

The authority of the Constitution Commission to publish and disseminate the Draft Constitution and the Explanatory Report

This short note is in response to allegations by senior members of the Fiji Government and the RFMF that the Constitution Commission violated the law when it ordered the printing of 600 copies of the Draft Constitution.

The process for the making of the constitution was negotiated largely between the Attorney-General, Mr. Aiyaz Sayed-Khaiyum and me. I insisted on a legal framework for the process, so the Commission would have a clear guidance on its responsibilities and the protection of its independence, and the public would have an understanding of the process and their participation in it (contrary to the view of the AG that there should be no law on the process). Originally there was to be one Decree covering the whole process, the first draft of which I wrote. The AG divided the draft into two Decrees, one covering the Commission and the other the Constituent Assembly. I insisted that the Decree on the Commission should be as I had drafted it (with the exception of the provision on immunity of those involved in previous coups, excluding the 2000 one). But significant changes were made as regards the Constituent Assembly which I was opposed to (which were set out in a joint statement by the Commissioners when the Decree was published).

It was agreed throughout that the process would be highly participatory (the PM has said that every Fijian must have a voice) and that the Commission would be completely independent. Both Decrees guarantee that the process would be “inclusive, participatory and transparent”. The process was defined to include public consultation on the draft constitution by the Commission, and the submission of public views to the President for transmission to the Constituent Assembly. The Commission was to ensure that all the people were able to participate in the process, and to show “manifest respect for people’s participation” and of their rights. The Commission had to inform the people the progress of the process so that they understand the issues under discussion. The participation of people was also reiterated in an important objective of the process: “true and sustained democracy”.

The Commission also had to publish an Explanatory Report summarising as concisely as possible and in a way that the people understood the recommendations embodied in the draft constitution and the reasons for those recommendations.

It was within this framework that the Commission decided on its engagement with the people including publishing the draft constitution and consulting the people. However on 31 October when the Commission had already made some decisions on the draft constitutions and were planning public consultations, that a Decree was published without any consultation with or advance notice to the Commission that there would be no public consultation. There was no mention whatsoever that the Commission could not publish the Draft Constitution and the Explanatory Report to the public. Indeed even after the October Decree, both the original Decree

retained statements about the consultation and the duty of the Constituent Assembly to take public views into consideration (for example sec. 8 (1) (c) of the Decree mentions the function of the Assembly to “debate the Draft Constitution, Explanatory Report and the view of the people expressed on the Draft Constitution”).

It is not unusual for important reports to be presented to the Head of the State. This in no way precludes distribution of the report to the public.

If the overall objective of the process: participation of the people and the responsiveness of the Commission and the Assembly to their views, is to be respected, it is imperative that the Draft Constitution and the Explanatory Report should be available to the public immediately after they have been presented to His Excellency the President. It is on this assumption that we ordered the printing of a sizeable number of copies and were about to publish other material to assist the public when the Commission was told that it was not to publish any material relating to the Draft Constitution.

The position of the Attorney General is extraordinary, and hard to understand. The Decrees make clear that the Draft Constitution that the Assembly has to consider is that produced by the Commission—none other. It therefore makes no sense to say that that Draft cannot be released to the public. In none of the nearly 20 constitution making process in which I have been involved, or others that I have studied, has the commission been told not to publish the draft constitution. What happens to the Government’s objective of a “true and sustainable democracy” if the people are not allowed to read and discuss the Draft Constitution?

The Assembly has been given a maximum of 9 weeks to consider the Draft and adopt the constitution. Inevitably a week or more will be taken up to swear in and induct the members, adopt the rules of procedure, assemble a secretariat. The documents that the Assembly members have to read, understand and debate are long and complex. When are they going to have the time to explain the documents to the people and seek their views?

Under what moral authority has the Government changed the process more than half through the period given to it? The Commission and even more the people have the right to expect that the rules and procedure governing the process as set out at its start will be respected and observed. It is on this basis that they engaged in the process.

The change of rules has also seriously interfered with the independence of the Commission. The dissemination of its work is surely a matter for the Commission, especially given the emphasis on the participation of the people. And is the printing of a decree any different from the phone call from the PM or the AG to the Commission to desist from their legitimate activities? Would the latter not be a clear instance of the violation of the independence of the Commission?

The illegal ban on the publication of the Draft Constitution and the Explanatory Report has led to circulation of legal texts purportedly as the Commission’s documents. This has resulted in

considerable misunderstandings and confusion. The authentic, and the only valid, documents are those that I presented to the President on 21 December 2012. I have therefore decided on my own responsibility to release copies of the authentic documents to the public.

Yash Ghai

1 January 2013