

EXTRAORDINARY



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GOVERNMENT OF FIJI

FIJI CONSTITUTIONAL PROCESS (CONSTITUTION COMMISSION) DECREE 2012
(DECREE NO. 57 OF 2012)

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GOVERNMENT OF FIJI

FIJI CONSTITUTIONAL PROCESS (CONSTITUTION COMMISSION) DECREE 2012
(DECREE NO. 57 OF 2012)

WHEREAS, the Prime Minister, Voreqe Bainimarama, made a historic statement on 9th March, 2012 announcing the establishment of an inclusive, participatory and transparent process to draft and adopt a new Constitution;

WHEREAS, the Prime Minister set out, at the same time, certain non-negotiable principles and values for the new Constitution, namely a common and equal citizenry; a secular State; the removal of systemic corruption; an independent judiciary; the elimination of discrimination; good and transparent governance; social justice; one person, one vote, one value; the elimination of ethnic voting; proportional representation; and a voting age of 18 years;

WHEREAS, the Prime Minister emphasised that the new Constitution must be premised on the fundamental values and principles set out in the Peoples' Charter for Change;

WHEREAS, the Prime Minister announced that the constitutional process must be one where every Fijian will have a voice;

WHEREAS, the Prime Minister announced that the draft Constitution will be considered by a Constituent Assembly in an inclusive and transparent process, and the Assembly will consist of representative civil society groups and organisations that are Fijian-registered, including faith based organisations, national organisations, political parties and Government; and

WHEREAS, the Prime Minister emphasised the overall objective as being the achievement of peace, prosperity; economic well-being and a true and sustained democracy for all;

NOW THEREFORE, in exercise of the powers vested in me as the President of the Republic of Fiji and the Commander in Chief of the Republic of Fiji Military Forces by virtue of the Executive Authority of Fiji Decree 2009, I hereby make the following Decree to establish the legal basis for the drafting and adoption of the new Constitution in line with these principles and objectives—

PART 1—PRELIMINARY

Short title and commencement

1. This Decree may be cited as the Fiji Constitutional Process (Constitution Commission) Decree 2012 and shall come into force on the date of its publication in the *Gazette*.

Interpretation

2. In this Decree, unless the context otherwise requires—

“civic education” means programmes of education, whether conducted by governmental or non-governmental bodies, having the aim of enabling the people of Fiji to understand the nature and role of the Constitution and the guiding constitutional principles, and to participate effectively in the constitutional process;

“Commission” means the Constitution Commission established under section 6 to consult the people and to prepare a draft Constitution;

“consensus” means substantial agreement among the members of the Commission which the Chair or the presiding officer is satisfied indicates that the decision reached is generally acceptable, and refers to decision making in a spirit of cooperation rather than of confrontation;

“Constitution” or “new Constitution” means the Constitution of the Republic of Fiji that is adopted and given Presidential assent under the Fiji Constitutional Process (Constituent Assembly and Adoption of Constitution) Decree 2012;

“constitutional process” means the entire process of constitution drafting and adoption, including the collection of public views by the Commission, preparation of a draft Constitution and public consultation thereon, and decree of the new Constitution;

“Fijians in the diaspora” means any person born of Fijian parent, but living outside Fiji, and retains an interest in and commitment to Fiji;

“Fijian” means a citizen of Fiji;

“Fijian Commissioner” refers to any member other than the International members of the Commission;

“guiding constitutional principles” means the principles set out in paragraphs (d) and (e) of section 3 and subsections (3) and (4) of section 7 of this Decree;

“Minister” means the Prime Minister; and

“State service” means the service of the State in a civil, disciplinary or judicial capacity.

Purpose

3. The purpose of this Decree is to draft a Constitution for Fiji that—
- (a) results from full, inclusive and fair participation of Fijians;
 - (b) meets the needs of Fiji and the aspirations of its people;
 - (c) unites the people of Fiji;
 - (d) includes provisions appropriately designed to achieve, among others,—
 - (i) true democracy; and
 - (ii) respect for, and protection and promotion of, human rights; and
 - (e) includes provisions that achieve the following non-negotiable principles and values—
 - (i) a common and equal citizenry;
 - (ii) a secular state;
 - (iii) the removal of systemic corruption;
 - (iv) an independent judiciary;
 - (v) elimination of discrimination;
 - (vi) good and transparent governance;
 - (vii) social justice;
 - (viii) one person, one vote, one value;
 - (ix) the elimination of ethnic voting;
 - (x) proportional representation; and
 - (xi) voting age of 18 years.

Principles

4. In the exercise of its powers and the performance of its functions, the Commission shall—
- (a) 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;
 - (b) manifest respect for human dignity, human rights, peoples' participation and openness; and
 - (c) base their decisions upon—
 - (i) the purposes and the guiding constitutional principles for the Constitution;
 - (ii) the wishes of the people of Fiji;
 - (iii) the lessons of the past; and
 - (iv) best relevant practice.

Timing of the stages of the process

5. The constitutional process shall follow the timeline set out in Schedule 1.

PART 2—THE CONSTITUTION COMMISSION

Establishment of the Constitution Commission

- 6.—(1) This section establishes the Constitution Commission.
- (2) The Commission shall be a body corporate with the power to—
- (a) enter into contracts;
 - (b) sue and be sued;

- (c) purchase or otherwise acquire moveable property; and
- (d) do all other acts necessary for the proper performance of its functions lawfully done or performed by a body corporate.

(3) The members of the Commission shall be—

- (a) Professor Yash Pal Ghai – as Chairperson;
- (b) Dr. Christina Murray;
- (c) Taufavakatale;
- (d) Penelope Moore; and
- (e) Dr. Satendra Nandan.

(4) For the purpose of this Decree, the members in—

- (a) subsections (3) (a) and (b) are the International Commissioners; and
- (b) subsections (3) (c), (d) and (e) are the Fijian Commissioners.

(5) In the event of a vacancy in the membership of the Commission, the Prime Minister shall appoint another person to be a member of the Commission.

(6) An appointment made by the Prime Minister under subsection (5) shall be published in the *Gazette*.

Functions and powers of the Commission

7.—(1) The functions and powers of the Commission shall be to—

- (a) study the circumstances and needs of Fiji and its people so far as relevant to the preparation of the new Constitution;
- (b) study the constitutional history of Fiji with a view of avoiding the mistakes of the past;
- (c) carry out research, to commission research, or to use existing research, or advice of experts, as appropriate, on the ways in which the new Constitution can achieve the purpose of this Decree;
- (d) inform Fijians including through its own website, and through the State and private media, of the progress of the constitutional process, in order that they may understand the issues under discussion, and be fully informed as to how they may make their own contribution and submissions;
- (e) collect the views of Fijians on how the purpose of this Decree may be achieved, especially with regard to contents of the new Constitution;
- (f) receive the views of the people through visiting as many parts of the country as possible and —
 - (i) holding public meetings and hearings;
 - (ii) holding, but only for good reason, meetings and hearings in private;
 - (iii) receiving oral submissions; and
 - (iv) receiving written submissions;
- (g) monitor the print, broadcast and electronic media to understand the views expressed;
- (h) communicate with Fijians in the diaspora in order to ensure that they understand the process and are able to express their views;
- (i) analyse scientifically the views submitted, and prepare a report summarising those views;
- (j) prepare a draft Constitution and any consequential changes to existing laws as may be necessary or advisable to give full effect to the draft Constitution, on the basis outlined in section 3, with an Explanatory Report, and present it to the people of Fiji for their comments; and
- (k) present to the President the draft Constitution, an Explanatory Report, the report of the views of the people and the comments received on the draft of the Constitution.

(2) The Explanatory Report referred to in subsections (1) (j) and (k) shall—

- (a) summarise, as concisely as possible and in a way that the people of Fiji shall understand —

- (i) the recommendations embodied in the draft Constitution;
- (ii) the reasons for those recommendations;
- (iii) how those recommendations relate to section 3 of this Decree; and
- (iv) the views received from the people;

(b) describe how the Commission has carried out its work.

(3) When the Commission prepares the draft Constitution, it shall consider appropriate and workable provisions acceptable to the people of Fiji for —

(a) timelines and time limits for the implementation of the Constitution, including for the enactment of new legislation, the creation of new institutions and offices and the phasing in of those provisions of the Constitution that cannot be immediately effective; and

(b) mechanisms to ensure the adherence to the timelines and the transitional arrangements generally.

(4) Notwithstanding anything contained in this Decree, when the Commission prepares the draft Constitution, it shall ensure that appropriate provision is included in the draft Constitution for immunity which—

(a) shall not be reviewed, amended or revoked by the new Parliament or any subsequent Parliament;

(b) continues the immunity granted under Chapter XIV of the Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990, as saved by the Constitution (Amendment) Act 1997;

(c) gives such immunity, as is provided in the Limitation of Liability for Prescribed Political Events Decree 2010, to all persons listed as ‘prescribed persons’ under that Decree for all events defined as ‘prescribed political events’ in that Decree;

(d) gives immunity, in a form that is not in any way inferior to the immunity provided in the Limitation of Liability for Prescribed Political Events Decree 2010, to His Excellency the President, members of the Republic of Fiji Military Forces, Fiji Police Force, Fiji Corrections Services, and individuals appointed to Cabinet or to any State service from 5th December, 2006 up to the first sitting of Parliament elected under the new Constitution, provided however that any immunity for the period from the date of the commencement of this Decree to the first sitting of Parliament elected under the new Constitution shall not apply to any act or omission that constitutes an offence under sections 77 to 390 of the Crimes Decree 2009; and

(e) shall exclude the jurisdiction of any court, tribunal or any other adjudicating body from entertaining any challenge to the provision on immunity.

Conduct of public hearings

8.—(1) The Commission shall take steps to ensure that its work of collecting public views is coordinated with civic education, in order that members of the public have as good an understanding as possible of the issue before they are asked to submit their views.

(2) The Commission shall ensure that ample notice is given of any meeting for the collection of public views.

(3) The Commission shall try to ensure that—

(a) members of the public can give their views in any language with which they are comfortable; and

(b) individuals with disability are not hindered from expressing their views, including by —

(i) the provision of sign language interpretation;

(ii) choosing physically accessible premises for meetings; or

(iii) providing assistance with physical access to premises.

Cooperation with the Commission

9. The Government and the various organs of the State shall cooperate with the Commission to ensure that its work proceeds as smoothly as possible.

Procedure of the Commission

10.—(1) Subject to this section, the Commission shall regulate its own procedure.

(2) The quorum for meetings of the Commission is three Commissioners, including at least two Fijian Commissioners and at least one International Commissioner.

(3) Notwithstanding subsection (2), a public meeting for the collection of submissions or the hearing of views on the draft Constitution may be held provided that at least two of the Commissioners are present, and provided that at least one of these is a Fijian Commissioner.

(4) For the avoidance of doubt, the work of individual Commissioners, or two or more Commissioners, in preparing documents for the Commission, or organising work of the Commission is not a meeting of the Commission for the purposes of subsection (2).

(5) The Commission shall endeavour at all times to make its decisions by consensus.

General provisions

11.—(1) The Commission shall be independent and not subject to the directions of Government, or of any organ of the State, or of any other person or organisation, other than as is necessary to ensure compliance with the general law, and the requirements of this Decree, and of public procurement and audit procedures.

(2) Before commencement of the constitutional process, members of the Commission shall take, before the Chief Justice, the oath or affirmation of office in terms set out in Schedule 3.

(3) The Commission shall be automatically dissolved upon the presentation of the draft Constitution by the Commission to the President, but the Secretariat shall continue in existence solely for the purpose of winding up the affairs of the Commission, in consultation with the Chair of the Commission.

Secretariat

12.—(1) The Commission may appoint its own staff or, by agreement with Government, employ the services of existing Government or parliamentary staff.

(2) The Secretariat shall be supervised by the Executive Secretary of the Commission, acting under the guidance of the Chair of the Commission.

(3) The Commission may employ consultants with specific expertise, locally or from overseas.

Responsibilities of Commissioners and conduct of Commission

13.—(1) The Commissioners and Executive Secretary shall—

- (a) observe the principles and values set out in section 3 of this Decree;
- (b) respect the Oath of Office set out in Schedule 3; and
- (c) be politically neutral.

(2) The staff and consultants of the Commission shall—

- (a) observe the principles and values set out in section 3 of this Decree; and
- (b) be politically neutral.

(3) The Commissioners shall individually sign and adhere to the Code of Conduct set out in Schedule 2 to this Decree.

(4) Any breach of this Decree or of the Code of Conduct may, depending upon its seriousness, be the basis for a formal warning, or—

- (a) removal from office in the case of a Commissioner;
- (b) termination of contract in the case of directly appointed staff or a consultant; or
- (c) termination of secondment in the case of a seconded Government officer.

(5) Action under subsection (4) may be instituted—

- (a) in the case of action against the Executive Secretary, staff or Consultant of the Commission, by the Chair, with the support of at least one other commissioner;

- (b) in the case of action against a Commissioner, by the Chair and at least two other Commissioners; and
- (c) in the case of action against the Chair, by two or more Commissioners.

(6) A Commissioner who is absent, without good reason, for more than three consecutive meetings of the Commission, shall be liable to be removed under the procedure prescribed in subsection (5).

(7) Any person accused of breaching the provisions of this Decree or the Code of Conduct shall be given the benefit of the rules of natural justice before any action is taken.

Immunities

14.—(1) A Commissioner, or the Executive Secretary shall not be liable for anything done or said or in respect of any matter or thing said, or done or omitted to be done in good faith in that person's capacity as Commissioner or as Executive Secretary.

(2) A person who appears before the Commission shall not, whether or not such appearance is in pursuance of any summons by the Commission under this Decree, be liable in any criminal or civil proceedings for any evidence or information given to the Commission.

(3) Notwithstanding subsection (2), a person may be liable for anything said that is irrelevant to the work of the Commission and is said maliciously, within the meaning of the law of defamation.

(4) Notwithstanding subsection (2), a person may be criminally liable for any statement made that constitutes an offence under any law and is an abuse of the occasion in the sense of being irrelevant to the work of the Commission, and the burden of proof whereof lies on the prosecution.

Records

15.—(1) The Commission shall keep careful and accurate records of its meetings and decisions, which shall be as far as possible verbatim records.

(2) The records of the Commission including their financial affairs, shall be available to any member of the public who requests access to them subject to the reasonable decision of the Commission to withhold records in order—

- (a) not to jeopardise ongoing negotiations as to the content of the draft Constitution;
- (b) to prevent the disclosure of information that is not relevant to the work of the Commission and might be damaging to individuals or the cause of national reconciliation.

(3) The records of the Commission shall be deposited at the National Archives of Fiji, with copies at the libraries of the University of the South Pacific, the University of Fiji, the Fiji National University, and other places to ensure access to the public broadly, as soon as possible after the conclusion of the work of the Commission, on condition that—

- (a) they are made readily available to members of the public as soon as the institutions are able to process them; and
- (b) they are kept securely so that they are available for future generations.

Financial resources

16.—(1) Taking into consideration the input of donors, the Government shall ensure that the Commission has the resources necessary for it to perform its functions effectively.

(2) The Commissioners shall receive reasonable remuneration and allowances.

(3) The Commission may receive financial contributions, and contributions in kind to support its work.

Audit

17. The Commission shall cause proper accounts of all funds, property and assets of the Commission to be kept and to be audited in accordance with the Audit Act (Cap. 70).

PART 3—SUSPENSION OF THE PUBLIC ORDER ACT (CAP. 20)

Suspension of section 8 of the Public Order Act (Cap. 20)

18.—(1) Notwithstanding anything contained in the Public Order Act (as amended), until such time when the draft Constitution is presented to the President by the Commission under section 7 (1) of this Decree, any person or group may, without having to obtain a permit under section 8 of the Public Order Act (as amended), hold or organise a meeting in a public place; provided however that in holding or organising any such meeting, no person or group shall engage in any act that constitutes an offence under sections 14, 15, 16 and 17 of the Public Order Act (as amended).

(2) Where any person or group who organises a meeting for the purposes set out in subsection (1) is found to be engaging in any act that constitutes an offence under sections 14, 15, 16 and 17 of the Public Order Act (as amended), then any such person or group shall not be eligible to hold or organise any further meeting without having to obtain a permit under section 8 of the Public Order Act (as amended).

(3) For the purposes of subsection (1), a public place shall not include any—

- (a) public road;
- (b) public park or garden; and
- (c) sporting arena.

(4) This section shall not apply to any public processions, for which section 8 of the Public Order Act (as amended) shall continue to apply.

GIVEN under my hand this 17th day of July 2012.

EPELI NAILATIKAU
President of the Republic of Fiji

 SCHEDULE 1—STAGES OF THE PROCESS
Stage I: Civic Education May – August 2012

Provision of civic education (with the aim of enabling the people to understand the nature and role of the Constitution and the guiding constitutional principles, and to participate effectively in the process).

All individuals and organisations are free to provide civic education and to lobby for reforms.

Note: the civic education may continue once the Commission has begun its work, but this will require careful coordination between the Commission and groups conducting civic education to ensure that groups being consulted have received civic education first.

Stage II: Consultation July – September 2012

The Commission will begin by collecting and analysing views of the public; public meetings will be held at which oral and written submissions may be made; submissions may also be made to the offices of the Commission and through its website.

Stage III: Preparation of initial draft October – December 2012

The main work on this will take place during these months, but if necessary, submissions may also continue to be received. The Commission will formally present the draft Constitution and the Explanatory Report to the President by the first week of January 2013.

Stage IV: Constituent Assembly

Constituent Assembly to hold its first sitting by the second week of January 2013.

The work of the Constituent Assembly is to be completed at the latest by the end of the third week of March.

SCHEDULE 2—CODE OF CONDUCT FOR THE COMMISSION

1. The basic principles applicable to the work of a Commissioner are—
 - (a) commitment to the best interests of the nation and people of Fiji as a whole;
 - (b) political neutrality;
 - (c) openness with both the Commission and (subject to the provisions of this Code and the law) the people of Fiji; and
 - (d) the scrupulous avoidance of any conflict between his or her personal interest and duty as Commissioner.
2. A Commissioner should attend all meetings of the Commission unless there is very good reason for being unable to do so.
3. A Commissioner should not attend any meeting that is actively preparing a submission for the Commission.
4. A Commissioner should rigorously avoid any involvement with politically or otherwise clearly partisan organisations.
5. A Commissioner is bound by the decisions of the Commission and should not express dissent, publicly or privately, other than in a meeting of the Commission.
6. A Commissioner must not accept any bribe, benefit or favour, including hospitality, from any person who would stand to gain from any decision the Commission might make. This rule will be interpreted with common sense, and would not apply to hospitality offered by the Government at an official function or meeting.
7. Despite paragraph 6 of this Code, if a Commissioner believes that to refuse a gift, other than money, would cause unnecessary offence and undermine public trust in the Commission, he or she may accept the gift while making it clear that the gift will be placed on public display at the office of the Commission, and the Commissioner must ensure that the gift is indeed displayed.
8. Commissioners must respect the role of the Chair of the Commission as spokesperson for the Commission. The implications are that requests for information from the media or from individuals or organisations must be referred to the Chair. Any invitation to attend any meeting should be cleared with the Chair, who may refer the invitation to a meeting of the Commission. The Commission will discuss how to deal with invitations to write in the press, appear on radio and television programmes and will develop guidelines, which Commissioners must respect.
9. Commissioners must take particular care not to reveal any details of discussions that might endanger the development of consensus.
10. Violation of this Code of Conduct may be grounds for removal of a Commissioner from office.

SCHEDULE 3—OATH OF OFFICE

I, _____, do solemnly swear/affirm, that I shall faithfully and fully, impartially and to the best of my ability carry out my obligations and fulfil the trust reposed in me as _____ of the Constitution Commission of Fiji faithfully and conscientiously with the best interests of the people of Fiji at heart, and without fear, favour, bias, ill-will or prejudice.