 10 men and 10 women who satisfy certain qualifications in terms of leadership or at least active civil society engagement as NPA members. The Commission that appoints them is independent of government (see Article 151). The Commission must also try to ensure that they reflect the country's ethnic and cultural diversity.

ARTICLE 71 APPOINTMENT OF MEMBERS BY THE ELECTORAL COMMISSION

This Article provides for the nomination of candidates as NPA members by associations and groups. Nominees must also have a record of civic involvement or community leadership. This perhaps casts that net more widely than for the COC-appointed members under the previous Article.

Article 71 anticipates that there will be many nominees for these places on the NPA and gives the Electoral Commission the responsibility of identifying those who are actually to serve. This is to be done on the basis of lots, not by scrutinising their qualifications and experience in the way that the COC does under Article 70. This means that there can be no bias in choosing them – they are selected randomly. Thus these people are more likely to be "ordinary people".

The Article leaves it to the Electoral Commission to chose the method of drawing lots, but it would probably be by means of a computer program that would pick individuals at random. Alternatively it could use mechanical or human means of drawing lots.

To ensure that all parts of the country are adequately represented, a Divisional distribution requirement is specified, and for each Division half of those chosen must be women and half men. Initial appointments are staggered to ensure continuity (see next Article).

ARTICLE 72 TERM OF OFFICE AND VACANCIES

To ensure that there is continuity of experience, civil society members of the PNA will normally serve three years, but initial appointments are staggered so that the entire civil society group in the NPA is not replaced simultaneously every 3 years (details are in Schedule 8). Vacancies are filled by methods similar to initial appointments.

THE SYSTEM OF GOVERNMENT

Chapters 7, 9 and 10 deal with the system of government. As in the past in Fiji the system is a parliamentary one: characterised by the fact that the head of government – the prime minister –is usually appointed from Parliament and owes his or her office to having the support of the majority in Parliament. Removal of the prime minister is also by Parliament. There is also a separate head of state (the President) who does not have executive functions.

There was very little pressure in submissions to the Commission to change the system of government. This is the system that people in Fiji understand. A parliamentary system is a more collective system, rather than a presidential system where far more power is concentrated in the hands of one person. In a parliamentary system, with its tradition of question time, and the possibility of a vote of no confidence, accountability of government to the people's elected representatives is arguably more easily achieved.

On the other hand, parliamentary systems are sometimes prone to instability. For this reason provisions have been introduced to prevent frequent votes of no confidence (see Article 116). And in many parliamentary systems the head of government is able to choose the time for elections, thus giving what is often an unfair advantage. Under the Draft this would not be possible (see Article 88).

In response to a considerable number of suggestions and in order to enhance democratic control while giving the government enough time to carry out election promises, the term of Parliament has been reduced to 4 years.

Another modification of the old system is that up to four ministers may be appointed from outside Parliament (Article 117) in order to draw in expertise from outside Parliament and to have some ministers who are not torn between constituency work and their portfolios.

CHAPTER 7 THE PRESIDENT

ARTICLE 73 THE PRESIDENT OF FIJI

This Article outlines the role of the President. That is an almost entirely ceremonial role, and the President may act in his or her own discretion only if the Constitution itself or an Act of Parliament says so. Under the Draft Constitution the President would have such freedom of action only if referring back a statute passed by Parliament (Article 108). In fact it is arguable that the Draft should be changed to prevent an Act of Parliament giving the President additional discretionary powers: though it is unlikely that Parliament would give such powers to a President appointed by the PA.

Otherwise the President does not have personal powers but should have "the moral authority of the office", and should use that authority to promote the values of the Constitution. Such a President can be a force for good in a nation, without being politically divisive.[19] The President's powers come only from the Constitution and he or she cannot claim any extra powers. The President is not the Commander in Chief of the Military Forces.

The President is a member of the National People's Assembly, but not its presiding officer, and also carries out a large number of formal functions.

ARTICLES 74 ELECTION OF PRESIDENT, 75 ASSUMPTION OF OFFICE OF PRESIDENT AND 76 VACANCIES AND ACTING PRESIDENT

The normal term of office of the President is five years. This means that on most occasions there will be a President in office whenever there is a parliamentary election. The President may serve only one term, so should not be tempted to please anyone in the hope of being re-elected. The President serves until his or her successor is sworn in.

The date of election is fixed as the second to last day of business of the relevant sitting of the NPA (when it will be joined by the parliamentarians). Nominations will be done in advance. Elections will be by secret ballot and if no-one wins more than half the votes cast there would be a second ballot between the top two candidates.

The President would be sworn in, in a public ceremony, the following day.

As with other Officers of the State, the Draft Constitution prescribes a mechanism for removal. In the case of the President this would require a motion passed by at least half of all the MPs (36 must vote in favour), and this would lead to a Panel of the Chief Justice, President of the Court of Appeal, two members of independent commissions and 2 lay members being appointed to decide on the allegations (Schedule 5 section 5). If the Panel recommends removal, the Chief Justice will immediately declare the President removed. The grounds for removing the President are similar to those for other Officers of State (see Article 67 above).

Schedule 5 (s. 2) also sets out a procedure to consider whether the President should be removed because of incapacity (not wrongdoing). Again, this is initiated by Parliament.

There is no Vice-President. This seems unnecessary for a ceremonial role in a small country. If necessary the Speaker of Parliament acts for the President. And if the President dies or is removed from office there would be a fresh presidential election.

[19] Anyone who would like to understand what may be achieved by such a head of state might be interested in looking at the website of the President of Ireland http://www.president.ie/.

CHAPTER 8 REPRESENTATION OF THE PEOPLE

The Decree setting up the Commission required the Draft Constitution to have certain features:

- one person, one vote, one value;
- the elimination of ethnic voting;
- proportional representation;
- a voting age of 18.

All these features are found in Chapter 8.

ARTICLES 77 REPRESENTATIVE GOVERNMENT AND 78 VOTER QUALIFICATION AND REGISTRATION

These Articles are straightforward, requiring no explanation. It should be noted that Article 78 (2) says there must be a single, national, common voters' roll, unlike the past where voters were on ethnic rolls.

ARTICLE 79 PROPORTIONAL REPRESENTATION SYSTEM, 80 CANDIDATES FOR ELECTION TO PARLIAMENT AND 81 AWARDING OF SEATS FOLLOWING ELECTION

These Articles set out the main features of the proportional representation electoral system adopted in the Draft Constitution. A system of proportional representation (PR) is one that guarantees that the make-up of the body elected reflects the size of the support for each party in the country. If one-third of the people vote for a particular party, it gets one-third of the seats in the body elected. If half the people vote for a party, it gets half the seats. Proportional representation is found in many countries in the world (about 36% in fact). An invariable feature of PR is that it uses multi-member constituencies.

There are many different ways of achieving proportionality in representation. Like the Council for Building Better Fiji in the People's Charter process, the Commission rejected the system of PR called "single transferable vote": this involves the voter in ranking the candidates, voting for up to as many candidates as there are seats for the constituency. The Commission felt that this was too similar, as far as the voters were concerned, to the old Alternative Vote system, and also most people would not understand how their votes were translated into seats.

The other main method of achieving PR is by using lists. Each party puts forward a list of its candidates for the constituency. The names on that list should be in order of preference as far as the party is concerned. So if a party submits a list of 20 names for a constituency with 20 seats, and it gets 25% of the seats it would win 5 seat and the top 5 names on its list would be the individuals to hold the seats. The voters could see the full list in advance.

Like the People's Charter, the Draft Constitution includes a list system – see Articles 79(1), 80(1) and (2)).

The key features of the system in the Draft are that it uses 4 multi-member districts or constituencies so that people vote for MPs from their division. 11 additional MPs are drawn from a "compensatory list" to ensure that the results of the election are truly that parties are represented in proportion to the votes that they receive. Although the system focusses on the proportional representation of parties it also allows independents to stand for election.

At least for the first election the Draft uses the four Divisions with which people are already familiar: Central, Northern, Western and Eastern (also proposed in the Peoples' Charter) as constituencies. There would be 24 seats for Central, 22 for Western, 9 for Northern and 5 for Eastern (Schedule 6 s. 4(3)).

In future the boundaries of the divisions could be amended by an ordinary Act of Parliament, but the number of constituencies is fixed (Art. 79 (3) read with Schedule 6 s. 4(2)). The smallest constituency (in population terms), Eastern, is retained to ensure proper representation for those scattered islands. If Eastern were to be given the number of seats that reflects its population it would have no more than 3. This would mean very limited representation for Easterners. For this reason the Draft says that no district may have fewer than 5 seats (Article 79(4)(b) provides, and explains, this). As explained below, the inflated number of seats for the East does not mean that the proportionality a PR system is intended to achieve is lost. The 11 compensatory seats make up for it.

How would the voters cast their vote, and what would the ballot paper look like? In many countries with PR systems the voter simply votes for a Party and its list, without any ability to change the make-up of the list or the order in which the names appear on the lists. This is called a "closed list" system. The ballot paper might have just party names and symbols. This is the system the Draft Constitution provides for. Each voter has a single vote, for a party list (Article 79(1)).

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.

With large constituencies open list systems would be also very complex for the voters. Either there would be a huge ballot paper (in Central with 24 seats if there were, say, 10 parties each with a list of 24 names, the voter would be faced with a ballot paper with 240 names), or asked to write in a number corresponding to the name of their chosen candidate out of the 240. There are other methods, but these two had been proposed, but none would be simpler.

With four multi-member constituencies it is possible that the overall outcome of the elections would not be proportional. It is difficult to achieve strong proportionality in small constituencies. The "compensatory" seats deal with this. So, full proportionality is secured by reserving 11 of the 71 seats as "compensatory" seats, used to ensure that each party gets a share of seats that is in proportion to the votes that it received nationally (Article 81(1)(b)).

The calculation (both for the seats in the divisions and for the 11 compensatory seats) is slightly more complicated than one might expect because of the risk that parties would be entitled to fractions of members. For example, a party winning 15% of the votes in a constituency with 23 seats would be entitled to 3.45 seats. There are various ways of dealing with this. The Draft Constitution requires the Electoral Commission to make regulations adopting one of the internationally accepted ways of doing so (Article 81(2)). This will not be hard as the Draft also requires that the first (Interim) Electoral Commission includes two experienced members outside Fiji appointed after consulting specified knowledgeable international institutions (Schedule 6 s. 7 (2)(c)).

There are certain likely consequences of such a system. Proportional representation tends to produce a large number of small parties. This can destabilize government. So, to limit the number of parties in Parliament, no party will get any of the 11 compensatory seats unless it has at least 1% of the total votes across the country (Article 81(1)(b)).

The system also puts a lot of power in the hands of the party leaders who make up the lists. This ought to be moderated by having a democratic party system (which the Draft requires, see Article 58). And the Draft Constitution provides that non-party people (independents) may also stand (Article 80(1)(b)).

The PR system makes it easier for small parties to get seats in Parliament than the systems Fiji has used in the past. One consequence may be that no party gets more than half of the seats, and that parties will have to work together to form a government – a coalition government. This has advantages: government should reflect a wide range of citizens' concerns. There may also be disadvantages, including unstable coalitions and small, even extremist, parties being able to insist that their ideas are adopted in return for joining a coalition.

However, the draft Constitution has some proposals to help deal with these risks in the chapter on Parliament (see below). And the politicians will work out how to make coalitions work. The most important thing is for the parties to come to a clear agreement on their shared policies when they form a government. Finally, if a small party really wants to be part of the government it may have to give up its extremist views.

To ensure that a reasonable number of women are elected, the Draft requires that the party lists all include women. While believing that it was time Fiji took gender equality seriously, the Commission also recognised that it may take some time for women to become active in politics and for parties to organise to include women. Therefore the Draft Constitution says that for the first election every party list must have the following (Schedule 6 section 6): out

of the first two names one must be a woman, out of the first 5 names 2 must be women, out of the first 8 3 must be women and thereafter out of any 3 names 1 must be a woman. This does not guarantee that one third of the Parliament would be women. If a party won only one seat that would probably be a man; if it won 7 it might be that only 2 were women. But it would ensure that any party with a significant number of seats in a constituency would have some women.

For later elections the parties would have to alternate men and women (Article 80(3)). A list might be man-woman-man-woman etc. or woman-man-woman-man etc. A party that got only one seat might have only a man; a party that won 9 seats might well have 5 men and 4 women. But it would guarantee a good number of women. As women gained experience and influence, lists might begin with a woman's name, so a party with 9 members from a list would have 5 woman and 4 men.

ARTICLE 83 ELECTORAL COMMISSION

It is considered essential in most countries that the body responsible for elections is independent of government or party, control. This is best achieved by an independent commission.

It is also important that Fiji is not burdened by too many commissions and most of the actual work of an election commission is done by staff not by the commissioners. Therefore, Article 83 provides for a small, part-time commission. They would make the policy decisions, not the day to day decisions. Because election laws are complex and because the commission has a dispute settlement function, one member should be someone with considerable legal experience (Article 82(2)).

The functions of the commission are clearly set out. Its dispute resolution functions relate only to matters that require rapid decisions. Election petitions disputing the announced results of the election will be brought before the courts as is usual (clause (3)(d)).

Like other commissions, this one has the power to issue compliance orders (clause (4) referring to Article 147(3)(c)).

CHAPTER 9––PARLIAMENT

PART A—ESTABLISHMENT, ROLE AND COMPOSITION OF PARLIAMENT

ARTICLES 83 ESTABLISHMENT OF PARLIAMENT, 84 ROLE OF PARLIAMENT AND 85 COMPOSITION OF PARLIAMENT

Articles 83 and 84 outline the nature and functions of Parliament as the body that represents the people in making law, discussing public issues and scrutinising and overseeing the executive.

Art. 84(2) is unusual in that it explains briefly the role of an MP (something that experience in many countries shows even MPs themselves are often unclear about). Gross dereliction of duty might lead to procedures for removal of the MP (see Article 89).

As mentioned earlier, the previous size of Parliament, 71 MPs, is retained. This may be controversial but the size takes two important matters into account: First, a 71 member Parliament is better able to provide a fair and proportionate representation of the diverse interests of groups in Fiji than a smaller one in which many smaller groups (such as Rotumans perhaps) might be excluded. Secondly, in the parliamentary system proposed for Fiji, up to 15 MPs may be drawn into the Cabinet and thus not really able to be active MPs scrutinising proposed laws and government action. In effect then, Parliament is 55 members strong which is fair number for the tasks that they must carry out.

ARTICLES 86 DATE OF ELECTIONS FOR PARLIAMENT, 87 TERM OF PARLIAMENT AND 88 EARLY DISSOLUTION OF PARLIAMENT

The Draft Constitution provides firstly that there should be elections every four years and, secondly, that usually elections should be on the second Monday in August (Article 86 (1)(a)). This makes the term of Parliament also four years (Article 87), shorter than the five years in the past, but not as frequent as in New Zealand, for example. Four years should be enough for a government to carry out its major policies, but gives the voters the opportunity of voting them out of power if they fail to perform.

In many parliamentary systems the Prime Minister chooses the date of elections. This gives an unfair advantage to the party in power. A number of countries have now fixed terms, or at least restrict this prime ministerial freedom. The UK is one such country. The specification of a day for elections in Article 86 follows suit.

There could be an early dissolution of Parliament only in rare circumstances. As mentioned above, the basic principle of a parliamentary system is that the government is supported by a majority of the MPs. If the majority does not support the government, it is dismissed through a vote of no confidence. But, especially in countries with PR systems and many small parties represented in Parliament, it may be easy for Parliament to pass a vote of no confidence in the government but much more difficult for it to agree to a new government. The result is very frequent elections which are expensive and create both economic and political instability.

Like Germany, the Draft puts in place a mechanism to avoid frequent elections. Accordingly, it says in Article 116 that a vote of no confidence to dismiss the government must be accompanied by a vote choosing a new Prime Minister. If they cannot agree on a new Prime Minister they cannot pass a vote of no confidence.

But this might produce a deadlock with a Parliament that cannot agree on a new Prime Minister but is not prepared to support any laws or other action proposed by the existing government. So, Article 88 provides that the Leader of the Opposition (see below) can move a motion for early dissolution, which must be based on the lack of confidence. This can only be done if a formal vote of no confidence under Article 116 has been moved and failed. The motion for early dissolution must have the support of at least 36 MPs (over half of a full house, even if there are some vacancies).

The right to do this is limited to the Leader of the Opposition to avoid a situation in which the government itself obtains an early dissolution when it choses, thus avoiding the very objective of a fixed term for Parliament.

The reasonable interpretation of Article 88(2)(c) would be that the unsuccessful vote of no confidence must have taken place very soon before the dissolution motion. This procedure must not be used to allow the Leader of the Opposition to force an election at a time that suits him or her when this is denied to the prime minister.

It is anticipated that the threat of dissolution is most likely to lead to the MPs finding themselves able to identify a leader: MPs rarely want to go to elections early. Nonetheless, the Constitution also places limits on when elections may be held. If a crisis of confidence occurs within the first 18 months of the life of Parliament, the MPs cannot escape from the situation by dissolving Parliament (Article 88(3)). They must elect a Prime Minister after an election (by the process in Article 115). In some countries with proportional representation systems it can take weeks or even months to form a coalition and identify a Prime Minister.

And MPs cannot force an early election within 9 months before the normal end of Parliament's term (Article 88(3)(b)).

ARTICLE 89 TENURE OF MEMBERS AND VACANCIES

This Article deals with when an MP loses his or her seat and how vacancies are filled. Its main points are:

- the possibility of removal from office under Schedule 5 (see the discussion of Article 67 above)
- an MP who leaves his or her party loses their seat in Parliament; this also applies to someone who is dismissed from the party as a disciplinary matter
- when a person who won a seat on a party list ceases to be a member for whatever reason, the vacancy is filled by taking the next person on the list, who is of the same gender.

In a voting system like that proposed in the Draft a voter usually votes for party. It would be a betrayal of the voters for a member to leave the party and insist on remaining an MP; so this is made impossible by clause (3).

PART B PARLIAMENT'S OFFICERS, COMMITTEES, SITTINGS AND BUSINESS

ARTICLES 90 SPEAKER AND DEPUTY SPEAKER OF PARLIAMENT AND 91 ELECTION OF SPEAKER AND DEPUTY SPEAKER

These two Articles contain fairly standard and straightforward provisions about the presiding officers of Parliament. Points worthy of particular note are:

- The Speaker is to be elected from people outside Parliament (Article 91(1)(a))
- The Speaker has an official status, as presiding officer of one of the three branches of government (executive, legislature and judiciary) equal to the Chief Justice, head of the judicial branch (Article 90(2))
- The Speaker has a special responsibility for ensuring public access to Parliament (Article 90(3)(c)(ii))
- The Speaker (and Deputy) may be removed either by a vote supported by 48 MPs or under Schedule 5 (see above) (Article 91(3)(d) and (e)).

ARTICLES 92 LEADER OF THE OPPOSITION, 93 MINISTERS FROM OUTSIDE PARLIAMENT AND 94 COMMITTEES

These deal briefly with important matters. The Leader of the Opposition (which may comprise several small parties and independent members) is to be elected by those MPs not supporting the government (Article 92). Ministers who are not MPs (who may number up to 4, see Article 117(2)(a)) may attend and speak but not vote (Article 93). Unlike the 1997 Constitution, there is no formal requirement of sectoral committees. Committees are left to Parliament except that they must be composed in a way that reflects the party make-up of Parliament and its social, cultural and gender diversity as well (Article 94(2)), and the committee on public account must be chaired by a member from the opposition (Article 94(3)).

ARTICLE 95 STANDING ORDERS

In accordance with usual practice Parliament may make its own internal rules of procedure. However, certain requirements are specified. The rules must enable all members to participate, with special mention being made of minority parties and independent members. The general requirement would be important in ensuring, for example, that women are able to participate fully: experience teaches that women often find it hard to participate in male-dominated gatherings. There are other obstacles to women's participation such as family responsibilities; in many countries sitting hours have been adjusted to try to deal with this

issue. Some solutions may be outside the scope of rules – such as provision of child care facilities or even places where young women MPs may breast-feed children, which have been provided in some countries.

Clause (2)(e) sets a constitutional requirement something that is a practice in many legislatures: that when Parliament is asked to approve draft legislation or international agreements (see also Article 111) there must be explanatory material that states the implications of the proposal. Since it applies to "legislation", it would cover also regulations and other subsidiary laws (see Article 110).

The public participation theme (see also Articles 1, 53, 55, 58 90 and 101, among others) recurs in clause (2)(f).

ARTICLES 96 FIRST SITTING OF PARLIAMENT AFTER AN ELECTION AND 97 OTHER SITTINGS OF PARLIAMENT

The first sitting of Parliament does not depend on a decision by anyone, whether President, Prime Minister or Speaker: the date is fixed (Article 96(1)). Generally the Speaker fixes other sittings, but the Prime Minister may require a sitting to be held, as may MPs themselves – provided that at least 24 join in the request (Article 97).

Parliament does not have to sit in Suva (Article 97(1)). It would be desirable if it occasionally met elsewhere and its committees could readily do so.

ARTICLES 98 QUORUM, 99 VOTING AND 100 LANGUAGES OF PARLIAMENT

It is undesirable for Parliament to sit with very few members present. But also the quorum requirements should not be so demanding that they are frequently not met. Nor should it be possible for a small section to prevent proceedings taking place by staying away. The fixing of a quorum at 24 is designed to be a reasonable compromise (Article 98(1)). However, as important a matter as voting on legislation ought not to take place with few members present, so 35 is fixed as the quorum for this purpose (clause (2)).

The Speaker should be the custodian of the rules in this as in other respects, and he or she is required to raise the quorum issue not leave it to members – who may have their own reasons for not drawing attention to the absences (clause 3).

The provisions on voting are those commonly found. But the person presiding is given no casting vote (Article 99(2)). This is because usually the Speaker will preside and he or she is not a member of Parliament elected by the people. The situations in which a different majority is specified (see clause (1)) are on vote of no confidence (Article 116(3)), vote for dissolution (Article 88(1)), declaration of state of emergency (Article 181), amending or repealing certain land laws (Article 17 and Schedule 2), amending the Constitution (Article 183(8) and removing the President (Schedule 5 s. 2 and s. 5).

Article 100 deals with language in this specific context (see also Article 5). For the assistance of hearing impaired members (see also Article 95(2)(c)) sign language may also be used. In such a situation of course an interpreter of sign/spoken language would have to be provided.

ARTICLE 101 PETITIONS, PUBLIC ACCESS AND PARTICIPATION

This Article provides some detail on the general principle of public participation. Petitions are an ancient form of participation that are still relevant. The Parliament of Scotland (part of the UK) gives very full guidance on how to petition. It provides a template for petitioners to ensure that all necessary details are included. It is possible to have the petition on the Parliament's website as an "e-petition" so that more people will be aware of it. Any language may be used. There is no postal charge for sending a petition to the Parliament. A committee of 9 members of the Parliament considers every petition The Parliament says "Many petitions have brought about changes in the law, in government policy, the production of revised guidelines on an issue, a change in a decision." [20]

The provisions in this Article concerning open meetings are equally important. Frequently, in older Parliaments, meetings of parliamentary committees are behind closed doors. Under this Article this will seldom be permitted. The test proposed for excluding the public, "grounds that are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom", deliberately echoes the test for limiting rights provided in the chapter on Human Rights (Article 48). This is so that the understanding of the test developed for protecting rights will apply here too. It will allow discussion of matters that legitimately demand secrecy to take place behind closed doors but will prevent the government or politicians from hiding behind unfounded claims of "state secrets". Also important is that the Speaker is not the final arbiter of whether the public may be excluded from a meeting. If there is a dispute about whether holding a meeting behind closed doors is constitutional, the matter can be decided in a court.

ARTICLES 102 POWERS, PRIVILEGES, IMMUNITIES AND DISCIPLINE AND 103 POWER TO CALL FOR EVIDENCE

Article 102 (with Article 95 above) follows the approach common in many constitutional systems of leaving Parliament to regulate its own affairs, including discipline of members. This is to prevent interference by other branches of government. The MPs' freedom of speech and "parliamentary privilege" mean that the existing law will continue: MPs cannot be sued (civilly) or prosecuted (under criminal law) for what they say in Parliament. But Parliament may have rules that suspend or otherwise penalise members. These principles were developed in the days before constitutions were written and recognised as supreme over

[20] See its website at http://www.scottish.parliament.uk/vli/publicinfo/htsapp/documents/Petitionleaflet-EngFINAL.pdf

everyone including Parliament. There is therefore some room for reconsidering them: are they fair to MPs and are they otherwise constitutional? Like any other state action, rules of Parliament will have to be consistent with the entire Constitution, including the Bill of Rights. In particular, this will mean that disciplinary procedures against members will need to comply with the requirement of administrative justice (Article 39).

Article 103 confirms a standard practice that is important particularly for Parliament to perform its function of supervising the executive: that it can require the production of evidence. Unlike some constitutions it is clear that this is equally a power of Parliament and of its committees.

ARTICLE 104 SECRETARY GENERAL AND STAFF OF PARLIAMENT

This follows past practice of recognising the important office of Secretary General. It also makes it clear that the staff of Parliament are not part of the regular public service.

PART C PARLIAMENT'S LEGISLATIVE AUTHORITY

ARTICLES 105 LEGISLATIVE ROLE OF PARLIAMENT, 106 EXERCISE OF LEGISLATIVE POWERS AND 107 MONEY BILLS

Parliament is the "legislature" – it makes laws, though it has other important functions. It alone can pass Acts of Parliament.

Article 106 goes further than many constitutions by trying to prevent certain possible abuses. One of these is the risk that Parliament may pass a large number of changes to the law, or even introduces new laws, in a way that makes full scrutiny unlikely, by putting them into some omnibus Bill. Some countries have a practice of "Miscellaneous Amendments Bills" which include a ragbag of different measures amending a wide range of laws. This makes it hard for both MPs and the public to get to grips with what is being done. Fiji's practice seems to have been better than this. However, Article 106 (2) requires that different topics be dealt with in different Bills.

Causes (3) and (4) deal with another risk: that legislation is rushed through without adequate time for deliberation. It leaves it to Parliament to decide how this is best prevented. And it makes it possible for two-thirds of Parliament to decide that there is real need for speed (clause (4)).

Article 101 (2)(b) has already specified that there must be arrangements for public participation in the making of legislation. The Speaker also must support participation, as mentioned earlier. In South Africa, on the basis of slightly different wording[21], the courts

[21] That Constitution speaks of "involvement" rather than "participation. Probably courts would not view than as very different.

have held that a law that was made without adequate public involvement was not validly passed.[22]

Articles 106(1) and 107 deal with "money bills" concerned with taxation and other raising of public revenue and public spending. Such a Bill may not be introduced by a private member or even a committee, but only by a Minister. Chapter 14 also includes important provisions on laws relating to public finance.

It should be recalled that Article 95 requires any Bill to be presented with adequate explanatory material.

ARTICLES 108 PRESIDENTIAL ASSENT AND REFERRAL AND 109 COMING INTO FORCE OF LAWS

The most common procedure is that a Bill is passed by Parliament and then is signed by the head of state to become law. Article 108 deals with two common issues. First, the President may send a Bill back to Parliament, but only if he or she has some concern about its constitutionality. If Parliament passes it again, the President must sign. This would not prevent someone challenging the constitutionality of the law in court at some future date. Second, if the President refuses or fails to sign, the Bill is treated as though it had been signed once fourteen days (Article 106(2) or seven days in case of a Bill submitted by Parliament a second time have passed.

The Act once signed does not have legal effect immediately; Article 2 provides that this happens after it has been published in the official government Gazette, unless another date or dates are specified in the Act itself.

A check on the risk of MPs trying to pass laws to give benefits to themselves is provided by clause (3); if a law specially benefits MPs it will not come into effect until after the next election. In addition MPs will not freely fix their own salaries etc. (Article 161 provides that the Salaries and Benefits Commission fixes the upper limit of all salaries of Officers of the State).

ARTICLE 110 REGULATIONS AND SIMILAR LAWS

Many areas of the law are complex and require a great deal of detailed regulation. It is normal for Ministers to be able to make regulations to fill in the detail and in many countries there are more pages every year of regulations than there are full Acts of Parliament. This reduces the democratic control over law making (most regulations do not get properly looked at by Parliament – the supposed law makers).

[22] *Doctors for Life International v The Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC), *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 ZACC 12

Article 110 constitutionalises a practice that is well established in many parliamentary democracies (see Australia, New Zealand, Canada, the UK) Regulations must be sent to Parliament which must consider them, so the people's representatives retain some control over them. And there are limits to what regulations may do: they may not change an Act of Parliament for example: if something was important enough to warrant an Act of Parliament it is important enough to be amended by Parliament.

Clause (3)(c) reflects basic existing, and important, rules of law. Clause (3)(b) is new: reflecting the Draft's stress upon the importance of participation.

ARTICLE 111 PARLIAMENTARY AUTHORITY OVER INTERNATIONAL AGREEMENTS

If Fiji signs an international agreement it does not automatically become part of Fiji's local law. But certain parts of international law are binding on all countries, and when it comes to human rights the courts "must consider international law relevant to the protection of the rights and freedoms in this Chapter" (Article 51(1)(b)). If the country breaches its international obligations there may be consequences, including sanctions from other countries. It is important that people understand the obligations under international law that the country is adopting, and especially that MPs understand and agree to this commitment.

Article 111 provides that most international agreements (or treaties) must be approved by Parliament before they finally become binding on the country. This does not apply to agreements that are "technical" or "administrative" meaning that they do not involve issues of principle but only of detail, or set up procedures for carrying agreements already made. These are excluded so that the implementation of agreements that have already been approved are not delayed by the parliamentary approval requirement.

CHAPTER 10 THE NATIONAL EXECUTIVE

The Executive is what is often called the "Government": the politically elected or appointed people who make the policies and run the country (the non-political part of the government, the public service, if often called the "administration"). But these terms are used in various ways. In the Draft Constitution "executive" means the Prime Minister and Ministers who make up the executive branch of government, to be distinguished from the legislative and judicial branches. However, under this Draft most of the members of the executive are also members of Parliament.

PART A PRINCIPLES AND STRUCTURE OF THE NATIONAL EXECUTIVE

ARTICLES 112 PRINCIPLES OF EXECUTIVE AUTHORITY AND 113 THE CABINET

These articles, in accordance with the general style of the Draft, set out the general principles governing the executive and explain the role of the executive – which comprises the Prime Minister and other Ministers, who make up the Cabinet.

One of the risks of a parliamentary system, especially in a small country, is that the Prime Minister may "buy" support by making many MPs Ministers. The scope for this is limited by the requirement that there are not more than 14 Ministers in addition to the Prime Minister (Article 113(1)).

The principle of both individual and collective responsibility and accountability (Article 113(3)) is an important aspect of a parliamentary system, giving it the system its collective nature. Collective responsibility means members of the executive must respect collective decisions, must not criticise the Cabinet (or other members of Cabinet) in public and if the government falls all its members go.

The duty to appear before Parliament or a committee and answer questions is an important aspect of accountability; it applies to all ministers, whether they are MPs or not (clause 4).

Often a duty or power is conferred on the Cabinet as a whole. An example in this article is in clause (6): the possibility of asking the Supreme Court for an opinion on the Constitution. This need not be about a particular concrete case; it could be a request for an advisory opinion. For example the Cabinet might ask for an opinion as to whether a particular policy or action would be constitutional. The opinion would be sought in a fully argued case before the Supreme Court and the decision delivered just like a judgment in an ordinary case.

PART B THE PRIME MINISTER

ARTICLES 114 OFFICE OF PRIME MINISTER, 115 ELECTION OF PRIME MINISTER AND 116 NO CONFIDENCE IN THE PRIME MINISTER

The Prime Minister is the head of the executive and chairs the Cabinet. He or she takes the principal responsibility for the government of the country. A slightly unusual provision is Article 114(2): it is not the President – as in many countries – who will deliver the government's annual policy address but the Prime Minister. This brings practice closer to reality. In commonwealth parliamentary systems, the Head of State usually reads a policy address prepared by the government. Under Article 114(2), the Prime Minister will read it him or herself.

Nor does the President play any part in identifying the Prime Minister. Parliament elects the Prime Minister (Article 115). Parliament sits 14 days after the elections (see above). During that time nominations for Prime Minister must be put forward. If one party has more than half the seats probably only once candidate would be nominated. Also, if discussion between parties can produce agreement on majority support there may be only one nomination.

Otherwise more than one party may put forward a candidate and there will be an election. If necessary there will be a second election between the two front-runners to ensure that whoever is elected has the support, at that stage at least, of a true majority of the MPs. The second vote can be postponed fort a week to allow discussions and negotiations to go on (Article 115(2(c)).

Like other Officers of the State, the Prime Minister may be removed for wrongdoing under Schedule 5. Otherwise he or she can be removed only by a vote of no confidence supported by at least 36 MPs (Article 116(3)). The decision must not be rushed: 4 days must elapse between moving the motion and the vote; this is to allow the Prime Minister a fair chance to defend him or her-self, and MPs to reflect. The vote does not just remove one Prime Minister: the motion must propose an alternative (clause (1)). The purpose of this rule to prevent opposition parties from destabilising the government by constantly deposing the Prime Minister and thus the government even though they cannot present an alternative who will garner the support of a parliamentary majority and to avoid periods of confusion when there is no Prime Minister. (See full discussion under Article 86 and following.)

Clause (5) prevents no confidence motions being brought forward frequently: if one fails another may not be brought for 6 months. This is also in the interests of stability. However, if the reality is that the Prime Minister does not have the support of Parliament, but there is no alternative acceptable leader, the Leader of the Opposition may move a motion to dissolve Parliament under Article 88 (see above).

PART C MINISTERS

ARTICLES 117 APPOINTMENT OF MINISTERS AND 118 MINISTER'S TERM OF OFFICE

It is traditional in Parliaments based on the Westminster model to have all their cabinet members drawn from elected members of Parliament. However, in parliamentary systems in Europe for instance, this practice is not necessarily the practice. Some of those countries prohibit cabinet members who are also MPs and in others in practice all or many are not MPs. In those countries it is argued that an MP has a big enough job serving his or her constituency without being a Minister as well and that Ministers should have more specialised, technical skills than most elected public representatives. An additional consideration arises in Fiji. It is a small country and even 71 is not a large Parliament. It may not be easy to find MPs with the skills needed to fill all Cabinet posts.

On the other hand, with a tradition of having elected politicians in Cabinet, the Commission was reluctant to open up Cabinet completely to non-MPs. Therefore, the Prime Minister may appoint up to 4 Ministers who are not MPs (Article 117(2)). To retain the responsibility of ministers to Parliament each of these outside Ministers must be approved by Parliament.

The Prime Minister must be able to rely on the Minsters and may thus dismiss all or any of them at any time (Article 117(3)).

Like any other Officer of the State, a Minister may also be removed for wrongdoing (Article 118 and Schedule 5). He or she is also governed by the integrity provisions of Chapter 5 (see above) and the Code of Conduct in Schedule 4.

CHAPTER 11 JUSTICE AND THE RULE OF LAW

Chapter 11 deals with principles of justice, the courts and judges, and other justice institutions whose independence must be protected in a constitution: including the Judicial Service Commission, the legal profession, the Solicitor General (a redesigned institution), the Director of Public Prosecutions and the Mercy Commission.

PART A PRINCIPLES OF JUSTICE

ARTICLE 119 JUSTICE UNDER LAW

Article 1(2) of the Draft Constitution includes the rule of law as a founding value of Fiji. Part one of Chapter 11 spells out what that means. Article 119 elaborates the guiding principles of the rule of law, with some very specific provisions.

Among the specific provisions, clause (1)(k) relates to alternative dispute resolution, such as mediation. It does not require anything, but is an encouragement to the use of First, state authority may not be exercised in an arbitrary manner (Article 119(1)). Second, laws themselves must be understandable, certain and reasonable so that everyone can follow them; they must apply to all people equally; and they must respect liberty. Third, the rule of law means that the application of law, including prosecutions, must be fair and access to justice must be real. More specifically, justice must not be impeded by procedural technicalities, by cost or the remoteness of courts and courts must operate regularly all over the country; alternative forms of dispute resolution may be used if they are appropriate; views of victims of crimes must be considered; and, if used, restorative justice must be "based on the willing participation of the victim and the genuine acceptance of responsibility by the offender". The detail in Article 119 is important in its emphasis on the rule of law as a principle that ensures that law is not a tool of control manipulated by those in power or the legal profession but is used to build a truly just society in which individuals are fully respected and social justice is realised.

ARTICLE 120 AUTHORITY OF COURTS TO ENFORCE THE CONSTITUTION

Article 40 in the Bill of Rights gives everyone a right to have their disputes resolved in a court or other tribunal. This captures the established right to be able to go to court on matters that affect you directly. For matters relating to the Constitution, however, Article 120

provides much broader access to the courts than Article 40: it gives "everyone" the right to go to court to challenge a law or act for being unconstitutional. Lest there be any misunderstanding, Clause (2) spells this out stipulating that, in addition to people who act in their own interest (ie because the infringement of the Constitution affects them directly), people acting on behalf of others, acting in the public interest and associations etc can initiate constitutional cases.

Giving a wide range of people access to court on constitutional matters is a mechanism for protecting the Constitution itself as well as for ensuring that everyone's rights are properly protected. For these reasons Clause (2) is broader than its counterpart in the 1997 Constitution (section 41) which gave only people directly affected by the issue (and people assisting detained people) the right to bring constitutional issues to court. (the Reeves Commission noted that Rules of Court could develop more generous rules. The courts did not necessarily take a very narrow view of this concept of a right being contravened "in relation to him or her".

Clauses (4) and (5) of Article 120 deal with the authority of the courts in deciding matters. Clause (4) echoes Article 2(2) and is emphatic: courts must "declare that any law or conduct that is inconsistent with this Constitution is invalid to the extent of the inconsistency". The last phrase, "to the extent of the inconsistency", means that a whole law is not invalid if only one part of it is. Clause (4) proceeds to recognise that in some cases a mere statement of invalidity may not be adequate and grants courts a broad authority to make just and equitable orders in cases of unconstitutional laws or actions.

Clause (5) adds some important detail, spelling out that a court may limit the retrospective effect of an order of invalidity and may suspend such an order for a period of time. These powers allow courts to take into account the effect on society of a declaration of invalidity. A creative court might read them into the Clause (4) power to make any order that is "just and equitable" but they are specified because usually if, for example, a law is found to be invalid any actions taken under it since its creation would also be invalid. For instance, if a court finds an aspect of the law of criminal procedure to be unconstitutional, the declaration of invalidity would mean that any trials in which that unconstitutional provision was applied would be a nullity. The Clause (5) provision that allows a court to limit the retrospective effect of its order would allow it to order that trials concluded in the past are not invalidated provided that such an order did not undermine justice in an unacceptable way. Similarly, sometimes a declaration of invalidity can leave a problematic gap in the law. Clause (5) allows a court to suspend the invalidity for a time period to cover that. The South African Constitutional Court did this when it found that South Africa's adoption law was unconstitutional for excluding fathers of children born to unmarried mothers from any decisions concerning their adoption. In some circumstances, the Court said, fathers should be consulted. An amendment to the law was needed to provide for this and so, rather than disrupting all adoptions of children born to unmarried mothers by declaring the Act invalid,

the Court gave the South African Parliament two years to introduce an appropriate amendment. (In the interests of justice it also ordered that the father who had brought the particular case should be consulted on the adoption of the child.)[23]

PART B THE COURTS

Articles 121 – 127 deal with the independence of courts, the structure of the court system and their rules.

ARTICLE 121 JUDICIAL AUTHORITY AND INDEPENDENCE

Article 121 vests the judicial authority of Fiji in the courts and asserts the independence of courts, judges and other judicial officers. To secure their independence it also requires no interference with courts; State organs to support the courts; Parliament to provide adequate financial resources to the judiciary; and the judiciary to have control over its budget and finances. Finally it declares court orders binding.

ARTICLES 122 - 127

These Articles set out the court system in Fiji. They retain the existing system with one important exception. Following international standards,[24] Military Courts are included as part of the system, bound by the principles that bind other courts. The functions and jurisdiction of magistrates' courts are not set out in the Constitution but Article 122(3) authorises Parliament to provide the legislative framework for them and other courts. Articles 122 – 127 also spell out the composition of the courts.

ARTICLE 123 THE SUPREME COURT

As under the 1997 Constitution, the Draft Constitution makes the Supreme Court the final court of appeal in Fiji and gives it the power to provide opinions to Cabinet on constitutional matters.

In addition, when it is "in the interests of justice", clause (5) of the Draft allows people "direct access" to the Supreme Court or a direct appeal from any court (the usual procedure would be to go to the Appeal Court first). This means that in serious matters of great national urgency, or where justice and good governance would be prejudiced if the matter were not urgently determined by the highest court, the Supreme Court might hear matters that have not been dealt with in another court or might accept an appeal directly from the High Court or a magistrates' court. It is unlikely that this authority would be used frequently as the Supreme Court is not established as a trial court for hearing evidence and so on and it is likely that

[23] *Fraser v Children's Court Pretoria North and Others* (CCT31/96) [1997] ZACC 1; 1996 (8) BCLR 1085; 1997 (2) SA 218

[24] ECOSOC paper E/CN.4/Sub.2/2004/7 accessible through http://ap.ohchr.org/documents/alldocs.aspx?doc_id=9700 and http://www1.umn.edu/humanrts/instree/DecauxPrinciples.html.

judges will prefer matters to be aired in other courts before being heard in the Supreme Court. Nonetheless, when long drawn out processes through other courts would unduly affect rights or threaten the application of the constitution this aspect of the Supreme Court's jurisdiction is very important.

ARTICLE 124 THE COURT OF APPEAL

The Court of Appeal has the same jurisdiction as it presently has. However, there are two changes to the judges that sit on cases in the Court of Appeal. First, Article 124(3) requires 3 judges in every case (the current law allows the Court of Appeal to sit with 2 judges if it is impracticable to require three).[25] Secondly, although High Court judges may sit on the Court of Appeal, two of the three judges allocated to a case must be judges appointed as Court of Appeal judges. Although it is demanding to secure three judges for all appeal cases, the Draft insists on three to avoid the unfortunate situation of cases lost because two judges cannot agree. And it limits the number of High Court judges sitting on the Court of Appeal because the right to appeal is better realised if more senior judges hear matters on appeal.

No one can take a case directly to the Court of Appeal. The Court of Appeal decides appeals from other courts only. Generally, it can determine whether or not to hear a particular case or a law can require that it must hear certain cases. But in two circumstances the Draft Constitution gives people a right to appeal to the Court of Appeal. First, if an appeal concerns the interpretation of the Constitution, the Court of Appeal must hear it. Second, if the case originated in the High Court (in other words if it did not start in the magistrates courts or another, lower court), the Court of Appeal must hear it. This gives everyone the right to have their case heard in at least two courts (in other words it secures a right of appeal).

ARTICLE 125 THE HIGH COURT

This Article captures the provisions on the High Court in the 1997 Constitution (section 120).

ARTICLE 126 MILITARY COURTS

In line with developments in international law,[26] Article 126 brings military courts into the mainstream of the court system. This has a number of implications for the rule of law in Fiji:

- It does not remove the authority of the military to operate courts.
- It does require military courts, like all other aspects of the military and other security services, to be governed by law.
- By including military courts in Chapter 11 on Justice and the Rule of Law, it makes it absolutely clear that military courts, like all other courts, are bound by principles of fair trial and other provisions of the Constitution concerning rights and justice.

[25] Court of Appeal Act s. 6.
[26] Draft Principles Governing the Administration of Justice Through Military Tribunals, U.N. Doc. E/CN.4/2006/58 at 4 (2006).

- It limits the authority of military courts to offences of a military nature committed by military personnel but moves serious human rights violations by military personnel to ordinary courts.
- It confirms the right of anyone tried by a military tribunal to an appeal to the Court of Appeal.

ARTICLE 127 COURT RULES AND PROCEDURES

Parliament must provide for a rules committee to make detailed procedural rules for the courts (subject, always, to the principles in Article 119 and especially Article 119(3)). Such a committee must include not only judges (no doubt most will be judges) but at least one lawyer, who is not a judge, and ion person who is neither a lawyer nor a judge, in order to ensure the court users' perspectives are expressed.

PART C - JUDGES

This Part deals with judges and other judicial officers. Indeed, it might be improved by naming it "judicial officers" and making it clear that the principles relating to the independence of judges apply to magistrates as well. For instance, the part includes a provision on the criteria for appointment as a judge which demands highest competence and integrity. This principle should apply to magistrates and others making judicial decisions as well.

This Part sets out the basic framework necessary to underpin a strong and independent judiciary. International standards confirm that the independence of judges is dependent in part on the manner of their appointment; their security of tenure; and their financial security.[27]

ARTICLE 128 INDEPENDENCE OF JUDGES

Article 128 provides that a judge cannot be forced out of office by abolishing his or her office. This provides a measure of security against action by Parliament or the executive that is aimed at removing judges who are seen to impede their wishes. Instead, a judge may be removed only in accordance with the procedure set out in Schedule 5 (Article 134). In addition, the salary of judges is secured and legal proceedings are not to be brought against them for anything said or done in the course of their judicial work. The provision about "austerity reduction" is unusual but tries to deal with the risk that a national economic emergency may necessitate reduction in judges' income – it is based on a decision of the Canadian Supreme Court.

[27] See, among other things, the Bangalore Principles of Judicial Conduct adopted by the UN Economic and Social Council in 2006 (ECOSOC 2006/23 http://www.unodc.org/pdf/corruption/corruption_judicial_res_e.pdf).

ARTICLES 129, 130 AND 131 APPOINTMENT OF JUDGES AND OTHER JUDICIAL OFFICERS, INCLUDING CRITERIA AND QUALIFICATIONS

The Judicial Service Commission (JSC) established in Article 135 is responsible for the selection of all judges, magistrates and other judicial officers. But there are three, slightly different procedures.

- First, in selecting a Chief Justice, JSC must consult the Prime Minister and Leader of the Opposition. This provision departs from the arrangement in the 1997 Constitution (section 132) which allowed the Prime Minister to select the Chief Justice after consulting the Leader of the Opposition. Such an approach, which places the leadership of the judiciary in the hands of a political appointee is not in line with a system committed to judicial independence. Nonetheless, the new provision does include politicians in the process in recognition of the leadership role that the Chief Justice must play and the desirability of having political support for the head of the judiciary.
- Second, for all other judges the JSC makes a decision without any need for consultation.

In both these cases, the President makes the appointments recommended by the JSC.

- Third, under Article 131, all other judicial appointments, including appointments of magistrates, are made by the JSC alone. But, if the JSC wishes to appoint a non-citizen to one of these positions, the Prime Minister must agree.

Article 130 spells out criteria for appointing judicial officers and sets the experience required for appointment as a judge (that is to the High Court, Court of Appeal or Supreme Court or other courts of similar status).

ARTICLES 133 AND 134 TENURE OF OFFICE AND REMOVAL

Security of tenure is an important aspect in the protection of the tenure of judicial officers. Article 133 deals with this, acknowledging that Fiji will draw on foreign judges.

A Fijian appointed as Chief Justice or a judge of the High Court serves until he or she reaches the age of 70. Judges of the Court of Appeal or Supreme Court may serve until they turn 75. This changes the retirement ages in the 1997 Constitution which set 65 for High Court judges and 70 for the Chief Justice and judges of the Court of Appeal and Supreme Court. There are two reasons for the change: First, people are now living considerably longer and remain active much later in life and, second, the higher courts (the Court of Appeal and Supreme Court) are likely to draw on foreign judges and the best foreign judges may become available only after retirement from active work on the bench in their home country. The distinction between High Court judges and others was supported in submissions

to the Commission on the basis that the trial matters that High Court judges hear demand more physical stamina than cases brought on appeal.

Article 133(1) introduces a new requirement for the appointment of foreign judges. They may serve only one term, determined by the JSC. This addresses a difficulty with foreign judges. In the past they 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. On the other hand, experience in Fiji has shown that it is difficult to get judges with appropriate expertise for various cases. 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.

The Draft Constitution does not provide for any acting appointments to the judiciary. This is for the same reason that it does not allow foreign judges to serve on renewable contracts: acting judges may be inclined to make decisions that they feel will increase their likilhood to get permanent appointments.

Article 134 deals with the removal of judges and other judicial officers. It refers to Schedule 5 which sets out a procedure that ensures that they cannot be removed for reasons unrelated to their professional capacity or serious wrongdoing.

PART D - INDEPENDENT JUSTICE INSTITUTIONS

ARTICLE 135 JUDICIAL SERVICE COMMISSION

An independent Judicial Service Commission that acts with integrity is an important safeguard for the judiciary and the rule of law. Article 135 expands and diversifies the membership of the JSC. Under the 1997 Constitution it had only 3 members two of whom, the Chief Justice and Chairperson of the Public Service Commission, were appointed by the government. Under Article 135, the JSC will have 6 members, 3 of whom are likely to be lawyers. They will be drawn from different sectors of society (the judiciary, the legal profession, civil society) so that the selection of judges can take into account the need for professional expertise and for judges who will command social respect.

In addition to its core function of selecting judges, other judicial officers and the Solicitor General, the JSC will deal with complaints against judges, their continuing education and provide advice to the government on matters relating to justice.

ARTICLE 136 THE LEGAL PROFESSION

Courts decide cases based mainly on the arguments made by lawyers. And, unfortunately, corrupt judiciaries involve also corrupt lawyers. The legal profession is as central to the justice system as the lawyers; it must be independent, honest and competent. For this reason this Article sets out the bare bones of the role of lawyers, and the restraint required from the State to retain their independence.

ARTICLE 137 SOLICITOR GENERAL

Many commonwealth countries whose constitutional arrangements are derived from Westminster have an Attorney-General who fulfils a number of different functions. The AG is often a member of Cabinet, independent legal adviser and public prosecutor all rolled into one. The tension in these multiple functions is obvious as the AG attempts to develop and fulfil the policy of the government while at the same time acting independently and being perceived as non-partisan. The first move to separate out these functions in Fiji was taken in 1990 when the Director of Public Prosecutions was established as a separate office. The Draft Constitution maintains that arrangement which is discussed below.

However, in addition, it establishes a separate office for an independent legal advisor to the state. The Solicitor General will not be a government appointment and will not be a member of Parliament or the Cabinet. He or she will be appointed by the JSC and will be protected by the provisions of Chapter 13 which secure the independence and effectiveness of commissions and special offices.

The Solicitor General will fulfil functions that, in the interests of good governance, should be fulfilled independently including giving legal advice, preparing draft legislation, keeping a register of laws, and representing the State.

ARTICLE 138 DIRECTOR OF PUBLIC PROSECUTIONS

Previous Fiji Constitutions recognised the importance of the Director of Public Prosecutions and this Draft follows suit. Under it, the DPP has all the protections granted to independent commissions and offices in Chapter 13.

The provisions relating to the DPP are designed to establish a strong and independent prosecutorial service that is protected from undue political pressure. The most important features of the provisions relating to the DPP are:

- With only one possible exception the DPP is responsible for all prosecutions on behalf of the State (Article 138(2)). The exception is that an Act of Parliament may give the Ethics and Integrity Commission the power to prosecute. An important implication of giving the DPP full control of prosecutions is that police prosecutions must be conducted under the auspices of the DPP's office. The DPP may delegate prosecuting authority to others, including the police, but those prosecutors will be required to follow any practices prescribed by the DPP.
- The DPP may take over private prosecutions and prosecutions initiated by the Ethics Commission only if the person or body that initiated them agrees or if a court gives permission (Article 138(3)). This is to ensure that the DPP is not used to block prosecutions that the government does not wish to proceed. For example, it may occur that a private party initiates a private prosecution that would expose corruption in government. The government may then put undue pressure on the DPP to take over the prosecution and then stop it or end it in another way. Clause (3) removes that possible source of pressure.
- Following developing international practice relating to prosecutions and fair trials, the DPP may stop a prosecution only before a plea has been entered. Once the accused has pleaded, the case must run its course and the accused must be acquitted or convicted. If the State discovers the evidence is inadequate it can close its case. This provision ensures that the power to prosecute cannot be used unjustly and that trials are brought to proper conclusions. A stop-start approach by which the prosecution discontinues a trial when it sees it needs to collect more evidence and comes back later, leaving the accused uncertain of his or her position, is not permitted.

The DPP must have regard to the public interest. He or she will liaise with the Minister responsible for justice, but cannot be directed how to make decisions.

ARTICLE 139 MERCY COMMISSION

In every democracy there are circumstances in which it may be justified to pardon someone who has been convicted following a fair trial. In addition, sometimes it is legitimate to exercise mercy and reduce or suspend a sentence. Following the 1997 Constitution (section 115), the Draft Constitution grants the President the power to do this on the recommendation of the Mercy Commission.

The Draft makes two changes to the arrangements under the 1997 Constitution: First, it changes the name of the Commission. In the past the Commission was called the "Commission on the Prerogative of Mercy". In the Draft Constitution the name of the commission is simply Mercy Commission. The reference to the prerogative was deleted because the historical concept of the prerogative power is of a power that is unconstrained by law, entirely in the discretion of the executive. Prerogative powers are incompatible with the concept of a constitutional state.

The second change to the Commission lies in its composition. It now consists of the Minister of Justice (representing the government), the Commissioner of Corrections Services, and four others appointed by the Constitutional Offices Commission. A larger commission allows the diversity of Fijian society to be represented and allows the Constitutional Offices Commission to recruit people with appropriate skills. For instance, it may be considered desirable to have a medical doctor on the commission or a lawyer.

CHAPTER 12 LOCAL GOVERNMENT

As the Commission says in the Explanatory Report, "The Draft Constitution recommends a radically new system of local government, based on locality and residence and not race, as is the case at present with much of local administration."

The Draft does not provide the details of the system. It recognises that the determination of units (like municipalities) in a system of local government and the allocation of functions to them is a complicated matter and depends on, among other things, (i) the capacity that exists in different parts of the country; (ii) population density; (iii) the needs and interests of communities of people; and (iv) cost. So, a system of local government needs to be established in consultation with the people that it will effect backed up by the experience of administrators who have worked on the delivery of services and so on.

In 4 Articles, Chapter 12 provides a set of principles with which the new system of local government must comply but it leaves the exact system for future determination.

The provisions of this chapter are based on international standards including the International Guidelines on Decentralization and Access to Basic Services for All (UN Habitat 1999) and the Aberdeen Agenda: Commonwealth Principles for Good Practice for Local Democracy and Good Governance (Commonwealth Local Government Forum 2005).

LOCAL GOVERNMENT AT PRESENT

Currently local government in Fiji is complicated with at least five different systems. Some of these systems are based on race, sometimes the areas for which they are responsible overlap.

First, the national government delivers services through districts which have advisory councils appointed by the district administrator. There are 22 Districts which correspond only roughly to the 14 iTaukei provinces. Each District has an informal District Advisory Council—neither established nor recognized by statute—to advise the government on local matters. Its members are selected and appointed by the district administrator.

Second, there is a special system of administration for all iTaukei people and for others living in villages. It is run by the national iTaukei Affairs Board and consists of 14 provincial councils that are responsible for iTaukei matters. Provincial councils can make by-laws for the provinces and impose levies on adult men in the provinces. Their functions are to formulate and implement policies for 'health, peace, order, welfare and good government of Fijian residents' and 'the economic, cultural and social development,' as well as carry out functions delegated by the Minister. Councils have typical municipal by-law powers over (i) transportation infrastructure, (ii) public health, (iii) recreation and sport, (iv) village planning, (v) water supply, (vi) education, (vii) cemeteries, markets and pounds, and (ix) mail services. There are many tikina in each provincial council area. The tikina are primarily service delivery bodies for (i) implementing the policies of their Provincial Councils and (ii) collecting specific rates and the soli vakavanua. Tikina are also integrated into the Provincial Councils since they nominate one or two of their members to the Council and liaise directly with the Assistant Roko on day-to-day matters.

Third are the rural local authorities which are responsible for non-iTaukei people living in rural areas.

Fourth are urban councils. These are for towns (14) and cities (10) and are responsible for things such as public health, markets, recreation and so on in urban areas. Under the Local Government Act, the members of an urban council were to be elected. Sometimes iTaukei villages fall within urban council areas but villagers do not pay rates.

Fifth, the Rotuma and Banaban communities have their own systems.

WHAT CHAPTER 12 DOES

The system of local government envisaged by the Draft would build democracy in Fiji from local communities up, eliminating the duplication created by separate systems for separate ethnic groups and giving everyone an opportunity to participate in decisions affecting their daily lives.

What size each local government area would be, whether there would be more than one level of local government in each area, what their responsibilities would be, how representatives would be chosen are matters left to be decided in the future.

ARTICLE 140 SYSTEM OF LOCAL GOVERNMENT

The main principles of the system are established in this Article:

- Democracy – people elect local representatives
- Non-discrimination – participation is based on residence in a particular area and not on race or ethnicity
- Participation – everyone may participate in local decision making

- Inclusion – the system must pay attention to all citizens (see also Article 142(4)(b))
- Local decision making – local governments must have responsibility for services best delivered at local level
- Accountable government – the exercise of authority must be accountable to the people

Any system of local government that is established may be tested against the principles set out in Article 140.

ARTICLE 141 LOCAL GOVERNMENT STRUCTURES

Article 141 sets the broad parameters for what the law establishing local government bodies must do. Key here are the requirements that:

- Every part of Fiji must be under a local government (clause (2)(a))
- Not all local governments need be the same (clause (2)(c) and (d)). For instance, more densely populated areas might have local governments with greater responsibilities than those in sparsely populated areas. Also, there may be multiple levels of local governments in certain areas. For instance, a large rural area might have a municipality with certain responsibilities that cannot easily be fulfilled by small communities and small communities within this larger local government area may also have certain local government responsibilities.

ARTICLE 142 LOCAL GOVERNMENT RESPONSIBILITY AND ACCOUNTABILITY

Article 142 deals with two issues: the responsibilities of local governments and accountability for carrying them out. Common problems with local government structures that often lead to poor performance and even failure are that they have limited autonomy and so cannot act in ways that truly respond to local needs and that their responsibilities are unclear. Clause (1) requires the local government system to give adequate autonomy to local governments so that they can fulfil their responsibilities in a way that responds to the actual needs of the community that they serve. Clauses (2) and (3) respectively stipulate that responsibilities must be clearly set out (clause (2)) and, in an elaboration of Article 140(5), it that as a rule local governments must be assigned any responsibilities which they could fulfil.

Clause (4) requires local governments to comply with standards of accountability recognised in international instruments.

ARTICLE 143 GOVERNMENT CO-OPERATION

Democratic local government that serves citizens properly requires local governments to have autonomy from the national government. If they do not, the goal of government that is capable of fulfilling the particular needs of a community with policies tailored to its

particular circumstances cannot be met. However, this does not mean that local government can operate in total isolation from the national government. Local development is dependent on part in national development and in programmes that are coordinated across the country. In addition, in a country committed to social justice and equity, resources should be distributed fairly so that poorer areas with limited resources do not lag behind other areas. The way in which local government is established should ensure that it does not result in certain communities being disadvantaged.

Article 143 addresses the relationship between local governments and the national government. The overarching principle is contained in clause (4) – it requires cooperation amongst governments (local governments and the national government) in good faith: The relationship between the national government and local governments is not intended to be competitive but to be supportive.

Clauses (1) – (3) provide the detail: clause (1) places an obligation on the national government to support local governments. It is aimed at preventing the national government from washing its hands of local government matters and, for instance, allocating blame for inadequate delivery of services to local governments when, in fact, it was due to the historical capacity limitations of a local government to perform properly. Clause (2) responds to an almost universal problem of unfunded mandates: frequently, national governments give local governments substantial responsibilities. Usually local governments accept them, often because they seek more autonomy (or power). But equally often, local governments do not have the resources to fulfil the responsibilities assigned to them and citizens suffer. To avoid such situations clause (2) demands that local government does have access to adequate revenues. Note: the clause does not require the national government to make financial transfers to local governments. Transfers would be one way of implementing clause (2) but by referring to "sources" of revenue, clause (2) also anticipates that unfunded mandates could be avoided by giving local governments taxing powers. The reference to "predictable" sources of revenue for local governments in clause (2) is equally important. Local governments will need to embark on capital projects (say to secure a reliable electricity supply, to build and maintain sea wall or to provide transport to a market). To do this, they need to have some certainty about the revenue that they will receive over time.

Clause (3) recognises that there may be situations in which a local government fails to fulfil its functions. As many local government functions are likely to concern basic necessities (access to clean water or a clinic; transport; local roads etc) some provision needs to be made to ensure that they are maintained even when the local government concerned fails for some reason or another. Under clause (3), the national government may intervene to keep systems going. But clause (3) lays down a firm framework for such interventions: (i) they may occur only when they are necessary – and in law, the requirement that something is "necessary" sets a very high standard; (ii) they must comply with the provisions of the Chapter (which means among other things that they must be carried out in a supportive way and not so as to

undermine the local government (see clause (1)); and (iii) there must be legislation in place that sets out the procedures that must be followed when the national government takes over a local government function.

It is likely that this intervention power will be used very rarely. Nonetheless it is an important part of the constitutional framework. Without it, the national government can sit back and watch local governments fail. If the local government is dominated by a political party that is in opposition to the national government, the national government might use evidence of such struggling local governments as evidence of its superiority to political opponents, even if the cause of the local government failure is because of the limited resources of the local government body and not its political programme. At the same time, any power that is given to the national government to intervene in local governments must be properly constrained by law. The national government should not be allowed to undermine local democracy.

Schedule 6 (on transition) provides that existing local government bodies will continue, but that that work should start straight away on developing the new system. Experience shows that in many countries endless plans are made for local government reform but nothing actually get done. The Transitional Advisory Council (also set up by Schedule 6) must set up a working group of 6 people with relevant knowledge and experience, to prepare detailed proposals on local government. Their report is to be presented to the responsible Minister soon after the first elections. The Schedule sets out a long list of matters that their report must deal with.

CHAPTER 13 INDEPENDENT COMMISSIONS AND OFFICES

The idea of three branches of government – legislature, executive and judiciary –independent of each other and acting as checks on each other, is familiar. In many countries what might be described as a fourth branch, independent commissions and offices, has emerged. One of these, the office of Auditor General, has a long history, but some of the others are relatively new. In countries with more recent constitutions, these institutions may be set up in the constitution. Many older democracies, learning from the newer democracies, have adopted independent institutions (especially judicial service commissions, electoral commissions and human rights commissions) in recent years.

The 1997 Constitution included a number of independent institutions such as the Public Service Commission, Disciplined Services Commission and Constitutional Offices Commission (COC). Also, under the 1997 Constitution, the independence of the Auditor General was to be secured by the fact that he or she would be appointed by the COC. But the 1997 Constitution did not have a uniform or particularly clear way of securing the independence of these independent bodies.

The Draft establishes a number of independent commissions and offices, usually in the Chapter most closely related to their work. So, the Fiji Human Rights Commission is established in Chapter 3, Our Human Rights. Chapter 13 provides the framework within which they all operate.

One of the most important aspects of this Chapter is its provisions on the appointment and dismissal of independent officers and commissioners. These provisions are based on mechanisms first used in relation to the judiciary.

The value of having bodies and offices that do not owe their appointments, their continuance in office, or their conditions of service, to governmental or political forces is that their decision making should also be independent of those forces. This value is particularly important, or at least particularly apparent, when the officer or body has functions that involve judging the executive or others in positions of power or influence. This is obviously true of the Auditor General, the Ombudsman, and the Human Rights Commission.

Risks of biased decision making are present in other contexts too: if MPs can fix their own salaries, if government may be able to succumb to the temptation not to prosecute its political friends, or to prosecute its political enemies, if certain people are in a position to exercise influence to find employment for relatives, or for political supporters, or those in power can put personal or party or government interest before that of the nation. These possibilities all suggest the desirability of separating decisions of this sort from such influence.

The use of independent commissions also makes it possible to look for a wider range of skills and experience than may be available in the elected government or even the professional civil service.

ARTICLE 144 ESTABLISHMENT AND OBJECTS OF INDEPENDENT COMMISSIONS AND OFFICES

This Article formally establishes the bodies and offices and lists them. Maybe some people will look at the list and say this is too many for a small country. However, most of these bodies have existed in the past. Secondly, they are all doing jobs that have to be done. If not done by the specified bodies they would be done by the public service or politicians (and the administrative work would still be done by public servants). Third, a number of them are not permanent or full time bodies. In fact, because most of the work is done not by the named officers or people called "commissioners" but by salaried public servants, the number of commissioners is kept small, and many are part-time appointments (Article 150(1) provides a presumption of part-time appointment; to be full-time the Constitution or legislation must specifically provide). Some commissions comprise, in part, individuals who hold another office.

The Ethics and Integrity Commission may seem new, but it will take over the work of FICAC. It has been discussed earlier (see Article 66).

One position found in the 1997 Constitution is missing: the Supervisor of Elections. This is because the Supervisor is primarily responsible for the management of elections and should be answerable to the independent body that bears overall responsibility for free and fair elections (namely the Electoral Commission). It is the Commission's independence that should be the guarantee of fair elections.

ARTICLES 145-150

These articles set out the procedures to be used in appointing Commissions, and in their operation to ensure that the objectives of the Constitution are realised. Points of particular interest are:

- The Commissions and offices have two main sources of skills: (i) under Article 145(6) their staff are to be appointed by the Public Service Commission (PSC) – with the agreement of the receiving bodies, or to be seconded to them from other State organs; (ii) they may appoint their own contractors and consultants and to control their own budget (Article 145(7)). Note: Article 145(6) stipulates that staff appointments by the PSC on behalf of an independent body must have the agreement of the body but nothing is said about agreement when public servants are seconded to the independent bodies. This is an oversight in the Draft: in both cases the agreement of the independent body should be required. It would compromise their independence if they were not able to participate in the hiring decisions for their own staff.
- The protection of salaries and benefits of commissioners and office holders to protect them from victimisation, but with the possibility of general reductions in case of economic necessity (Article 146(2) referring to Article 161(4))
- The powers of Commissions that receive complaints (e.g. the Human Rights Commission) to investigate and to apply to the High Court to have a compliance order registered as a court order. The significance of this is firstly that defiance would constitute contempt of contempt of court which can be punished (Article 147 (3) especially (d)). But it would not be right for the Commission to both decide that something wrong had been done and to impose the punishment. The Bill of Rights says that everyone has a right of access to a court or independent and impartial tribunal; being both prosecutor and judge (which would be the situation of the

Commission if it could also punish) would not satisfy the requirement. The court's role is to ensure that the order is fair and that all relevant parties have been heard in the process of making it.

- The requirement of establishing offices across the country where appropriate (Article 148(5)
- But to save resources the suggestions that commissions and offices might share facilities (Article 148(6))
- The requirement that reports are available to citizens (Article 148(10). One of the most important roles the independent bodies is to provide information to the public that allows it (the public) to assess how government is behaving. Thus, making reports accessible to the public is critical.
- Publicity and consultation requirements for appointment to an independent body (Article 149(1)) in addition to the specific requirements of suitability (clause (2)) and integrity (Article 63(2))
- The prohibition of any person who has been involved in political activity or has held certain public offices within the previous 4 years being appointed to a commission or independent office, a period extended to 8 years in the case of appointment to the Electoral Commission (Article 149(6)). This ensures that members of the bodies are at a distance from partisan political activities and are, and are perceived to be, independent.
- The exclusion from appointment of anyone with a significant criminal record within the last 5 years (Article 149(4)(h): this must be read with Schedule 5, which disqualifies, permanently or for 10 years, those actually removed from public office for certain behaviour (see above)
- The limit of terms of office to two periods of 5 years (Article 150(2)).

ARTICLE 151 CONSTITUTIONAL OFFICES COMMISSION

This is the only article in this chapter that actually creates a Commission: one that was originally set up by the 1997 Constitution. As indicated above, it is important that appointments to independent bodies be made in a way that secures their legitimacy (or acceptability) and ensures their independence. The COC provides a mechanism for an independent process. But, its composition requires particular attention. As COC is the body

that appoints people to other independent positions, the question is "Who appoints the members of the COC?" Article 151 answers this question by drawing its members from two different sectors. Two members are draw from among the chairpersons of other commissions – they serve "ex officio"; four members are drawn from among members of the public with a record of public service – they are chosen by the Prime Minister and Leader of the Opposition, ideally working together. This should ensure that no single political party monopolises the commission and that its membership is not ever entirely partisan. It is an improvement on the 1997 Constitution, under which members of the COC were formally appointed by the President (section 143) which meant at the direction of the Cabinet (s. 96).

Section 20 of Schedule 6 deals with the first appointments to the COC, before the ex officio members are in place.

The COC's functions are to appoint, or to recommend the appointment of, various office holders or members of bodies, including commission members other than those who serve in their official capacity (see Article 149(1)) and 20 members of the National People's Assembly (see Article 70), and also to take the initiative in removing various public office holder for inability or misconduct (see Schedule 5 s. 3(1) and s. 5(2)(d)).

The Commission must try to broaden the pool of people available and willing to take public appointments (see Article 151(2), and must advertise opportunities widely (see Article 149(1)).

CHAPTER 14 PUBLIC FINANCE

Chapter 14 deals with principles of justice, sound financial management in the public sector, revenue raising and spending, as well as three institutions: the Salaries and Benefits Commission, the Auditor General and the Reserve Bank. Although this chapter covers matters that are often considered to be very technical, its framework is in fact simple and it is extremely important. Without fair, accountable and honest financial management, a state cannot flourish. So, the provisions of the chapter form a critical part of the constitutional arrangements concerned with establishing an accountable democratic system and preventing corruption. In some places they are fairly detailed but overall the goal is to set principles and allow Parliament and the executive to develop the most effective systems to meet those principles.

ARTICLE 152 PRINCIPLES OF PUBLIC FINANCE

Like other chapters, Chapter 14 opens with a set of principles that expand on the general principles established in Article 1(2) of the Draft. The principles emphasise openness and accountability in the financial management of the state; require decisions relating to revenue

raising (usually through taxes) and spending to contribute to social justice ("must promote a just society" and taxes and expenditure must be fair (para (b)) etc; and require proper financial management.

ARTICLES 153 ANNUAL PRESENTATION OF THE BUDGET, 154 BUDGETS AND 155 EXPENDITURE BEFORE THE BUDGET IS PASSED

Articles 153 and 154 deal with the annual budget in which the government's spending for the forthcoming financial year is set out. The budget becomes the Appropriation Act and no spending may take place unless the Act or the Constitution permits it.

Because the annual budget is about the way in which the government will implement its programmes, it is important that it is properly discussed in Parliament. Thus, Article 153 requires it to be presented to Parliament in adequate time for it to be discussed fully and adopted. There is a safety valve though. If something happens (such as a cyclone) which makes it impossible to approve the budget in time, Article 155 allows the government to continue to spend on the same basis as in the preceding financial year for up to four months. Parliament is given control over this spending in Article 155(1) which allows it to impose further limits on such pre-budget spending. For instance, it might require special reporting of such spending; it might permit spending on some programmes only (such as those critical to social welfare) but cut others (such as travel by members of the executive).

Note: The wording of Article 155 in the Draft differs from its 1997 counterpart, section 178, in an important way: it does not restrict pre-appropriation spending to spending on "the ordinary services of the Government". The change in wording is because the 1997 appeared to prohibit such spending on capital projects, such as building a bridge or hospital, as they would not usually be considered "ordinary" spending. But an inability to pay for such project could be extremely expensive. For instance, the government might find itself obliged to pay compensation if it was forced to default on obligations under a contract. And the people might be kept waiting unnecessarily for the completion of a useful project.

Article 154 describes the minimum information that a budget should contain. It could be usefully clarified by spelling out (i) that it covers both the national government's budget and budgets of local governments and (ii) that clause (2)(b) applies to estimates that, ultimately, will be included in the national budget.

Note also, the requirement that budgets should include "multi-year projections" (clause (1)(e)) introduces stability into the system. The approach to public finance in which a government springs surprises on the public on budget day is outmoded because, among other things, it undermines the ability of the public to do responsible financial planning and it excludes the public from participation in the process by which the budget is drawn up. Multi-year projections, which in many democracies extend over three years into the future,

demonstrate the medium term programme of the government, reassure the people and investors of the realism of its plans and remove the unhealthy element of surprise.

A NOTE ON DIRECT CHARGES

The Draft refers to "charges" in a number of places. For example, Article 158(2)(c) refers to "a charge against the Consolidated Fund" and refers to other Articles including Article 128(3) which says that the remuneration of a judge is a "charge" on the revenue fund.

A charge on the Consolidated Fund, or any other fund, is an amount that may be paid out of the fund without specific authorisation in the annual Appropriation Act. So, for example, even if the remuneration of judges is not covered in that Act, their salaries can be paid (see Article 128(3)). The payment is authorised by a law – the Constitution. This prevents these important recurrent items of expenditure becoming the victims of political controversy or budgetary problems. (This does not prevent a reduction of such salaries if necessitated by national economic circumstances (see Article 161 (4) below)).

ARTICLE 156 REVENUE

Article 156 captures the central tenet of democracy that no taxes may be imposed except by law. The word "legislation" clarifies that this may be by an Act of Parliament or by a valid regulation issued by a Minister as authorised by an Act. (Note: Article 110 puts strict constraints on making regulations, including that they must be submitted to Parliament which may disallow them). It means that any Act giving tax-raising power to a Minister would have to be very clear.)

Clauses (2) and (3) are important anti-corruption mechanisms. For instance, clause (2) ensures that any waiver of a tax is not only recorded (and the public would have access to such a record under both Article 32 and 152(a)) but also reported to the Auditor General. So, government officials or the revenue raising authority could not give special favours on taxation without having to defend such actions under the law and the public being aware of them. Clause (3) would, among other things, prevent MPs from passing a law that exempted them from some or all taxes.

ARTICLE 157 BORROWING AND GUARANTEES

A modern state depends to a significant extent on borrowing. Borrowing takes place outside the public eye and so Article 157 signals that Parliament can control this process, and Parliament and the public be informed about it. Furthermore, the Article prohibits the government from giving any guarantees on loans unless this complies with legislation. If there is no law, the guarantees may not be given. (This provision departs from section 181 of the 1997 Constitution which required Parliament to authorise every guarantee. That would

make it impractical to have certain common arrangements like an export guarantee scheme.[28] And Act of Parliament could require parliamentary approval of guarantees in excess of a certain amount, for instance.)

ARTICLES 158 CONSOLIDATED FUND AND 159 OTHER PUBLIC FUNDS

Article 158 requires all money received by the state to be paid into a single, "consolidated" fund with one narrow exception set out in Article 159.

The Consolidated Fund (which may be spread over a number of bank accounts) provides complete information of the money received and expended by the state. It is important to have such information "consolidated" so that adequate control can be maintained. Article 158 prescribes that no withdrawals can be made from the Fund other than by law.

The exception in Article 159 to Article 158's general principle is narrowly crafted. It recognises that there will be circumstances in which special funds may be necessary. Public bodies that charge fees to the public will often be authorised to use those fees for certain purposes, rather than paying them into the Consolidated Fund. This may be specifically permitted by law. The same is true of fines paid under law to public bodies. (Note: Article 159 is worded in a more simple way that section 176(2) of the 1997 Constitution but it has the same effect.)

ARTICLE 160 CONTROL OF PUBLIC MONEY AND TENDERING

This Article picks up the requirement of sound public financial management in the general principles that introduce the Chapter and demand that it is positively implemented through an Act of Parliament. Currently the Financial Management Act of 2004 does this. In addition, clauses (2) and (3) require proper procedures to be followed when contracting for services and goods. The requirement of transparency is particularly important here as it is is the most effective way of ensuring that there is no corruption.

ARTICLE 161 SALARIES AND BENEFITS COMMISSION (SBC)

The Salaries and Benefits Commission ensures that the salaries of Officers of the State, that is people in the most senior political and civil service positions like the President, MPs and permanent secretaries (see the definition in Article 185) are controlled. There are two issues here: (i) the SBC stops senior people from using their authority to give themselves very high salaries and (ii) it protects the salaries of office holders who fulfil a watchdog function over government and who need to be independent. Politicians can't punish judges or members of independent commissions for actions that are critical of governments by reducing their salaries.

[2828] Among the activities of the UK Export Credits Guarantee Department are "helping overseas buyers to purchase goods and/or services from UK exporters by guaranteeing bank loans to finance those purchases".

The SBC is one of the commissions covered by Chapter 13 and details relating to the way its members are chosen and may be dismissed, its independence and its authority are set out there. However, Article 161 clearly stipulates that this is a temporary commission. It meets just once every 4 years to determine a framework within which salaries and all other benefits must be set. Salaries might be adjusted annually but they would have to stay within the framework.

There are a number of advantages in having the SBC meet only every 4 years. First, it means that salaries are not constantly renegotiated. The framework is set and stays in place for a reasonable length of time. Secondly, it saves money. Commissions are expensive.

Clause (4) deals specifically with those office holders whose specific role is to protect democracy and whose independence must be protected i.e. judicial officers, members of commissions and independent officers like the Director of Public Prosecutions. Giving people in these positions financial security is considered so important that often constitutions or the law stipulates that the salaries of judges may never be reduced. Accordingly, in line with the position taken in Canada, clause (4) says that salaries and benefits of this group of State Officers may be reduced only in very specific circumstances: when it is for reasons of austerity and when it is part of a programme that applies to all Officers of the State. So, for example, judges cannot be singled out for salary reductions.

ARTICLE 162 AUDITOR GENERAL

The office of the Auditor General is well established in Fiji. The provisions in Article 162 draw on the provisions in the 1997 Constitution (sections 166 – 168) and spell out his or her role.

The Auditor General's function is to inspect all the financial statements and accounts of the state, and report to Parliament, and the people (including through the National People's Assembly), on the financial management of the government and public service. The Auditor General reports on to the accuracy of the accounts and points out problems and errors.

The requirement that all state bodies must submit their financial statements to the Auditor General within three months of the end of the financial year unless the Auditor General has allowed them a longer time is new. This is to avoid the situation in which statements are presented so late that it is impossible to do any real follow up or respond to problems. If sound financial management and record keeping is maintained during the year, three months should be more than adequate (even taking into account that work may start slowly in January after the end-of-year break).

Under section 167(5) of the 1997 Constitution it was permissible to remove some bodies from the financial oversight of the Auditor General. Clauses (3) and (7)(b) prevent that. Though An Act may allow a state body to be audited by by someone else, the Auditor

General has a right to review that audit (clause (8). Note: Sometimes people are concerned that the Auditor General is overloaded if all state accounts are to be audited by that office. However, this concern overlooks the fact that the Auditor General can outsource work to private auditors. The Auditor General would retain overall responsibility but the actual line-by-line auditing can be done by others (as is the practice in other democracies).

ARTICLE 163 RESERVE BANK OF FIJI

Article 163 spells out the functions of the Reserve Bank. The relationship of a reserve (or central) bank to the government varies in different countries. Some are totally independent, others are closely linked to the government. Under this Article the Reserve Bank of Fiji would act independently but would be in close communication with the government so that it understands the government's policies and is properly informed of the government's view of the general economic conditions in the country. So, clause (2) requires regular consultation between the Bank and the Minister of Finance. Similarly, before the Constitutional Offices Commission selects the Governor of the Reserve Bank, it must consult the Minister of Finance.

CHAPTER 15––PUBLIC ADMINISTRATION

The key role of the public service in the implementation of the Constitution is very clear. This chapter sets out the principles and the framework for the public service, ensuring its independence from political manipulation, and its effectiveness in service delivery, and in carrying out the policies of government.

ARTICLES 164 VALUES AND PRINCIPLES OF PUBLIC SERVICE AND 165 SERVICE QUALITY

The chapter begins, in the style of the constitution as a whole, with a statement of values and principles. These are directed towards the effectiveness of the service, but also towards fairness to the public servants themselves. Points worthy of special note are:

- The protection of responsible public servants who draw contraventions of the Constitution to the attention of the authorities (Article 164(4)) and from victimisation for doing their jobs (clause 6)
- The requirement of fair hearing for those involved in disciplinary proceedings (clause 5)

- The requirement that the public service both understand and address the needs of all sectors of the community: so that women, minorities, people who don't speak the most common languages, or person with disability, meet with understanding and not hostility or incomprehension when thy have dealing with the public service (Article 165(1))
- The encouragement to cooperation between agencies of the state (clause 2).

ARTICLE 166 APPOINTMENT OF PUBLIC OFFICERS

This deals really only with diplomatic appointments and those of permanent secretaries. The former represent the nation, and indeed the government, and therefore they are appointed after consulting the relevant Minister.

ARTICLE 167 PERMANENT SECRETARIES

Permanent secretaries are appointed by the Public Service Commission (Article 166(2)), but they can be moved by the Prime Minister (Article 167(4). The relationship between a Minister and his/her PS is very important, and for this reason it may be necessary to move a PS.

ARTICLES 168 PUBLIC SERVICE COMMISSION AND 169 APPEALS FROM THE PUBLIC SERVICE COMMISSION

The PSC is an independent Commission (under Chapter 13), which runs the public service including appointing and disciplining its members. It may allow a government agency to appoint its own staff (clause 4) but it must always itself appoints Permanent Secretaries (clause 6).

Article 169 simply requires a legal framework for appeals from PSC decisions.

ARTICLE 170 THE OMBUDSMAN, 171 AUTHORITY OF THE OMBUDSMAN AND 172 COMPLAINTS AND INVESTIGATION BY OMBUDSMAN

There has been an Ombudsman in Fiji for many years. That independent office is continued by the Constitution. It is described as "an accessible forum for resolving complaints about failings in administration by Officers of the State or State organs" (Article 170). The Ombudsman will also hear complaints about the response of departments and bodies to Access to Information requests.

These Articles set out fully the powers of the Ombudsman (which is an independent office under Chapter 13). This means the office can be fully operational straight away, as there is no

Ombudsman Act that sets out these matters. The Ombudsman can be dismissed under Schedule 5 like other Officers of the State.

The previous arrangement of the Ombudsman heading the Human Rights Commission has not been continued as the Commission received submissions suggesting this was not a satisfactory arrangement.

Other provisions of the Constitution that are relevant are Article 39: right to fair executive and administrative action, and the right to access to public information (Article 32). The Commission has drafted a law so this can become a reality very soon; one was promised in the 1997 Constitution but none has ever been passed. That law gives the responsibility for administering it to the Ombudsman Access to Information Law ss. 20-22).[29]

CHAPTER 16 NATIONAL SECURITY

One of the principal reasons for drafting a new constitution for Fiji is to put in place a framework for government that makes coups less likely. Many aspects of a constitution are relevant to this including, for instance, provisions relating to regular elections. Obviously, however, this Chapter, on National Security, is a key part of the arrangements.

Chapter 16 starts with a set of five principles that are of special relevance to the security sector. The first, in Article 173(1) sets the overall mission of the institutions of national security: to allow people to live in peace and free from fear. Article 173(2) and (3) establish the central democratic principle of civilian control of security forces subject to law. In addition, the Article asserts the right of the state, through law, to control the participation of Fijian citizens in any armed conflict and also stipulates that another country's armed forces cannot be deployed in Fiji without Cabinet approval.

ARTICLE 174 INSTITUTIONS OF NATIONAL SECURITY

Article 174 defines the institutions of national security (the military, police and corrections service) and establishes the constitutional framework within which they must all operate. The framework requires professionalism, discipline, transparency, training to act in compliance with the Constitution and the law, political neutrality and the recruitment that ensures that each service reflects in its membership the diversity of the country. The requirement of respect for human rights is particularly important (clause (3)(c) and (d)(i)).

Clause (4) which provides that "a member of any security service must not obey a manifestly illegal order" deserves further explanation. Under international law members of security forces may not follow manifestly (clearly) illegal orders. In other words, the defence that

[29] Appendages to the Draft Constitution.

someone was following a superior order does not hold. This principle emerged after the Second World War and is now codified in the Rome Statute of the International Criminal Court. Increasingly it is also captured national constitutions (e.g. Niger and South Africa), in statutes (eg Canada and Australia) or in case law (e.g. Australia and the USA). The second part of the clause ("and is justified in refusing to obey such an order") simply reinforces the first part, making it 100% clear that illegal orders must be disregarded.

Because this principle is part of international law, members of the Fiji Military Forces are clearly bound by it when, for instance, they take part in peace keeping operations. Including it in the Constitution clarifies that it applies to members of all security forces, not merely the military and protects members of those forces from prosecution when they have refused to obey orders that are manifestly illegal.

ARTICLE 175 NATIONAL SECURITY COUNCIL

As Article 175(1) states, the National Security Council (NSC) provides a forum in which the security sector and the civilian sector to which it is accountable can discuss matters relating to national security.

The composition is balanced to include members of the executive (the Prime Minister and relevant ministers), members of Parliament who are not in the executive (committee chairs and a representative of the opposition) and the heads of the different security services. Clearly it may be desirable to require security clearance for members of the NSC. This would be permissible.

The NSC provides a check on executive power because its recommendation is necessary for the declaration of a state of emergency. (See Article 181 below.)

Clause (5) of Article 181 demands that the NSC reduce the size of the military over time. It reflects the view of many people who made submissions to the Constitution Commission.

ARTICLES 176 REPUBLIC OF FIJI MILITARY FORCES AND 177 COMMANDER OF THE MILITARY FORCES

The Draft insists that the military act only under civilian control and clearly delineates the role of the military – protection of the nation against external threats – and the role of the police – maintenance of internal law and order. The delineation of roles follows internationally established standards for these disciplined forces. The Draft does recognise that there will be occasions on which the capacity of the military is needed in the country. Following the traditional practice in Fiji, it stipulates in Article 176(1) that the military may be used in the country in two circumstances only: (i) in emergencies (such as floods) when directed to do so by the NSC; and (ii) to restore peace when its assistance is requested by the

Commissioner of Policy in writing (and then it operates under the command of the Commissioner of Police).

Note: In dealing with the military in some detail, the Draft departs from the proposals of the Reeves Commission and the 1997 Constitution. The Reeves Commission argued that because the military is subordinate to Parliament, it should be established and maintained by statute and not in the Constitution. The Draft stipulates that the military is subordinate to Parliament but it does not leave the determination of the role of the military entirely to Parliament. Instead it sets out a framework for the management of the military. So, although the military is subject to the control of Parliament, Parliament is not free to expand the authority of the military beyond the limits set in the Draft. For instance, Parliament could not give the engineering branch of the military a permanent role in building bridges in Fiji. It is important in any democracy to keep a clear line between the military and the civilian public administration. This is particularly so in a country where the military has not always resisted the temptation to intervene in civilian affairs.

ARTICLES 178 POLICE AND CORRECTIONS SERVICES COMMISSION, 179 COMMISSIONER OF POLICE AND 180 COMMISSIONER OF CORRECTIONS

The Public Service Commission (Article 168) is responsible for appointing members of the public administration. A separate commission is established for the police and corrections service because different criteria and experience may be necessary in recruiting and managing personnel in these "disciplined services" (so named because they work in circumstances where great discipline is needed and controlled use of force may be necessary).

Both the Commissioner of Police and the Commissioner of Corrections Services are independent officers and the provisions of Chapter 13 apply to them.

ARTICLE 181 STATES OF EMERGENCY

Article 181 allows a state of emergency to be declared under very carefully controlled circumstances. The Article conforms to international standards in (i) establishing parliamentary control over the declaration of a state of emergency and (ii) giving the Supreme Court authority to determine whether or not a state of emergency is justified.

Clause (1) permits Cabinet to make regulations for a state of emergency. Under existing law – the Emergency Powers Act – the President had the power to make regulations on the advice of the Cabinet (meaning he had to do what they asked). Consideration should be given to revising the wording of clause (1) to provide simply that an Act of Parliament may authorise emergency regulations. The existing Act could continue, or be replaced, but Parliament would be free to limit the power of the Cabinet, whereas clause (1) contains no restrictions: As presently worded the provision may be read to allow regulations that are not authorised

by an Act. This possible reading departs from usual practice in parliamentary democracies and should be avoided. However, Article 49 does provide that any emergency legislation, which would include Cabinet regulations, must only limit rights if strictly necessary, and if justified in a democratic society, as required by Article 48 (see above).

CHAPTER 17 AMENDMENT OF THE CONSTITUTION

Much as those who adopt a constitution may hope it will last for ever, it is almost inevitable that a constitution will need some alteration at some time, to adapt to changing circumstances, or simply because there was some error or unworkable provision. There is a delicate balance to be struck between making the constitution too easy to change (and thus the protection that it includes being watered down), and it being too hard, which may mean either the governments and courts resort to strained interpretations to make the document more flexible, or measures (such as coups) being taken to effect the change that the constitution itself does not allow. The main temptation to change the constitution will come from those whose scope it limits, and mechanisms for change try to pit these against each other to prevent change being too easy. Many constitutions bring the people into the picture by requiring a referendum. The draft brings in the people through the National People's Assembly, in the hope that this will be a counterweight to government and politicians and even military influence, but not as expensive and possibly divisive as a referendum, or as easily manipulated as many have been

ARTICLE 182 PROTECTION OF CONSTITUTIONAL PRINCIPLES, VALUES AND ELECTORAL SYSTEM

Provisions that are permanently protected: Following certain other constitutions (Germany, Namibia for example), Article 182 singles out certain parts of the Draft Constitution for *permanent protection*. These provisions are:

- Articles establishing basic values
- All the Articles on human rights including the Bill of Rights itself and provisions that make it work properly
- The immunity provision
- Article 182 itself (so that the protection of the listed Articles could not be bypassed by amending this Article)

The protection does not mean that no sort of change to these provisions may ever take place, but none of them may be repealed, infringed or diminished in effect –

(a) It is possible to amend the provisions but no amendment may diminish (reduce) their effect.

(b) Amendments to other parts of the constitution that have the effect of diminishing the effect of any of the listed provisions are not permissible. So, one could not include a provision in the Chapter on Public Administration to the effect that no documents concerning the environment produced by the civil service may be provided to the public as this would infringe Article 32 of the Bill of Rights which guarantees access to information. (Note: The opening words of Article 182(1) say: "No amendment to this Constitution may…")

(c) It is possible that a constitutional amendment could be "unconstitutional" even if it is adopted according to the procedures in Article 183. The courts would have the final say on this.

Provisions that are protected for a prescribed period: Article 182(2) prohibits any change for a certain length of time. The provisions protected under clause (2) are chapter 8 (on elections) and Articles 87 and 88 on the term of Parliament (which make the term of Parliament relatively rigid). Why is this protection given, how extensive is the protection from change, and for how long?

Amendments to provisions concerning the electoral system are prohibited for a period because, the system will be entirely new to Fiji and, as recent experience in New Zealand shows, it takes a number of elections for people and political parties to get used to a new system. The provision requires the new system to be tried in at least two elections before it is tampered with. This does not mean that no adjustments can be made to the system if the first elections reveal any serious problems. Chapter 8 contains a framework; the details of the electoral system (proportional representation, as explained earlier) are to be dealt with in legislation which, of course, can be amended. It is the basic list PR system that cannot be changed.

Clause (2) also prevents Articles 87 and 88 from being amended by the first Parliament. As discussed earlier, these provisions respond to the fact that a PR system of representation might lead to small parties and coalition governments which, in turn, may be quite unstable. To prevent frequent elections under these conditions, the draft places limits on dissolving Parliament and calling elections.

This protection prohibits the constitutional provisions concerned from being touched at all; no amendment whatsoever is permitted.

The protection is limited in duration: after the second elections, during the term of the second Parliament under the Constitution, it would be possible to amend the provisions by the procedures set out in Article 183.

ARTICLE 183 PROCEDURE TO AMEND THE CONSTITUTION

This provision provides for a process for amending the Constitution that ensures that –

- Citizens are involved: Amendments can be proposed by ordinary citizens; the National People's Assembly will consider proposed amendments; and there is considerable time for public debate of amendments.
- Amendments are not put through in a rush
- A proper process is followed to check that proposed amendments are consistent with Article 182 (i.e. that they don't infringe one of the protected provisions): the Solicitor General must do this.
- Amendments cannot be adopted by a small number of MPs: a super majority is required (48 of the 71 members).

The procedures are rather cumbersome, mainly because of the role of the People's Assembly, which will not have the same experience in debating and voting as Parliament. Also the annual sitting of the NPA is very short and discussion of proposed amendments wold have to be very well organised. No doubt the Executive Committee, supported by experienced administrators would devise just the sort of procedure that is set out in clause (3).

It is important to note that the NPA cannot reject a proposal; its resolution is only advisory.

CHAPTER 18 INTERPRETATION AND COMMENCEMENT

This Chapter deals with a number of nuts and bolts issues necessary to make the constitution work well.

ARTICLE 184 PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

This sets out principles of interpretation, emphasises among other things that the values underpinning the constitution and articulated elsewhere, must inform all interpretation.

ARTICLE 185 DEFINITIONS.

It should be noted that these definitions apply to the text of the constitution only. Article 185 does not provide an interpretation of the meaning of terms in other laws. It may be important that the Constitution has its own dictionary: there is an Act (the Interpretation Act) that provides a dictionary for ordinary legislation. If it could change the meaning of a word in the Constitution this would open the way for the Constitution being changed by ordinary Act instead of the procedure in Article 183.

ARTICLE 186 GUIDES TO UNDERSTANDING THE CONSTITUTION

This deals with other interpretive matters most of which are technical. Provisions of interest are –

- (8) which says that a person holding an office under the constitution may be reappointed, unless the Constitution says otherwise; in fact the Constitution very often does put a limit on the terms of office, and
- (11) which confirms that the schedules are part of the Constitution; these contain very important provisions, as we have seen at various points in this *Companion*.

ARTICLES 187 TRANSITIONAL ARRANGEMENTS, REPEAL AND CONSEQUENTIAL AMENDMENTS AND 188 COMMENCEMENT AND TITLE

These are self-explanatory. It is very important to read and understand Schedule 6; all too often readers of constitutions fail to appreciate that many of the provisions do not come into effect straight away. The main features of Schedule 6 are:

- When the first elections are to be held (including the length of notice to be given) – s. 3
- How the first elections are to be conducted in terms of numbers of seats per Division (s. 4)
- How the term of Parliament is to be adjusted to the constitutional provision in Article 86 about elections being in August (s. 5)
- That the requirement of electoral lists alternating genders does not apply until the third election (until then basically one out of every 3 in the list must be women) (s. 6)
- The establishment of various bodies on a transitional or interim basis including the Electoral Commission (s. 7), a Transitional Advisory Council (s. 17) (for its role see also s. 25), the first Ethics and Integrity Commission (s. 18), and Interim Judicial Service Commission (s. 19) and the first Constitutional Offices Commission (s. 20).
- The arrangements for a caretaker government for the last 6 months before the first elections to avoid the incumbents having an unfair advantage (s 10).
- Provisions to allow prevent military officers holding civilian posts once the elections have been announced (s. 14).
- The transition to the new system of local government (s. 12), while keeping in force until then existing laws on iTaukei Affairs, as well as Banaban and Rotuman affairs.
- Measures to enable the current judiciary to continue on a temporary basis, with some security of tenure, while requiring them to step aside once the elections have taken place and a democratic government is in office (s. 11).
- Provisions to ensure that the government complies with the Constitution immediately it is in force, as far as is feasible, which means especially complying with human rights provisions even if the full machinery of the new Constitution is not yet set up (s. 9(2), 10(2) and 23).
- Adopting two pieces of legislation drafted by the Commission: the Public Order Law and the Access to Information Law (s. 23(5)).

- Reviving cases that were terminated by Decree, and allowing any case that was prevented from being started by Decree to be revived or started notwithstanding the lapse of time, in order to enable justice to public servants and others whose cases were stopped or prevented from starting (s. 24).
- Various provisions to ensure smooth transition of the public service, laws and institutions.
- Complying with the Decrees setting up the Commission and the rest of the process to provide immunity to the same extent as the government has done under previous decrees: this was done by simply saying that those immunities, in the legislation specified, are continued (s.27).