

Fiji's Draft 2012 Constitution: the pragmatic and the purist

Professor Wadan Narsey

27 December 2012

The Fiji Constitution Commission has on its website a link to a document called "Fiji Constitutional Process (Constitution Commission) (Amendment Decree) 2012" which would seem to be their official Draft Constitution, but which unfortunately cannot be read or downloaded.

However, Fijileaks put out a version of Fiji's 2012 Draft Constitution (call it 2012 DC).

<http://www.fijileaks.com/uploads/1/3/7/5/13759434/explanatorynotevictorscoop3.pdf>

Also available on Fijileaks is an Explanatory Report, prefaced by Professor Ghai, which contains extremely revealing background material which could not be put into the 2012 DC.

<http://www.fijileaks.com/uploads/1/3/7/5/13759434/explanatorynotevictorscoop3.pdf>

Those with a purist commitment to lawfulness and constitutionality, will find some outcomes envisaged by the 2012 DC to be ethically and morally repugnant, especially the grant of immunity to those who implemented the 2006 coup, and those who supported the illegal Military Regimes thereafter.

But, at this historical point in time, the 2012 DC makes a number of pragmatic recommendations.

First, the 2012 DC insists that elections must be held by September 2014.

Second, they propose an electoral system which will be a significant improvement, encouraging the presence of small parties and progressive gender equality in Parliament (minor remaining weaknesses may be ironed out later).

Third, and most important, are the concrete "transition institutions" which must be set up before the elections.

It is vital that Fiji civil society (including the political parties, religious organizations, business interests, NGOs, and professional bodies), fully understand and support these transition institutions, if there is any hope at all for Fiji to be returned to parliamentary accountable government in 2014.

The last holds the promise of the restoration of basic human rights, including the right of legal redress, a return of investor confidence and healthy economic growth, if the downward spiral of increasing poverty is to be reversed.

But even that is not guaranteed at the moment.

The 2012 DC still has to pass through the Regime-appointed Constituent Assembly, and the Tribunal established by the Regime's Chief Justice.

Ominously, there are signs that the Military Regime and its supporters are not going to be satisfied with the rich cake of immunity offered by the 2012 DC and a graceful exit strategy, but may callously and shamelessly fight to retain the icing they have enjoyed for six years.

Fiji people cannot rely for any support from an international community (especially Australia, NZ, US and EU) who are clearly keen to normalize their diplomatic relations with Fiji- largely because of their geo-strategic interests in a Pacific where China and India have eclipsed them for the last six years. The American Bar Association in particular, has been quietly influential in the constitution review process.

It's the Regime's own Commission

With the apparent disagreements between the Regime and the Yash Ghai Commission, it is easily forgotten that all five members of the YGC were selected by the Regime, with two international constitutional experts (Yash Ghai and Christina Murray) and three known Regime supporters (Satendra Nandan, Peni Moore and Taufa Vakatale).

It is a great credit to them all that they have produced a consensus Draft Constitution, and in particular suggest that Nandan, Moore and Vakatale (contrary to the expectations of anti-Regime bloggers) have also served with integrity on the Commission.

Academics will no doubt have a field day examining the extent to which the 2012 DC is genuinely a "home grown document reflecting the views of the Fiji people" or largely reflect the views of an array of international and local expertise hoping to create an "ideal constitution" for Fiji.

Yes, the YGC has abided by all the constraints imposed by the Regime's Decrees, including the granting of full amnesty from 2000 to 2014 for all supporters of the unlawful Bainimarama government.

But the Explanatory Report makes clear, (often conveyed as "people's views") that all of Fiji's military coups (1987, 2000 and 2006) have succeeded because of the willingness and selfishness not just of the RFMF to mount coups, but because they have been actively supported by sections of the judiciary, major political parties, the Great Council of Chiefs and high chiefs, religious organizations and leaders, the business community, and other social leaders.

The Explanatory Report also points out the great damage this last coup has done to the economy, peoples' standards of living, and the very fabric of Fiji society.

It seems clear that the future of Fiji will be largely decided by the same groups and the extent of their commitment and support for the transition arrangements being recommended by the 2012 DC.

This will become evident in the Constituent Assembly.

The transition arrangements

The YGC envisages that once the 2012 DC is "assented to" by the President, a "Transition Advisory Council" must be appointed to see Fiji through to elections.

They should comprise 2 persons nominated by Bainimarama (with 1 representing the RFMF), 1 by the Fiji Law Society, 1 by the three university Vice Chancellors in Fiji, 3 by civil society, the 3 Chairs of the Interim Electoral Commission, Ethics and Integrity Commission, and Judicial Services Commission, and 2 persons from the Caretaker Cabinet.

Second, once the elections are announced (at the latest by April 2014) the President must appoint a transitional "Caretaker Cabinet" (comprising former senior public officers) to take the country to the elections and the next parliamentary government.

Third, the elections are to be conducted by an Interim Electoral Commission (also clearly defined in the 2012 DC).

Fourth are the changes recommended to the Regime's Decrees to make them consistent with the provisions of the 2012 DC.

None of these transitional steps may be taken for granted.

Repeal of parts of Decrees

The Explanatory Report by Yash Ghai notes very critically *"The government has operated under previous laws as modified and supplemented by Decrees passed by it. There are no fundamental values and principles which govern the contents or procedures for making decrees. The government is free to do what it likes. Several Decrees violate rights of the people. Some restrict access to courts..."*

This is a sorry indictment of the Bainimarama Regime, despite all the grand claims of the Charter exercise and document, and the continuous barrage of propaganda from the Regime for six years.

The 2012 DC sets out to right some of the legal wrongs.

Important proposals are made through Article 187 (and Schedule 7) to repeal all or parts of many Decrees promulgated by the Military Regime over the last six years, which are inconsistent with the human rights provisions of the 2012 DC.

Fiji's slumbering Fiji Law Society might like to explain to the Fiji public the significance of the specific changes being proposed by the 2012 DC to the following: Regulation of National Spectrum Decree 2009 (No.48/09); Media Industry Development Decree 2010 (No.29/10) Sections; Employment Relations Promulgation 2007 (No. 36/07); Employment Relations (Am) Decree 2011 (No.21/11); Essential National Industries (Employment) Decree 2011 (No.35/11); Public Order Act (Cap.20) as amended by Public Order (Amendment) Decree 2012 (No.1/12); State Proceedings Act (Cap.24); Television Decree 1992 Section 4A Television (Amendment) Decree 2012 (No.52/12).

The YGC had itself begun the task of reviewing all the decrees until they were stopped by the Military Regime. Their initial analysis of the decrees, largely from the point of view of impact on human rights, may be also seen on Wikileaks.

http://www.fijileaks.com/uploads/1/3/7/5/13759434/analysis_of_decrees_post-2009-1_victor_fijileaks3.pdf

What of purist constitutionality?

The Ghai Explanatory Report declared that Fiji needed a "new" constitution because "the immediate cause is that there is currently no constitution." ie implicitly accepting that the Bainimarama Regime had effectively abrogated the 1997 Constitution.

This runs completely counter to solid legal opinion, including that by the Regime's current Chief Justice (Anthony Gates), that no person (or a military coup) can lawfully abrogate a Constitution or revise it even in the way that the 2012 DC is attempting. (Read this segment of my Final Submission to the YGC which also suggests how it is only the next elected Parliament that can grant immunity and make contentious changes to the Constitution).

<http://narseyonfiji.files.wordpress.com/2012/12/b-new-or-revised-constitution-and-how-it-is-not-semantics.pdf>

The 2012 DC itself indirectly points to the treason committed by Bainimarama, the officers of the Fiji Military Forces, and all those who have participated in their government since 2009.

The 2012 DC explicitly states (Clause 177) that the Commander of the RFMF must be accountable to the Minister of Defense in the elected government. (Not so, said Commodore Bainimarama).

Secondly, under Article 174, Clause (4) "A member of any security service must not obey a manifestly illegal order, and is justified in refusing to obey such an order." (Not so, said the officers of the RFMF for the last six years).

Under Clause (5) Neither the security services, nor any of their members, in the performance of their functions, may— (a) prejudice a political party interest that is legitimate under the Constitution or any legislation; or (b) further any interest of any political party or candidate in a partisan manner". (Not so, said the RFMF in 2006, and they continue to declare what political parties can or cannot do.)

Neither the 2012 DC nor the Explanatory Report ask why the immunity provisions have to be granted from 2000 and not just from 2006 when the Qarase Government was unlawfully deposed, nor from 2009 when Bainimarama formally abrogated the 1997 Constitution. (This segment from my earlier Final Submission to the YGC attempts to put together a still-sketchy picture.

<http://narseyonfiji.files.wordpress.com/2012/12/g-who-is-responsible-for-the-coup-culture-and-how-eliminate-it.pdf>

All that persons being granted immunity have to do is "swear or solemnly affirm that " that they "renounce any actions in my past that may have promoted, assisted or protected attempts to establish a government otherwise than in accordance with law."

There is no recommendation for a Truth, Reconciliation and Justice Commission to establish the truth behind the coups of 1987, 2000 and 2009; to know exactly what the 2012 DC is granting immunity for; and to bring real reconciliation to Fiji, that no piece of constitutional paper, can provide.

These are all the painful challenges that remain for the people of Fiji and any future elected Parliament, regardless of what happens to the 2012 Yash Ghai Draft Constitution.