

Public Participation & Constitution-Making in Fiji: A Critique of the 2012 Constitution-Making Process



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Introduction¹

On 1 July 2009, the Bainimarama regime announced a Roadmap for Democracy that promised a transition to parliamentary democratic rule by September 2014 (Ministry of National Planning 2009). An important part of this Roadmap, according to the same announcement, was the plan for a constitution-making process that would provide a 'solid foundation and framework for the rebuilding of our nation [that is] is critical for Fiji'. To ensure national ownership of the Constitution, the regime promised a participatory constitution-making process that would involve political parties, the private sector, civil society, non-government organizations, and citizens of Fiji.

The aim of this paper is to critically examine the 2012 constitution-making process in Fiji focusing on the principle of participation and how it was translated into practice. This was one of the central guiding principles of the Commission and, more importantly, this principle is now judged as a universal tenet of constitution-making. While literature clearly shows the possibilities of constitution-making processes in transition from conflict and in post-conflict societies, experience of the 2012 constitution-making process in Fiji will highlight the inherent difficulties in such processes in situations of tightly controlled military regimes.

This paper is divided into four main parts. Firstly, the paper will lay out a brief theoretical framework for participation that would be used to analyse the findings. The second part presents a short overview of the history of constitution-making in Fiji while the third part will provide a brief insight into the 2012 process and finally the paper will discuss the 2012 constitution-making process and present an analysis of how the principle of participation was manifested.

Part I: Participation and Constitution-Making

There is an ever-growing literature on constitution-making in transitional societies. Constitution-making has over time shifted from elite-led closed-session events to ones with high levels of civic engagement (Moehler & Marchant). Whilst scholarly literature during the second wave of democratisation and constitution-making focused on the content and provisions of constitutions when judging democratic credentials, the later stages of the third wave of democratisation and constitution-making placed more emphasis on the process (Moehler & Marchant n.d., 1–2; Ginsburg 2012, 4; Saunders 2014, 3). This shift has led scholars and policy makers to advocate greater public involvement and greater transparency as an international norm and as the best practice for constitution-making (Moehler & Marchant n.d., 3; Frank & Thiruvengadam 2010; Abdelgabar 2013; Ghai & Galli 2009; Banks 2008, 1046).

In spite of the near-universal acknowledgment of these standards, the way in which participation is translated into practice varies greatly. Jon Elster identifies and distinguishes the type and intensity of participation and citizen engagement as either 'upstream' or 'downstream' (Elster 1995). 'Upstream' engagement refers to engagement through the election of members to a Constituent Assembly and from direct engagement via consultation during drafting phases, to indirect forms of engagement through civic education programs, whereas 'downstream' engagement refers to participation through a referendum on a final document (Elster 1995). However, there is no agreement thus far amongst scholars and policy makers as to what level and system of participation and engagement produces the most desirable outcome.



International Standards for Constitution-Making

Minimum obligations concerning public participation in public affairs are established by international human rights law and subsequent proclamations and elaboration by various human rights bodies. Such obligations are spelled out in Article 21 of the Universal Declaration on Human Rights (UDHR 1948)² and Articles 1 (1) and 25 of the International Covenant on Civil and Political Rights (ICCPR 1966).³ These rights are further elaborated in General Comment 25 by the UN Human Rights Committee.⁴ According to General Comment 25, conduct of public affairs has been expanded from voting in elections to encompass participation in constitution-making processes as well. However, the Comment goes on to point out that this right to participate in public affairs is a 'subjective right', meaning that citizens do not have the unconditional right to choose how they wish to participate. Rather, the state chooses the modality of participation, ensuring that people are provided with opportunities to participate in the process (Hart, 2010).

Why Participate in the Constitution-Making Processes?

A well-thought out and planned participatory constitution-making process does offer some significant benefits.

Nation-Building and Unity

More and more importance is being placed on constitution-making in multi-ethnic societies because constitution-making is now seen as a means to build a nation as well as a state (Dann, Reigner, Vogel & Wortmann 2011, 3–4; Saunders 2014; Miller 2010, 644–47; Benomar 2004; Benomar C. August 2003; Hayson 2005; Brandt, Cottrell, Ghai & Regan 2011, 86–87). To achieve this goal of nation-building, the constitution-making process must be *inclusive* and it needs to be a confidence-building process between people of different communities. Saunders also points out that there is now general agreement that a constitution must, in one way or another, originate from citizens, therefore citizens' *participation* in the process of making a constitution has become very important (Saunders 2014).

Enhancing Legitimacy of the Constitution

With greater emphasis placed on citizen participation and the inclusiveness of the process of constitution-making, it is argued that this will lead to greater *legitimacy* of the Constitution and citizens, through participation in the process, and will ultimately lead to *national ownership* of it, therefore guaranteeing that the Constitution will be respected and followed (Saunders 2014; Benomar C. August 2003; Benomar J. 2004; Moehler & Marchant, 5–6; Elkins, Ginsburg, & Blount 2008, 367–75; Blount 2011, 39; Brandt, Cottrell, Ghai & Regan 2011).

Well-Informed and Active Citizenry

Constitution-making offers people a chance to be educated on issues relating to democracy, human rights, and the rule of law through civic education and awareness programs. There are long-term benefits of this as through these programs citizens become democratically empowered (Benomar J. 2004; Dann, Reigner, Vogel, & Wortmann 2011; Samuels 2006; Saunders 2014; Brandt, Cottrell, Ghai & Regan 2011).

Dangers of Participation

While public participation in constitution-making is emerging as a general international norm and best practice, there are some clear dangers of allowing too much participation.

Brandt, Cottrell, Ghai, & Regan (2011:87–90) caution that for divided societies, participation may be counter-productive. Groups and people may use the constitution-making process to seek self-interested positions and not be prepared to work with other groups to seriously discuss a future that would reduce conflicts. Another potential problem with participation in divided societies is that debate and discussions tend to be narrow, usually revolving around sectional/ethnic interests as opposed to the interests of the nation as a whole. The participatory process may be used by leaders of fundamentalist and intolerant groups to manipulate people and cause further divisions. Therefore, instead of the process being one about nation-building, it could turn out to be divisive (Blount 2011, 39).

There is another danger related to public participation. Due to the diversity of interests involved

in the process, it becomes harder to find a practical settlement in divided societies (Blount 2011, 39; Brandt, Cottrell, Ghai, & Regan 2011, 87–90). Time and effort are spent on trying to reach a consensus, sometimes making the process a lengthy one. Added to this is the reality of politics and decision-making in divided societies. Decisions in divided societies are usually made by a small group of influential elites in a manner that might be non-participatory and non-transparent.

On occasions, decision-makers, as a form of appeasement, include provisions in (draft) constitutions that they think will be most likely accepted by people (such as religious and ethnic groups) (Cottrell, Ghai, & Regan 2011, 87–90).

With broad participation there is also a danger that the constitutional text that emerges out of this process may be ‘an adhoc creations, rife with internal inconsistencies and institutional mismatches’ (Blount, 2011, 39).

Evaluating the Impact of Participation in Constitution-Making

Evaluating the impact of public participation in constitution-making processes is not easy. Just as consensus is lacking on what participation means and how to achieve it, there is no agreement amongst academics and policy-makers on how to measure the impact of public participation in constitution-making. At times focus is placed on the end result, i.e. whether a constitution has been achieved regardless of its quality, while at other times it is on avoiding a bad constitution. Some have even gone beyond these two criteria and measured the impact of participation by analysing whether the process was transformative in creating spaces for constructive public discourse by an informed and active citizenry (Brandt, Cottrell, Ghai, & Regan 2011, 85).

Brandt, Cottrell, Ghai, & Regan (2011) suggest eight criteria for assessing the impact of public participation in constitution-making. These are the effect of public participation:

- on the content of the constitution
- on resolution or creation of conflicts
- in broadening the political reform agenda
- on the responsiveness of the constitution to national goals and issues

- on the legitimacy of the constitution
- on citizens’ understanding of the system of governance
- on creating an informed and active citizenry
- on creating and promoting an understanding and support for constitutionalism and the rule of law.

Part II: History of Constitution-Making In Fiji

Constitution-making processes in Fiji since independence have moved away from being closed-session and elite-driven to processes which have involved high levels of public engagement. The debates surrounding issues of constitution-making have also been primarily focused on ethnic distribution of power between the two groups rather than issues related to nation-building.

Before independence in 1970, the constitution-making process was mostly carried out in private by leaders of major political parties together with colonial officials and the deliberations of these meetings were confidential (Cottrell & Ghai 2010, 278–79). The participation of the public during constitutional discussions was negligible.

After the coup in April 1987, the Governor-General under pressure from the coup makers and the Taukei movement appointed Sir John Falvey to chair a Constitutional Review Committee that would ‘review the Constitution of Fiji with the view to proposing to the Governor-General amendments which will guarantee indigenous Fijian political interests with full regards to the interests of other people in Fiji’ (Cottrell & Ghai 2010, 280). This was perhaps the first time that the public were to be engaged in the constitution-making process. The Falvey Committee conducted public hearings in the four major urban centres in Fiji, as a result receiving nearly 950 written and oral submissions. People’s participation in the process was limited by geography and the prevailing political climate (Cottrell & Ghai 2010, 280).

However, the CRC was unable to produce a unanimous report which led to further political uncertainty. In response to the uncertainties, Rabuka carried out another coup on 25 September 1987, declaring Fiji a republic, installing himself as the head of an interim government, and later inviting the former Prime Minister Ratu Mara to lead

an interim government. A Cabinet sub-committee was formed to prepare a draft constitution that largely took into account the proposals made by the Great Council of Chiefs. In 1989, the government appointed a retired colonel, Paul Manueli, to lead a Constitutional Inquiry and Advisory Committee to ascertain public response to the draft committee. The committee conducted 32 public hearings in 14 centres, receiving more than 500 written and oral submissions. The Manueli Report culminated in the 1990 Constitution (Lal 1992, 284–95).

The 1990 Constitution provided for a review within seven to ten years of its promulgation (Lal 1992). In 1993, an expanded Cabinet sub-committee that included representatives of the Opposition parties was set up to look into reviewing the 1990 Constitution. After much deliberation, a three-member committee headed by Sir Paul Reeves was appointed to review the constitution in 1995.

After much debate and discussion, wide-ranging and highly ambitious ‘terms of reference’ were drawn up for the constitutional review process. The commission was tasked with the responsibility ‘to recommend constitutional arrangements to meet the future needs of the people of Fiji, and promote racial harmony, national unity and economic and social advancement of all communities.’ In attempting to fulfill this, the recommendations ‘had to guarantee full protection and promotion of rights and interests of the indigenous Fijian and Rotuman people, have full regard for the rights, interests and concerns of all ethnic groups and take into account internationally recognized principles and standards of individual and group rights.’ In order to achieve this, the commission had to ‘scrutinize, facilitate widest possible debate on the terms of the Constitution, and after ascertaining the views of the people, suggest how the 1990 Constitution could be improved to meet the needs of Fiji as a multiethnic and multicultural society. (Lal 1992, 284–95).

From July to November 1995, the Reeves Commission travelled throughout Fiji, receiving almost 800 written and oral submissions. In 1996, the Commission presented its report titled *The Fiji Islands: Towards a United Future* to the parliament for deliberations (Government of Fiji 1996). It was only at the public hearings that citizens participated

in the process. Once the Commission’s report was submitted to the parliament, citizens’ participation ceased. Once submitted to the parliament, the Joint Parliamentary Select Committee (JPSC) took over and deliberations took place behind closed doors without any public involvement. The JPSC finalised the Commission’s report with some modifications into a Bill that was then subjected to the parliament for endorsement (Cottrell & Ghai 2010).

All three changes came about after military coups d’état. It is almost as if the occurrence of these coups signified a rejection of the constitution which was in place at the time. In some ways, Fiji’s coups have not only been coups against governments but also coups against constitutions and constitutional arrangements. This project focuses on the processes of 2012 constitution-making in Fiji. Three fundamental characteristics that should be apparent to any avid observer of Fiji’s constitutional history are: the lack of citizen participation in the process, the exclusivity of the process itself, and, as a consequence, a lack of ownership of the resulting constitution by the people of Fiji.

Constitution-making processes in Fiji prior to 2012 subscribed to international trends in constitution-making in divided societies by restricting public participation and leaving most of the negotiations relating to constitutions to the political elites and representatives of different ethnic communities.

During the various constitution-making processes in Fiji public participation has generally been restricted. The agenda and the parameters of deliberations are set in advance. It can be argued that constitution-making has been an elitist project, mainly driven by politicians. Public participation has also been restricted due to the lack of civic education on issues relating to the contents of the constitution and broader principles of democracy as a system of government. People have therefore been vulnerable to manipulation by the political elites before, during, and after constitutional deliberations. Debates on critical issues around nation-building, such as national identity and representation, have been missing from the public sphere; these have mostly been decided by political elites acting on behalf of their constituents. Together the lack of public participation and inclusiveness has led

to a lack in ownership of constitutions in Fiji and contributed to the subsequent political upheavals.

Part III: A Road Map to Democracy? The 2012 Fiji Constitution-Making Process

Outline of the 2012 Process

On 9 April 2009, the Fiji Court of Appeal ruled the 2006 military coup unconstitutional. The response by the military government was both swift and predictable. On the very next day, President Ratu Josefa Iloilovatu announced that the 1997 constitution had been abrogated. One of the reasons cited by the president was that this would 'facilitate the holding of true and democratic elections.' (President of Fiji - Address to the Nation 2009). Apparently, the military regime deemed that the 1997 Constitution was not conducive to the facilitation of true democracy. The military government announced a roadmap for achieving 'true democracy' for Fiji. One of the important aspects of this road map was to be the adoption of a new constitution which should reflecting the aspirations already articulated in the Peoples Charter for Change, Peace and Progress, a government-led initiative (National Council for Building a Better Fiji 2007). Since the abrogation of the Constitution (and the absence of the parliament), the military government ruled by decree (with presidential assent). The formulation of the decrees had no input and consultation from the public. The 2009 Administration of Justice Act removed the jurisdiction of the court to hear or determine a challenge to any government action. What actually happened was that the Cabinet considers and approved decrees in secret which were then ratified by the President.

With elections already scheduled to take place in 2014, it was imperative that a new constitution should be in place well beforehand. In 2012, the regime issued two decrees to facilitate the work on the new constitution: the Fiji Constitutional (Constitution Commission) Process Decree 2012 or Decree 57 and the Fiji Constitutional Process (Constituent Assembly and Adoption of Constitution) Decree or Decree 58. The former, Decree 57, established and stipulated the mandate of the Constitution Commission whereas the latter pro-

vided for the establishment and mandate for a Constituent Assembly. The role of the commission was to inform the public at large about the process, to collect and receive submissions from them and finally to draft a constitution in line with the views of the people and the non-negotiable principles that would then be presented to the Constituent Assembly for further deliberations. The role of the Constituent Assembly was to debate the draft Constitution, as well as the Explanatory Report of the Commission, and the views of the people of Fiji expressed on the draft Constitution; keep the people of Fiji fully informed of the progress of debate and adoption of the draft constitution in its passage through the Constituent Assembly; and ultimately to adopt the draft constitution.

Together the two decrees provided for a constitution-making process divided into four stages with specified timelines. The first phase was the civic education phase (the primary responsibility of the government) which was to run from May to August of 2012. This phase entailed organising training for the people, to enable them to actively and effectively participate in the constitution-making process.

The second phase began in July finishing in October. This phase was the consultation phase where the Commission actually went out to hear and collect the views of the people. Upon the completion of this phase, the Commission was then required to prepare the initial draft of the constitution to be handed to the President by the first week of January. The last phase involved the tabling of the draft constitution to a Constituent Assembly which would deliberate further before the constitution finally came into effect. The whole process was scheduled to be completed by March of 2013.

The very first principle and objective that Decree 57 laid out for the Constitution Commission was to 'ensure that the people of Fiji are able to participate in the process without any distinction based on race, gender, religion, age, occupation, status, residence, learning or disability' (Government of Fiji 2012). The Constitution Commission was given a very wide mandate which required it not only to collect people's views but also to prepare the people and facilitate their participation (Government of Fiji 2012). Decree 57 stipulated 11 non-negotiable principles

which the Commission had to take into account in the draft constitution—namely, *a common and equal citizenry; a secular state; the removal of systemic corruption; an independent judiciary; elimination of discrimination; good and transparent governance; social justice; one person, one vote, one value; elimination of ethnic voting; proportional representation; and a voting age of 18*. Overshadowing these 11 principles was the requirement for the constitution to grant immunity for events of 2006 and thereafter.

The regime, through its Roadmap to Democracy, viewed constitution-making as legitimising its Charter process. It went to the extent of limiting public debate on issues that the regime felt strongly about, that is, the 11 non-negotiables with the unconditional granting of immunity. At the centre of the Fiji Constitutional Process Decrees (57 and 58) was public participation, and the regime kept reminding people that this was their process and that they should take part in it to determine a democratic and stable future. If changes were to be made to the draft constitution, Decree 58 (establishing the Constituent Assembly) made sure that a supermajority of two-thirds was required. Perhaps a reason for this was that the regime felt that, with the non-negotiables, public participation would not jeopardise their vision for what the constitution should look like. This also indicated a high degree of legitimacy for the participatory process.

This paper will argue that the regime miscalculated the effects of the constitutional review, thereby abandoning the Commission's draft and the entire process in 2013.

Part IV: The Research

Research Objectives

The general aim of this project was to examine stage 2 (Public Consultation and Submission Phase) of the constitution-making process focusing mainly on the question of participation. This was one of the central guiding principles of the Commission and is now judged as an important requirement of constitution-making. Specifically, the project critically analysed how the principle of participation was translated into practice:

1. how people participated

2. the extent of participation
3. the impact of participation:
 - a. on the content of the draft
 - b. the legitimacy of the draft.

The Constitution Commission was established and started work in July 2012 with a substantial programme of public hearings and other opportunities for Fijians to submit their views to it. It was chaired by Professor Yash Ghai and included four other members: Professor Christina Murray, Professor Satendra Nandan, Penelope Moore and Taufa Vakatale. Supporting the commissioners was a professional Secretariat and consultants. The commission's work was funded by the Fiji Government; however most of the funding came from traditional aid donors such as the British High Commission, and the Australian and New Zealand governments amongst others.

Data Collection Methodology

Data collection methodology for this project was an evolving one. As the project went on, the methods were modified from just directly observing participants to further one-on-one probing of participants on their motivations and the process they undertook before participating, to chatting with the commissioners and CSO representatives, to eventually randomly interviewing people who did not participate in the process.

This research primarily relied on using qualitative methods for data collection, namely, the direct observation of public hearings of the Constitutional Commission and informal, unstructured participant (participating citizens) conversations and discussions of the process. The team, which consisted of two researchers, visited 20 (out of 110) public hearings held by the Constitution Commission. The aim was to gain a first-hand impression of the process and ascertain citizens' views of the process with relation to participation, inclusiveness, and ownership. The project also attempted to ascertain what the impact of public participation on legitimacy was.

The 20 public hearings visited included a mix of urban, peri-urban, and rural areas on Viti Levu and Vanua Levu. Due to financial constraints the team was not able to visit any public hearings in the outer islands.

At the public hearings, the researchers observed and recorded the process, how the public delivered their submissions, the questions posed by the commissioners, the time allocated for individuals to make submissions, the environment, and so on. Individuals after they made submissions were then approached for a further interview, using a semi-structured questionnaire to gain further insight into their motivations to participate in the process. 108 people who made submissions (individually and on behalf of groups) at the 20 public hearing sessions were interviewed. Questions that were asked related to but were not restricted to: knowledge of the process; knowledge and understanding of the constitution; and they put the submissions together.

Most public hearings in communities lasted a few hours—usually two to four hours in rural areas and four to eight hours in populated urban and peri-urban centres.

Informal discussions and conversations with the Constitution Commission Commissioners were also held to ascertain their views on the work of the Commission and the participation of people and the submissions. Conversations with ‘special interest groups’ such as non-governmental organisations, faith-based organisations, women’s and youth groups and other community-based organisations were also held. About 20 CSO and special interest group representatives were interviewed for this project. These groups’ views and opinions are important to the process as some of them have a large following in the communities and many NGOs and CSOs conducted civic education sessions and were crucial in mobilising people to take part in constitution-making.

An extensive literature review was also undertaken in regards to comparative and historical situating of the constitution-making process.

Data Analysis

Observations at public hearings — what was common, what was different in submissions — were noted down in a notebook. Individuals were identified for interviews, using a semi-structured questionnaire. Interviews were recorded then later transcribed.

In analysing the data collected, the researchers looked for patterns across observations and

interview responses. Then once patterns were formed, an inductive approach was used to draw out generalisations regarding people’s participation in the constitution-making process. The content of people’s submissions, the Commission’s Explanatory Report and its data analysis pivot table were also used to analyse data.

Research Findings

General Overview of the Submissions Received by the Constitution Commission

The Constitution Commission wound up their public hearings after almost three months of travelling around the country. By the end of it all, the Commission had conducted 110 public hearings, receiving 1831 oral and/or written submissions at these sessions. In addition to this, they also received 5339 written submissions through post, hand delivery, and emails. Of these, more than 1000 were submitted as group submissions (Commission Constitution 2012, 123).

The groups that participated varied in size from large, such as the Methodist Church, to medium, such as political parties, to small such as youth/women’s groups. These groups also varied in how they drafted their submissions. For example the Methodist Church instructed the heads of 54 divisions to draft submissions to submit to the head office for compilation as one Church submission while community-based youth/women’s groups organizing small meetings where they came up with issues they wanted to be reflected in their submissions.

Timing and Sequencing of the Constitution-making Process

Taking into account the broad mandate of the Commission as stipulated in the Decree, the timeframe for the process gave organisations and the public very little time for preparation. The five-member Constitution Commission, chaired by Professor Yash Ghai, commenced its work on 31 July 2012 with a three-month public consultations phase from 3 August to 15 October (Commission Constitution 2012, 121–24). The regime announced a four-phase constitution-making process on 9 March 2012 beginning in May 2012 with nation-wide civic edu-

cation (Fiji Broadcasting Commission 2012). Many civil society organisations interviewed stated that the timing and sequencing of the process was not ideal as it did not give them much time to mobilise funds and activities that would ensure that ordinary citizens are well prepared to participate (Costello-Olsson 2013; Buadromo 2013; Yabaki 2013; Deo 2012; Prasad 2012; Volatabu 2013). They felt that the process was rushed and better planning and information would have made it easier for them and their target groups to contribute meaningfully.

An added problem with the timeframe and logistics of the public consultation phase was that the five commissioners had to break up into groups to ensure they covered more ground, thereby receiving submissions from more people. While ideally this does not seem to be problematic, this approach was contentious in some areas, mostly rural ones. Some people we talked to wished to present their submissions to the Commission Chair, whom they felt was impartial and had more clout. In other areas, people hinted that they would have liked to see the five commissioners together listening to their submissions. This would have shown to the people the cohesiveness of the Commission and that the commissioners were listening to first-hand submissions.

Civic Education and Awareness

According to Brandt, Cottrell, Ghai & Regan (2011:91), civic education is widely recognised as an important part of constitution-making processes, especially in highly participatory processes. Civic education usually entails enhancing knowledge about the role of a constitution and the choices that are to be made when making a new constitution, apart from knowledge of the constitution-making process.

Constitution-making involves a variety of choices regarding complex issues. Making these choices requires provision of information about issues that are to be deliberated before any information is to be collected. A participatory process requires citizens to make contributions to making choices which can be difficult to understand for the majority of the population. Without comprehensive civic education and awareness programs many people will have little opportunity to meaningfully par-

ticipate in the constitution-making process (Brandt, Cottrell, Ghai & Regan 2011, 90–91).

The commission was not charged with the responsibility to carry out civic education (Moore 2013; Commission Constitution 2012). The regime, when announcing the constitution-making process in March, stated that it would carry out a nationwide civic education campaign from May to July because ‘the public must be well informed of the issues that they need to think about, that they need to address, and that they need to express’ (FBC 2012). The Prime Minister went further, arguing ‘if the public is not educated about the issues to consider, then the process will be useless’ (FBC 2012). The regime did not live up to its commitment to carry out a comprehensive civic education program before the start of the second phase of the constitution-making process.

Even CSOs and the Constitution Commission failed in ensuring that people were well prepared before the public consultation phase got underway. The failure by CSOs to carry out comprehensive civic education was hampered in part by the restrictive decrees put in place by the regime (Buadromo 2013; Costello-Olsson 2013; Yabaki 2013; Deo 2012; Volatabu 2013; Prasad 2012). For CSOs to hold public meetings they were required as per Section 8 of the Public Order (Amendment) Decree to apply for permits prior to holding meetings (Government of Fiji 2012). The restrictions were lifted only after insistence by the Constitution Commission Chair once the Commission started its work in July (Commission Constitution 2012).

Despite these obstacles, CSOs did manage to mobilise some funding and conduct limited civic education activities, mainly uncoordinated, around selected parts of the country (Buadromo 2013; Costello-Olsson 2013; Prasad 2012; Deo 2012; Volatabu 2013; Kumar 2013). However, some CSO leaders did express disappointment over the fact that they could have planned and co-ordinated their civic education activities better (Buadromo 2013; Volatabu 2013). Organisations like the Citizens’ Constitutional Forum (CCF), Fiji Women’s Rights Movement (FWRM), Aspire Network, National Council of Women Fiji, Pacific Centre for Peace building (PCP), Youth Assembly of Fiji Islands (YAFI)

amongst others held community-based training to ensure people made submissions (Buadromo 2013; Costello-Olsson 2013; Kumar 2013; Volatabu 2013; Yabaki 2013). In one case, huge numbers of Indo-Fijian women turned out to make submissions in Labasa (town in Vanua Levu) as a result of FWRM training and community sessions (Khan 2013).

As a result of this limited awareness and training, the oral submissions made at the public consultation venues lacked substance. Conversations with people after they had made submissions revealed that many did not understand the role constitutions play in a society, and many had not read the previous constitutions. Added to this, many people did not know much about the 2012 process, and some said that they heard about the Commission's visit to their community, in passing, through the media or from other people. Most of the oral submissions dealt with public policy issues such as access to

water, roads, health, education, wages, work conditions, land and so on rather than institutions of state. While these issues are very important, it was observed that most submissions did not identify issues that a constitution normally deals with. The table below quantifies how many of the submissions mentioned one of the 17 thematic areas that the Constitution Commission used for data analysis.⁵

Prevailing Political Climate

As Mosmi Bhim rightly observes, the 2012 constitution-making process was undertaken 'in the context of restrictive laws' that may or may not have had an impact on how people participated, prior to and during the constitution-making process (Bhim 2013, 168). After the abrogation of the 1997 Constitution in 2009, Fiji was operating under a state of emergency (Public Emergency Regulations (PER) Decree (2009)) that severely restricted basic democratic

Table 1: Summary of Submissions to the Constitution Commission by Thematic Area

Thematic Area	Not Mentioned	Mentioned	Total
Constitution-making processes	6675	417	7092
Citizenship and Ethnicity	5969	1123	7092
Language	6655	435	7090
Human Rights	1242	5840	7082
Electoral System	5932	1160	7092
Leadership & Integrity in Public Life	5714	1378	7092
System of Government	5845	1247	7092
Accountable Government	6082	1010	7092
Local Governance	5360	1732	7092
Great Council of Chiefs	5837	1255	7092
Land	4594	2498	7092
iTaukei Affairs	5696	1396	7092
Military	6347	745	7092
Coup Culture	6121	971	7092
Immunity/Amnesty	6467	625	7092
Transitional Arrangements	7010	82	7092
Religion	5304	1788	7092

Source: Constitution Commission Database 2012

freedoms of assembly and expression. The regime put out decrees in regard to the functioning of independent offices such as the judiciary, the Human Rights Commission, trade unions, media and the legal profession. In 2012, prior to the announcement of the constitution-making process, the regime lifted the PER Decree and replaced it with Public Order Decree 2012 where all restrictions under PER 2009 were retained, along with increased powers to arrest and detain people (Bhim 2013, 169). However, a notable omission from the Public Order Decree was media censorship. This was covered under the Media Industry Development Decree of 2010 and it limited the functioning of the media in a number of ways (Bhim 2013, 169–70). Yash Ghai, the Chair of the Constitution Commission, prior to taking up his post, called on the regime to make changes to laws severely restricting basic freedoms that would inhibit people from taking part in the process without fear (Rounds 2012). Later, the three major political parties — the Soqosoqo Duavata ni Lewenivanua, the Fiji Labor Party and the National Federation Party — aired similar concerns in their submissions to the Commission (Fiji Labour Party 2012; National Federation Party 2012). This call from Ghai was dismissed by Bainimarama, who said that ‘the comments by the chair are unfortunately misplaced... He has been told time and again and the people of Fiji have heard about this. None of the laws currently in place stop any Fijian or hinder any Fijian from making any submission to the commission on any topic’ (Narayan 2012).

The commission and regime’s relationship started on a high note with many promises of independence, inclusiveness and openness. However, by late August the relationship started to deteriorate. Bainimarama was quoted in the media telling Ghai to ‘...concentrate on his job and not get involved in politics’ after Ghai had suggested that the regime refrain from scrutinising and criticising submissions made by people to the Commission (Bhim 2013, 172). Tensions came to a head in early November, when Bainimarama attacked the Commission for being impartial in hiring the former vice-president as a consultant, even though it was well within the powers of the Commission to do so. The regime alleged that because of Ratu Joni Mad-

raviwiwi’s involvement, as the Roko Tui Bau, in presenting a submission to the Commission that called for Fiji to be declared a Christian state, he had contradicted one of the non-negotiable principles. In defending the Commission and its independence and impartiality, Ghai revealed that there was ‘massive interference’ by the regime in the work of the Commission, through emails telling Ghai what he ought and ought not to do (Radio Australia 2012). Subsequently, the regime promulgated an amendment to the Constitution Commission Decree (No 57), which stripped the Commission of its role in reviewing and recommending almost 300-plus decrees to ensure consistency with the draft constitution. The amendment decree also required the Commission to publish a monthly financial report and a list of employees in the print media (Bhim 2013, 173–74). This was an overt indicator of the deteriorating relations between the regime and the Commission.

In the interviews with CSOs, after the Commission wound up its work, most commented that the political climate had negative impacts on the constitution-making process. Firstly, it did not provide a conducive environment for CSOs to carry out civic education activities prior to the public consultation phase and then during the work of the Commission through the assessments and criticisms made by the regime on people’s submissions (Deo 2012; Kumar 2013; Prasad 2012; Volatabu 2013; Buadromo 2013; Yabaki 2013). Some CSOs went further by arguing that there was still a climate of fear, amongst some people, of not being able to participate in the process without retribution (Prasad 2012; Deo 2012). One human rights activist went even further by pointing out that in some places where the Constitution Commission was holding public hearings in the Western Division, there were police intelligence officers present, which was a further sign of intimidation (Deo 2012).

Traditional Decision-Making vs. Individual Mandate

One of the factors that ran contrary to the principle of participation in Fiji’s constitution-making process is the existence of indigenous traditional structures. The indigenous Fijian way of life is largely

based on communal living. In this setting, important decisions are usually made communally and there are protocols that define how decisions are arrived at and how they are implemented. Generally, important decisions are usually undertaken by men who hold traditional status in their community. Once a particular decision is made by these traditional leaders, it becomes binding for the whole of the community.

The requirement for people to participate in the constitution-making process created a dilemma for some indigenous communities. For instance, in one of the provinces, the paramount chief of the province convened a meeting for all the subject chiefs within the province for the purpose of developing a provincial submission. ‘The paramount chief of the province was the first person to make a submission. As was expected, all other submissions that came afterward from the people more or less were aligned to submission presented by the paramount chief.’⁶

Another instance which showed this dilemma was at the village of Votua in the Province of Nadroga. In this case one of the villagers made an individual submission which ran contrary to the village submission. Other villagers present were observed to have muttered to each other about the impudence of this fellow villager who had decided to break ranks with a decision the village leaders had already agreed upon.⁷

These two observed examples clearly show how indigenous traditional structures in some instances can actually create a dilemma for individuals who might want to participate as individuals.

Constitution-Making and Nation-building

In modern times, constitutions in multi-ethnic societies serve not only as the supreme legal document but also as the focal point of citizens’ allegiances. In this regard, constitutions have also become for most countries a document that defines and binds a country and its people. For countries that have experienced political instability, constitutions can be used to address contentious issues that may have undermined the existence and the unity of the state. The Constitution Commission in its publication, ‘Building the

People’s Constitution: Your Responsibility. A Guide to Constitution Making for the People of Fiji’ highlights that a constitution plays two important roles in a multi-cultural society beset by divisions and conflicts like Fiji: nation-building and state-building (Constitution Commission 2012).

The 2012 constitution-making process in Fiji can be regarded as an example of how constitutions may be used as an instrument of nation-building. The passing of Decree 57 by the military regime in March of 2012 provided the first impression as to how the new constitution and its formulation was going to factor into the larger notion of nation-building. Under this decree the Commission was mandated to consult as widely as possible throughout Fiji to try and capture how the people felt and what the people thought should be included in the constitution. The idea of allowing people to participate actively in the constitution-making process was definitely a step in the right direction. Ideally, the opening of such a space should have allowed people to exchange their hopes, fears and aspirations and more importantly helped them come to an understanding over the deep divisions that existed between the different groupings.

Unfortunately, other factors were at work which greatly undermined the utility of the constitution-making process as an instrument of nation-building. First and foremost was the restriction on freedom of expression which had been in place since the issuing of the Public Emergency Regulation in 2009. This imposition closed off all public avenues through which people could vent out their frustrations and disaffections. The negative impact of this censorship became apparent when the Constitution Commission began its consultation work. Some individuals and groups actually used this opportunity to vent their disaffection against the regime. The manner in which some of these expressions of disaffection were presented indicated that the deep divisions between the two major ethnic groups were still very much alive. For instance, the call for the reinstatement of the 1997 Constitution by some of the I-Taukei was mainly because that particular constitution at least still protected some of their group interests.⁸ Others even questioned the legitimacy and the independence of the Constitution

Commission itself. In some ways the space which could have facilitated genuine mutual exchange became an arena of contestation and protest.

Another major factor was the regime's insistence on making a number of principles non-negotiable. One such provision, which is of particular importance to nation-building, was that of a common identity. Ideally, having a common identity is a fundamental building block for any nation and should rightly be enshrined in a country's constitution. Since independence in 1970, there had been no common identity to define all the citizens of Fiji. The regime thought it fit to address this important oversight and decided to adopt the term Fijian as the identity for citizens of Fiji. However, the term Fijian is one that had been used exclusively to refer to the indigenous population, and the decision provoked opposition from the indigenous population who felt that they had been deprived of something which rightly belonged to them. This change also triggered protest from other ethnic groups, who felt that it was simply not right to use this term without first consulting the indigenous people. This issue of common identity, although declared non-negotiable, also became contentious during the consultation process.

The third and last factor was the timeframe and the approach used by the Constitution Commission in its consultation phase. If a constitution is to be used as an instrument of nation-building then its provisions need to be conducive to such an objective. This can only be achieved if enough time and space is given to all stakeholders to have proper dialogue and come to some sort of consensus on what should be included in their constitution. The problem in Fiji's case was that there was simply not enough time given for the people to try and sort out some of the issues that had caused division in the past. The four to six months' timeframe was too brief to expect people to be ready to make substantive contributions to the making of the constitution. The other related matter was the approach undertaken by the Constitution Commission in its consultative process. In its endeavor to reach as many people as possible and to allow easy access to people, the Commission unintentionally missed the opportunity of bringing

the different ethnic groups together. By visiting indigenous villages and Indo-Fijian settlements, the Commission was able to collect what they needed. However, they failed in the sense they could have brought different ethnic groups together and heard from all sides at the same time. This approach would also have allowed these different ethnic groups to also share their views with members of other ethnic groups and thus set the groundwork for inter-ethnic discussions.

This is not a new or unique phenomenon for divided societies like Fiji that undergo constitution-making. As highlighted by Cottrell, Ghai, & Regan (2011:87–90), the danger of further divisions and conflict caused by public participation is real. The rhetoric of nationalists and many grassroots indigenous Fijians as observed at the public hearings attest to the fact that the ethnic divisions (mistrust) that already existed in Fiji were on show and there was a sense of these divisions being exacerbated. A unique opportunity to bring people with differing opinions together was lost.

Participation in Practice: What Does This Mean?

Participation is much more than just opening spaces for dialogue. More importantly, it involves analysing the motive of the participation process and inculcating skills that empower and enable citizens to participate effectively and meaningfully. 'Here the contrast and the relationship between spaces that are created through invitations to participate and those that people create for themselves become especially important' (Cornwall 2008, 274–75). Cornwall further states that invited spaces and the opportunities that are available for participation are frequently controlled and owned by those who have opened up the spaces (power wielders), and it does not matter how participatory they seek and claim to be (Cornwall 2008, 275). For Fiji, the questions to be asked here are: What were the motivations behind allowing people to participate in the constitution-making process? And more importantly, how effective and meaningful was people's participation?

It can be concluded that the constitution-making process was merely tokenistic. Decree

(No. 57) was clear regarding the functions of the Constitution Commission. Sections 7 and 8 mandated the Commission to ‘inform’, ‘collect’, and ‘receive’ people’s views. While doing this, the Commission was to ensure that this process was coordinated with civic education so as to ensure that people had a good understanding of the issues before they expressed their views (Fiji Government 2012). People had no control over what the Commission did with the information, how the Commission used the information collected, and whether or not their submissions were taken onboard or not. This is not to say that the Commission did not intend to use the information gathered during the consultation phase. The commission was genuine in its commitment and was actively forthcoming in asking people to make submissions to them and get their voices heard.

For the people, participation signified **inclusion**. Since 5 December 2006, people have felt emasculated, unable to air their views, with constant threats to safety and security. Decisions had been made with no consultation or input by the communities. Finally after almost five and a half years of suppression, they felt they could finally have their say. Initially, there was some skepticism from certain sections of the society regarding the whole process. It was seen as a regime-initiated and regime-driven project intended to legitimise the regime’s agenda. There were also concerns regarding the composition of the Commission, especially the inclusion of the three local commissioners who were known regime loyalists. However, as time passed, people and organisations started to see the process as independent. This could be attributed to the impartial leadership of the Commission Chairman. People started feeling confident about the process, thereby lending it legitimacy. During this time the regime tried to interfere with the work of the commission through public pronouncements.

For the Constitution Commission, participation meant a number of things. Firstly, it meant **legitimation** for the process they were implementing and the draft constitution. It also meant **sustainability and empowerment** that would ensure that the people at large, through participation, understand and take ownership of their destinies. This the Commission

tried to do with the draft constitution that they ultimately produced where they tried to balance the demands of the regime with what the citizens had shared with them. Apart from granting the wishes of the regime (non-negotiables and immunity) albeit with conditions, the Commission tried to ensure that people’s participation in the new constitutional order was guaranteed and that they had a significant and active role to play in the future governance of the country.

For the **regime**, participation meant **legitimation** (Nominal Participation). As Cornwall (2008) and White (1996) noted, participation is about motivations that lead to [governments] adopting participatory approaches and about power and control. It was evident from the beginning that the regime had predetermined the outcome of this process and that public participation for them meant giving credibility to their ambitions. There was a gap in the rhetoric of ‘genuine participatory process’ and the actions of the regime and the military prior to, during, and after the public consultation phase. From the very beginning, the regime set the tone (setting the timeline, selecting the Commissioners and so on) for the process without much consultation. The actions from the regime towards the later stages of the Constitution Commission’s work and the deterioration of the relationship suggest that the regime was unhappy with how things were unfolding, and felt it could no longer influence the process. The changes to the Decree (No. 57) that stripped away the power of the Commission to review all the decrees that had been in place and also the powers of the Commission to present its draft to the people was rather unfortunate. A day before the draft constitution was to be presented to the President, police officers had seized copies of the draft being printed, with the Land Force Commander Mosese Tikoitoga defending the actions of the police by saying that it was not the Commission’s duty to print it (Australia Network News 2013). The Permanent Secretary of the Ministry of Information Sharon Smith-Jones was quoted as saying that police burned printers’ proofs ‘for security reasons’, in an action taken ‘to preserve the integrity of the constitutional process’ (Callick 2013)

After the Commission presented its draft to the President, the regime's public relations machinery together with the military went on the offensive, personally attacking the Chair (Tikoitoga had said that the commission 'was trying to destroy the process...his actions were unbecoming and they should be ashamed of themselves') and some of the provisions of the draft constitution as undemocratic and unacceptable.

On 10 January 2013 the President informed the nation that while the Commission's draft contained a few good elements, 'many of the provisions of the Ghai Draft positions us in the past. It has unfortunately perhaps succumbed to the whims of the few who have an interest in perpetuating divisions within our society' (Fiji Times 2013). He instructed the regime to draw up a new draft after extracting 'the positive elements of the Ghai Draft that will create true democracy, accountability and transparency and infuse into it, the key elements of the Peoples Charter and internationally accepted practices and standards and formulate a new Draft Constitution for me to present to the Constituent Assembly' (Fiji Times 2013).

It is fair to speculate that the regime was unhappy with the contents of the Commission's draft and sought to de-legitimise the commission and its draft by personal and unwarranted attacks. Ultimately and ironically the regime used a very secretive and un-participatory process to draft its own version of what it thought should go in a constitution and present it to the people.

The Attorney General started conducting public sessions on the regime's draft constitution which were at best a one-way affair — i.e., information-giving with little time for debate and discussions. The regime's alternative process received over a 1000 submissions (through written submissions, emails, and text messages!). The contents of these submissions are yet to be made public.

Concluding Remarks

The Constitution Commission and the public consultation they undertook were praised by many. The more than 7000 submissions received was by no means a small feat. Never in Fiji's history has such an extensive logistical exercise been

undertaken. People participated extensively in the process and actors such as the Commission and NGOs enhanced and facilitated this. However, what remains to be answered (and it is beyond the scope of this paper) is whether this extent of participation was actually meaningful.

If our definition of participation is simply to be present and make a submission then we can safely conclude that this process has been successful to a large extent. Nevertheless, if we take into account the definition of participation in the typologies that have been discussed then we can conclude that the success of participation during this process is a mixed one.

As noted earlier in this paper, academics and practitioners make claims that public participation ensures ownership of the document and builds legitimacy. However, when the regime started criticizing the Commission's draft, ultimately foregoing it for one drafted by them in secrecy, people mainly remained silent, instead of defending the document born out of a process that they participated in.

The regime's refusal to accept the draft or to proceed with the promised process of further consultation suggests that the regime had predetermined the outcome despite proclamations of participation, inclusiveness, transparency, and of building a better and sustainable democracy.

Postscript

On 22 August 2013, the regime unveiled the Constitution that was promulgated to by the President on 6 September 2013 (*The Australian* 2013). Interestingly, the 22 August version was made out to be the final version, yet the version of the Constitution that was promulgated to by the President on 6 September 2013 contained revisions that had not been declared publically. These actions by the regime clearly violated one of the main principles of the constitution-making process they had outlined in March 2012, i.e. 'full, inclusive and fair participation of all Fijians'.

After promulgating to the constitution the President, in an address to the nation, stated that 'With this document, we lay to rest the institutionalized divisions and inefficiencies' that have plagued us and embrace a common future in which we all have

an equal stake. And we lay the foundations of a new Fiji — taking our place among the great democracies and fulfilling the dream we all share of better days to come’ (The Fijian Government 2013). Bainimarama described the new constitution as a ‘blueprint for democracy’, marking a ‘new beginning’ for the island nation. He proclaimed that the 2013 constitution will make Fiji democratic — ‘The 2013 Fijian constitution enshrines principles that are at the heart of all the great liberal democracies... an independent judiciary, a secular state and a wide range of civil, political and social-economic rights’ (Australia Network News 2013).

While this was going on at the Presidential House, a group of youth and women’s rights activists had gathered outside to protest the promulgation of the 2013 Constitution. The group argued that ‘the President’s assent is just providing a rubber stamp to the controversial document, which replaces the constitution set aside by the military backed regime in 2009’ (Radio Australia 2013). Shortly afterwards 14 protesters, mainly women, were taken in by the police for questioning, and detained for several hours. The Fiji Women’s Rights Movement (FWRM) in a statement supporting the protestors claimed that ‘the group was protesting against today’s signing into force of the Fiji constitution, which has been controversially pushed through by the government despite a lack of transparency and lack of public participation’ (Pacific Media Centre 2013).

After eight years of arbitrary rule, Fiji held elections on 17 September 2014. Political campaigning in the lead-up to elections had many hotly debated topics, ranging from issues related to public policy to changes to the 2013 Constitution. On 14 June 2014, in her speech, the leader of the Social Democratic Liberal Party (SODELPA), Ro Teimumu Kepa, stated that once elected to power her party will seek to change the 2013 Constitution. In doing this, it will refer to the Supreme Court ‘for an advisory opinion on the status of the 1997 Constitution’ (RNZI 2014). Following this announcement, the Commander of the Republic of Fiji Military Forces (RFMF), in an interview with *The Age*, stated that ‘the military will not tolerate an elected government rewriting the Constitution’ (Marks 2014). This statement drew the attention of the political parties

and activists who saw the military’s unwillingness to accept the results of the elections and the military attempting to play the role of the defender of an imposed constitution that grants them full and unconditional immunity. The Fiji Labour Party (FLP) called on the military and its commander to ‘respect the will of the people’, but the commander went further and called on them to ‘to show support for a constitution for Fiji which is genuinely democratic, will ensure transparency and good governance and provide political stability’ (Fiji Live 2014).

These pronouncements by the military commander do not augur well for the future stability of Fiji. The intention to change the 2013 Constitution by the major political parties (except the regime-backed Fiji First Party) indicates the lack of ownership and legitimacy in the document that was borne out of a fraught process, a document written in secrecy with the intention of preserving the status quo.

Notes on Authors

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Eroni please could you email Linda a brief bio of yourself.

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Endnotes

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- 2 For the full text of the UDHR, see <<http://www2.ohchr.org/english/law/udhr.htm>>.
- 3 For the full text of the ICCPR, see <<http://www2.ohchr.org/english/law/ccpr.htm>>.
- 4 For the full text of General Comment 25, see <<http://www.unhchr.ch/tbs/doc.nsf/0/d0b7f023e8d6d9898025651e004bc0eb>>.
- 5 More analysis is currently being done on this by analysing 117 the sub-thematic areas that the Commission had devised for analysing the submissions.
- 6 Observation of the Constitution Submissions undertaken at the village of Noco for the Province of Rewa.
- 7 Observation of the Constitution Submissions undertaken at the village of Votua in the Province of Nadroga/Navosa.
- 8 This includes the recognition of traditional

institutions such as the Great Council of Chiefs, an electoral system that ensured communal representation, recognition for them as indigenous and recognition of some of their history such as Christianity and the Deed of Cession.

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