



# Submission to The Constitution Commission

From the Citizens' Constitutional Forum

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## Preamble

The Citizens' Constitutional Forum (CCF) envisions a nation in which all of Fiji's people live together in equality, justice and peace, respecting the rule of law, under a Constitution that guarantees democracy, the rule of law and human rights.

The Constitution must include Directive Principles which should guide the national government, other levels of government and all State institutions including the military and political parties.

While the principles would not be legally binding, mechanisms should be developed to ensure that they are followed. For example, legislation dealing with the military, the public service, political parties and the electoral system would need to be changed to reflect them.

These principles are:

1. The Constitution should recognise that Fiji is made up of different ethnic, language, religious, gender, income, regional and age groups. Public policy should respect these differences but in the spirit of national unity not create permanent divisions or allow the domination of any one group by any other. To foster multiculturalism, authorities should ensure integration of the public education system.
2. Public policy should be guided by the principles of social justice
3. Decisions should be made through dialogue and consensus, and must reflect the "principle of proportionality"
4. Public decisions about public funds should take into account the interests of future generations as well as present ones.
5. The State should encourage, protect and respect the independence of non-governmental organisations whose activities further the principles of the Constitution and act as autonomous checks to State power.
6. State actions must be environmentally sound and sustainable, equitable and inclusive and must promote gender equality and inclusivity.
7. The State must respect peoples' direct participation in national affairs and ensure consultation at all levels of social, political and economic decision-making.

## Context approach<sup>1</sup>

- Fiji is a multicultural society, where national unity must move away from racial or communal approaches.
- No ethnic or religious community is homogenous or united on economic, social or political issues, however among the people of all communities there is a desire for friendship and cooperation across ethnic barriers.
- Differences of interests and attitudes within each community make it unfair to impose a single paradigm upon whole communities. Laws and conventions should give individuals or groups the flexibility to decide how they want to organise their lives.
- Although the CCF rejects racial approaches it recognizes the need for inter- ethnic equity. Priority is placed on social justice and support for policies that would bring about better re-distribution of resources, incomes and opportunities, proportionate to demographic contextual change.
- The need for each community to be confident that its vital interests are secure and however particularistic should be protected in a way that it does not bring disadvantage to other communities or compromise national welfare and progress.
- Fairer electoral system, without racial distinctions.
- Principle of shared governance to be the mandate for the government, whereby institutions must learn and observe consensual ways of decision-making, democracy and public accountability.
- Equally, we must ensure that human rights principles and practices inform policies and actions of all public bodies. There must be effective protection and advancement of human rights, notably those of women, children, sexual minorities and persons with special disabilities.
- Tolerance, sustainable democratic values and practices, and fairness must be observed by all social and private organizations.

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<sup>1</sup> CCF: One Nation Diverse Peoples 1995 (p.8-12)

## **A. Electoral System**

In considering these issues, the CCF bore in mind international human rights standards and in particular Article 21 of the Universal Declaration of Human Rights:

- i) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- ii) Everyone has the right to equal access to public service in his country
- iii) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote of by equivalent free voting procedures.

## **A1. Ethnicity and the Electoral System**

- In the view of the CCF, neither of the electoral systems established by the 1970, 1990, 1997 constitution is suitable for Fiji at the present time.
- Both electoral systems divided rather than unite the people of Fiji and do not encourage them to work together for the national interest.
- Mutual respect requires an acceptance of the basic equality of all Fijians, no matter what their ethnic group.

### **Recommendation:**

**That the new Constitution establishes an electoral system that is inclusive and equitable in its application to Fiji's diverse communities.**

## **A2. The Choice of Electoral System**

- The new electoral system must suit and consider the demographics of this nation and must also do justice to the history of this nation and its people. CCF is aware of fears of some, that voting together as a nation will somehow harm the interests of their particular ethnic group, hence recommendation of a proportional representation, which by its very nature, assures proper representation for any group of reasonable size.
- With that in mind, we recommend below the adoption of a suitable system of mixed member proportional system (MMP) which is a form of proportional representation system and by its very nature assures proper representation for any group to be represented in Parliament.

### **Recommendation:**

**That the new Constitution adopts a suitable form of proportional representation chosen with the particular circumstance of Fiji in mind preferably an Open-List system.**

### **A3. The Right to Vote**

- Youths make up 42.3% of Fiji's population and contribute to the overall national effort in many ways.
- It is only fair that youths be allowed the right and responsibility of political choice as well.

#### **Recommendation:**

**The voting age to be lowered to 18 based on Universal Suffrage**



#### **A4. Equality of Voting Rights**

- Equal suffrage – no one person’s vote is worth more than another’s
- No ethnic or other group will be predefined as entitled to more seats per ratio of its population than another.

#### **Recommendation:**

**Constituencies and the number of seats per constituency be so defined that the ratio of electors to seat is, as nearly as practicable, equal throughout the country. An independent Electoral Commission should make initial determinations and changes to allow for shifts in population numbers.**

## A5. Equal Access to Public Positions

- Fears and concerns that resulted in a racially based electoral system have influenced the constitutional rule and practices for appointment to other positions as well. Therefore, these rules and practices should be abandoned.
- Specifically:
  - The office of the President should be an elected office
  - Presidency to be open to all citizens of Fiji
  - All public positions, including that of the PM should be open to Fiji citizens. Subject to affirmative action, there should be no bias in admitting people to the public service or appointing them to any public office. Merit should be the basis for appointment and promotion

### Recommendation:

- **The new Constitution should allow equal access to all public positions by citizens of Fiji, irrespective of their ethnicity, gender, sexual orientation and physical disability.**
- **CCF submits also that there should be a set of criteria of eligibility for candidates for all public position including candidacy for elections.**

## **A6. Administration of Electoral Laws**

### **Recommendation:**

- i) That an Independent Electoral Commission should:**
  - **Draw the initial electoral boundaries on the basis of accepted principles;**
  - **Determine and implement future boundary changes, with appropriate consultation;**
  - **Conduct and monitor elections;**
  - **Design and carry out educational programs on electoral matters;**
  - **Ensure that political parties select their candidates democratically including fair representation of gender, youth, and certain groups which may be relatively under-represented. At the same time, legislation should require the parties to be more open, transparent and accountable to their membership.**
  - **Be independent, transparent and accountable to the State/people.**
- ii) That political parties which intend to nominate candidates for elections must register with the Independent Electoral Commission and must satisfy the Commission that:**
  - a) They hold annual meetings;**
  - b) They conduct periodic elections;**
  - c) They file annual returns and accounts disclosing their sources of finance;**
  - d) Their membership must be open, inclusive and reflects the diversity of Fiji's population;**
  - e) They promote the overall aims of national unity and integration;**
- iii) The Commission itself must also be appropriately accountable.**

## B. Judiciary

- The Judiciary is part of the Constitutional system of checks and balances.
- Ensure liberty of individuals and groups, public bodies do not exceed their powers and that they exercise these powers reasonably and fairly.
- The loyalty of the courts is to the Constitution
- Judiciary must be independent to determine all legal and constitutional questions
- Competent judiciary is necessary
- All judges and magistrates (except Chief Justice) should be appointed by an independent Judicial and Legal Services Commission which should consist of:
  - a. Chief Justice
  - b. Speaker of Parliament
  - c. Ombudsman
  - d. Respective legal profession
  - e. Chairperson of the Public Service Commission
- No judge or magistrate should be dismissed except for inability to perform his or her functions or for gross misconduct, after an enquiry by an independent tribunal presided over by a judge of the Court of Appeal or the Supreme Court.
- Courts should have enough resources, including well-stocked library, translation services and access to electronic database and supplementary staff.
- Access to courts, especially to redress grievances against the State should be easy and inexpensive, if necessary through the provision of state aided legal assistance, particularly for the disadvantaged.
- The fair and impartial administration of justice also requires that there should be an independent prosecutorial service, headed by a Director of Public Prosecutions who would be appointed by the Judicial and Legal Services Commission. The same Commission should also appoint the professional staff of the Director's office.

**Recommendation:**

- **A range of measures to secure and preserve the independence of the judiciary of Fiji as prescribed under the *Bangalore* and *Beijing* Principles, including:**
- **Minimum qualifications for the appointment of judges and magistrates;**
- **Independent appointment procedures;**
- **Protection of the tenure and remuneration of judges;**
- **Adequate court resources;**
- **Public access to the court system;**
- **An independent and strong prosecutorial system;**
- **An independent and strong public defence system (legal aid commission) to balance the scale of justice**
- **An independent legal services commission**
- **Acceptance of the principle that decisions of all public bodies are subject to review by the courts.**

## C. Human Rights

### C1. International Human Rights Conventions

- Improve machinery for the protection and promotion of human rights.
- There should be a re-establishment of a Human Rights Commission, which should be located in a strengthened Office of the Ombudsperson and resourced adequately with special responsibility to monitor, enforce and promote rights and have extensive powers of investigation.
- Fiji's obligation to the ratified and signed conventions. At most to aspire to sign off on all human rights conventions of the UN.
- Include and/or expand the definition to include the principles of Equality Laws and the Non-Discrimination laws which handle the issues of affirmative action and protection of rights in a very substantive and considered manner.

### C2. Affirmative Action

- The main principle underpinning the establishment of the UN is equality of all people. Everyone is equal and there cannot be unfair discrimination on any ethnic or racial ground imposed on anyone by the State.
- It is the State's duty under international law to ensure everyone in its territory is treated the same as everyone else.

### Recommendation

#### **Affirmative actions:**

- **should be based on need and not ethnicity**
- **should be based on the principles of equality. [Annexed hereto and marked as Annexure A is the *Declaration of Principles of Equality*].**
- **consideration being made to Fiji's obligation to the ratified and signed conventions. At most to aspire to sign off on all the conventions.**
- **to expand the definition to include the principles of the Equality Laws and the Non-Discrimination laws which handle the issues of affirmative action and protection of rights in a very substantive and considered manner.**

### **C3. Bill of Rights for Fiji**

#### **Recommendation:**

- **That the following guidelines for the structure of a new constitutional Bill of Rights for Fiji:**
  - **It should be comprehensive (extending, for example, to discrimination against women; access to government information; the application of the rules of natural justice and fair administration)**
  - **It should be written in simple language and translated into the official languages of the country.**
  - **There should be strict limitations on authorised restriction of rights, including during a state of emergency.**
  - **Some guidance should be given on the interpretation of the Bill of Rights. For example, this should place the burden of justifying restrictions on those who wish to rely on them.**
  - **There should be a right of access to the courts to enforce rights and provide effective and efficient remedies**
  - **Recognise the various/diverse religious and belief systems so long as it does not impinge on the rights of others.**
- **The Constitution must consider and incorporate:**
  - **relevant conventions that have been ratified and signed by Fiji**
  - **make allowances to the other international Conventions as well**
  - **expand the Bill of rights to have provisions which address Freedom of Information and the principles of the International Covenant on Economic Social & Cultural Rights (ICESCR).**

## **D. Public Accountability**

### **Recommendation**

A range of measures to enhance accountability, these include:

- Establishment of a Leadership Code or a Code of Ethics to prevent abuse of power, to avoid conflict of interests and to maintain the dignity of public officers including Parliamentarians and Senators. The provisions of the Code should be binding on holders of political offices and senior administrators and applied even if they have left office;
- Establishment of an independent constitutional office or Commission to appoint, terminate or discipline public officials responsible for ensuring accountability such as the Ombudsman and members of the Ombudsperson's Commission, the Auditor General, the Directory of Public Prosecutions, the Public Service Commission, the Judicial Review Commission, the Commissioner of Police, the Police Services Commission, the Public Trustee and the Head of the Reserve Bank, the Commander of the Military and other senior public office holders. The Commission would comprise the Prime Minister, the Leader of the Opposition, the Chief Justice, the Speaker of the House of Representatives, and the Ombudsperson (except when dealing with the Ombudsperson's own appointment);
- Ensuring that the system for appointment, promotion, and appeal against the promotion of all other public-office holders is transparent;
- Ensuring that offices responsible for public accountability have empowering legislation and adequate resources to be effective;
- Members of the Parliament and government should be elected regularly, i.e. every four years. It should be possible to recall a parliamentarian after a year in office through a petition by one third of an electorate;
- Enactment of freedom of information legislation, to provide public access to information on government decision-making and the implementation of government policies;
- It should be possible to indict any public office holder including the highest office-bearers in the country;
- There should be a clearly stated list of penalties for breaches of public trust by public-office holders. These should be enforced in conjunction with liability to prosecution under criminal law and should entail the confiscation of illegally acquired assets and proceeds.



- **Office of Ombudsman to have extensive powers of investigation over the legislature and executive.**

## **E. The Fiji Military Forces**

### **Recommendation**

- **The military to be bound by the sovereignty of our constitution and accountable to civilian institutions such as the legislature;**
- **The size of the military should be of a scale appropriate to Fiji's national security requirements;**
- **The recruitment and appointment of military personnel must be based on merit;**
- **Immunity clause for coup perpetrators should be revoked**
- **Need to review:**
  - i) the role of, size, membership of the military**
  - ii) roles of the security forces including the Navy, Military, Police and Correction services be redefined.**
  - iii) Laws that give these bodies arbitrary powers should be reviewed.**

## **F. Fiji Police Force**

### **Recommendation**

- **The role and responsibility of the Police is to maintain law and order;**
- **There must be a clear separation of duties and responsibilities of the Police and the Military.**
- **National security is the role of the Police and the Military must only become involved through a defined constitutional process.**

## G. Civil Society

- Capacity of civic, popular and non-governmental organizations to promote and protect rights and democracy and facilitate inter ethnic understanding and cooperation must be recognized and strengthened.
- Independent from state structures
- Its independence from State structures must be protected and guaranteed.
- Must be transparent and accountable.

### Recommendation

**That the new Constitution recognise the role of non-governmental organisations in civil society as a principle means of allowing the people to pursue and protect popular social reforms. It must mandate the State to respect their independence as autonomous checks to state power.**

## H. Environment

- Constitution to include a section which clearly, thoroughly, and irrevocably establish and declare a nuclear free Fiji.
- First and foremost, all development policies must address questions of environmental protection and sustainability.
- The Government must be required to make public in a timely manner all reports on environmental assessments and safeguards when proposing any development policy

### Recommendation

- **Need to review:**
  - i) expand the issues to include climate change, sustainable, equitable and responsible use of resources.**
  - ii) adopt Rio+20 recommendations and**
  - iii) must be aligned to MDG goals**

## I. Additional Categories

Category	Recommendation
<b>Citizenship</b>	'Fijians' as national identity for all citizens of this country
<b>Constituent Assembly</b>	<p>Principles of good governance such as an independent &amp; participatory approach be applied throughout the process (no military influence)</p> <p>The make-up of the Assembly should be inclusive of diverse groups irrespective of ethnicity, gender, sexual and physical orientation and or status</p> <p>Deliberation of the Assembly should be open to public scrutiny</p>
<b>Size of Constituencies</b>	CCF wishes to submit that the size of constituencies be reduced to 5. i.e. Central, Northern, Western, Eastern, International diaspora.
<b>Role of Great Council of Chiefs (Bose Levu Vakaturaga)</b>	<ul style="list-style-type: none"> <li>• Should not have any part to play in the politics of the land but may be given social, economic advisory or provincial development management role. If given a national advisory role, the GCC must take into consideration the needs, and welfare of Fiji's diverse population and not just one ethnic group where citizens can come to for redress. It must also be open to discussion during the Constitution Development Process by the people.</li> <li>• Should therefore be revamped to cover "indigenous governing structure"</li> </ul>
<b>Interim Administration</b>	<ul style="list-style-type: none"> <li>• Support principles of Constitution, democracy and the rule of law in Fiji based on Milbrook Commonwealth Action Programme on the Harare Declaration (1995).</li> <li>• Military independent process led by suitable civilian administration for return to democracy.</li> </ul>
<b>Type of Government (Westminster)</b>	<ul style="list-style-type: none"> <li>• The CCF submits that we continue to adopt the basic Westminster system since it provides an Opposition which provides some checks and balance to the</li> </ul>

	<p>government of the day with the Senate and President to be elected.</p> <ul style="list-style-type: none"> <li>• It is further submitted that the size of the House of Representatives be reduced to 51 seats and the Senate to be reduced to approximately 25.</li> <li>• It is further submitted that an enabling mechanism be established after the new Constitution is adopted to take Fiji to the general elections, that is a caretaker administration be appointed to allow this transition.</li> </ul>
<b>Security Forces</b>	There must be a clear delineation of roles between the Military, Police, Navy, and Corrections Services.
<b>FICAC</b>	The Commission must be ensured to be independent of the legislature, executive and judiciary and must not be subject to influence by any outside party.
<b>Dissolution of Parliament</b>	Whenever the circumstances arise, the only authority to declare dissolution of Parliament would be the President and also to appoint a caretaker administration in the absence of a Parliament.
<b>Constitutional Review</b>	CCF acknowledges that the Constitution will be a living document and to this end expects that the provision for review of the new constitution should be for all provisions and articles of the document should be open for review through a democratic process subject to the context and the voice of the people of Fiji.
<b>1997 Constitution</b>	<ul style="list-style-type: none"> <li>• CCF submits that some part of the 1997 Constitution which are progressive for Fiji should be adopted and carried forward in the new constitution.</li> <li>• Further in this regard CCF submits that the issue of the abrogation of the 1997 Constitution will be an issue of legal challenge and that the constitution commission and the final document must address this by finding some provision for legal coherence between the 1997 document and the new constitution.</li> </ul>

# ANNEXURE A