

EXTRAORDINARY

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GOVERNMENT OF FIJI

FIJI CONSTITUTIONAL PROCESS (CONSTITUENT ASSEMBLY
AND ADOPTION OF CONSTITUTION) DECREE 2012
(DECREE No. 58 OF 2012)

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GOVERNMENT OF FIJI

FIJI CONSTITUTIONAL PROCESS (CONSTITUENT ASSEMBLY
AND ADOPTION OF CONSTITUTION) DECREE 2012
(DECREE NO. 58 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 (Constituent Assembly and Adoption of Constitution) 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—

“Assembly” means the Constituent Assembly established under section 7;

“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 Commission established under section 6 of the Fiji Constitutional Process (Constitution Commission) Decree 2012;

“consensus” means substantial agreement among the members of the Assembly 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 this Decree;

“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;

“Fijian” means a citizen of Fiji;

“guiding constitutional principles” means the principles set out in paragraphs (d) and (e) of section 3 and subsections (2) and (3) of section 8 of this Decree;

“Hansard” means the verbatim record of the Assembly;

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

“Tribunal” means the Tribunal appointed by the Chief Justice under section 21 of this Decree.

Purpose

3. The purpose of this Decree is to adopt 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 Assembly shall—

- (a) ensure that the members of the Assembly 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; and
 - (ii) the recommendations of the Commission.

Timing of the stages of the process

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

PART 2 — THE CONSTITUENT ASSEMBLY

President to refer the draft Constitution to the Assembly

6. The President shall, upon receipt of the draft Constitution and the Explanatory Report from the Commission, refer the draft Constitution and the Explanatory Report to the Assembly for debate and adoption.

Establishment of the Constituent Assembly

7. This section establishes the Constituent Assembly.

Functions of the Assembly

8.—(1) The functions of the Assembly shall be to —

- (a) represent the views of Fijians;
- (b) fulfil the purposes and the guiding constitutional principles of this Decree;
- (c) 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;
- (d) 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
- (e) adopt the draft Constitution.

(2) When adopting the draft Constitution, the Assembly 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.

(3) Notwithstanding anything contained in this Decree, when the Assembly adopts 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 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.

Composition of the Assembly

9.—(1) The Assembly shall comprise of such number of members, as the Prime Minister may prescribe by notice published in the *Gazette*.

(2) The Prime Minister shall, by notice published in the *Gazette*, appoint the members of the Assembly, and shall ensure that, where possible, the composition of the Assembly shall reflect the diversity of the people of Fiji and include, but not limited to, the following—

- (i) Government;
- (ii) registered political parties;
- (iii) faith based organisations;
- (iv) representatives of employers;
- (v) members of the business community;
- (vi) trade unions;
- (vii) farmers and members of rural communities;
- (viii) Republic of Fiji Military Forces;
- (ix) national organisations;
- (x) women;
- (xi) persons with disability;
- (xii) youth;
- (xiii) pensioners; and
- (xiv) other Fijian-registered representative civil society groups.

(3) The Assembly shall be presided by a Chair appointed by the Prime Minister.

(4) If the person appointed as the Chair is, for any reason, unable to perform the functions as the chairperson, then the Prime Minister shall appoint another member of the Assembly to act as the Chair of the Assembly.

(5) Any person appointed as a member of the Assembly may only be removed by the Prime Minister, if the Assembly, by way of a majority vote, passes a resolution to make a recommendation to the Prime Minister that a member be removed, provided however that the Assembly shall not make any such recommendation to the Prime Minister unless a Committee, appointed by the Assembly and comprising of such members as the Assembly determines, investigates and makes a finding in a report to the Assembly that a member has breached the Code of Conduct contained in Schedule 2 or this Decree.

(6) If a member of the Assembly is removed under subsection (5) or if a vacancy arises in the Assembly, then the Prime Minister shall appoint another person as a member of the Assembly.

Qualifications for members of the Assembly

10.—(1) To be eligible to be appointed as a member of the Assembly, a person shall—

- (a) be a citizen of Fiji;
- (b) be a person of experience in public affairs, or distinguished in his or her profession or sphere of life; and
- (c) be of honesty and integrity in every respect.

(2) A person is not eligible to be appointed as a member of the Assembly if the person—

- (a) has been declared to be of unsound mind, by at least two doctors with experience in mental illness, or by a court, whose decision has not be reversed;
- (b) has been convicted of an offence of dishonesty or an offence carrying a penalty of more than six months in prison; or
- (c) has been removed from public office for misconduct of any type.

Rights and responsibilities of the members of the Assembly

11.—(1) The members of the Assembly shall—

- (a) respect the Oath of Office in Schedule 3;
- (b) respect the Code of Conduct for members set out in Schedule 2; and
- (c) be guided by a concern for the interests of the nation as a whole, as well as for any geographical or sectional interest which they are elected or appointed to represent.

(2) Any breach of this Decree or of the Code of Conduct by a member may, depending upon its seriousness, be the basis for—

- (a) a formal warning by the Chair of the Assembly; or

(b) formal proceedings for removal from office under section 9 (5).

(3) A member who is absent, without good reason, from more than three consecutive sittings of the Assembly, including meetings of any committee of the Assembly of which he or she is a member, shall be liable to be removed under the procedure referred to under section 9 (5).

(4) No civil or criminal proceedings may be instituted against any member for words spoken, or written in any documents placed before the Assembly or to a committee.

(5) Notwithstanding subsection (4), a member may be liable for anything said that is irrelevant to the work of the Assembly and is said maliciously, within the meaning of the law of defamation.

(6) Notwithstanding subsection (4), a member 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 Assembly, and the burden of proof whereof lies on the prosecution.

Administration of the Assembly

12. Unless the Assembly determines otherwise at its first sitting, the Secretariat of the Commission shall also serve as the Secretariat of the Assembly and any equipment provided for the use of the Commission shall be made available for the use of the Assembly.

Committees of the Assembly

13.—(1) The Assembly may form thematic committees of its members to carry out preliminary scrutiny of aspects of the draft Constitution.

(2) There shall be a Steering Committee chaired by the Chair of the Assembly with the following members—

(a) the Chairs of the thematic committees; and

(b) any other person that the Chair thinks fit.

(3) The functions of the Steering Committee shall include advising the Chair on organising the work of the Assembly.

(4) The Steering Committee may be served by one or more consultants as decided by the Steering Committee.

(5) The Assembly may form any other committee as it deems appropriate.

Procedures of the Assembly

14.—(1) All members of the Assembly shall, at the first sitting of the Assembly, take the oath or affirmation of office before the Chief Justice.

(2) Any member not present at the first sitting shall take the oath or affirmation of office on the first occasion that he or she is present in the Assembly.

(3) The oaths or affirmations of office of the Assembly members shall be as prescribed in Schedule 3.

(4) Subject to section 15, in the performance of its functions, the Assembly shall regulate its own procedure.

(5) The general quorum of the Assembly shall be one half of all the members, and no vote shall be taken unless that quorum is present.

(6) Despite subsection (5), if at the beginning of any sitting of the Assembly there is no quorum, the person presiding shall adjourn the sitting for three hours, to enable members absent to be contacted by the Secretariat, and if, when the sitting resumes, at least one-third of all members are present, the sitting may proceed.

(7) Other than for decisions prescribed in section 15, any decision taken by the Assembly must be by a majority of the members present and voting, provided that the Chair or the presiding officer may rule that a decision shall be postponed until later in the same day, or until the next sitting day in order to enable more members to be present.

Procedures for the consideration of the Constitution by the Assembly

15.—(1) The draft Constitution prepared by the Commission shall form the basis of the deliberations of the Assembly, and any change to that draft, and any addition to or deletion from that draft, shall be made in accordance with the decision making rules in this section.

(2) The Assembly shall at all times strive to reach its decisions by consensus.

(3) If after striving to reach consensus, including by means of informal discussions, by the use of mediation committees or whatever means the Chair and the Steering Committee consider appropriate, consensus cannot be achieved, any decision on the substance of the draft Constitution may, subject to subsection (4), be made by taking a vote.

(4) If it has proved impossible to achieve consensus on a particular point—

- (a) any vote must be postponed for at least 24 hours in order to maximise the possibility of achieving consensus;
- (b) any vote to adopt any new provision, or to change or delete any existing provision of the draft Constitution, shall be by a majority of at least two-thirds of all the members present; and
- (c) voting shall not be by secret ballot, and, if the presiding officer thinks fit, shall be by division with the vote of each person voting, and the abstention of any person present and not voting, recorded, even if the use of a voice vote would, or does, clearly indicate a two-thirds majority in support.

Media

16.—(1) The Assembly shall operate in as open a way as possible, including by permitting members of the local, and as far possible and appropriate, the foreign media, to be present in reasonable numbers at its deliberations.

(2) The Assembly and its Secretariat shall supply the media with regular and accurate information about the work of the Assembly, and endeavour to assist the media to understand the issues in order to enhance public understanding of the constitutional process.

(3) The deliberations of the Assembly shall be open to the media except in the most exceptional circumstances.

(4) Deliberations of committees of the Assembly may be closed to the public and the media if the Chair of the committee, after consulting with the Chair of the Assembly and, if possible, the Steering Committee, thinks fit, in the interests of facilitating the reaching of consensus.

(5) Audio or visual broadcasting of deliberations of committees of the Assembly shall not be permitted.

(6) Audio or visual broadcasting of deliberations of the Assembly shall be permitted, provided that this is not disruptive to the work of the Assembly.

Public access

17.—(1) Facilities shall be provided for members of the public to witness sittings of the full Assembly.

(2) The Assembly may set up a mechanism for controlling access to the public gallery, in order to ensure that numbers are kept at a reasonable level, and the identity of any non-members of the Assembly is known. This mechanism should ensure that as many people as possible have an opportunity to be present at the deliberations of the Assembly at some time.

(3) The power to exclude individual members of the public may be used for reasons of space or because of disruptive behaviour within the Assembly precincts.

(4) The Chair of any committee of the Assembly may, after consulting the Chair of the Assembly, exclude members of the public generally from particular deliberations if this is in the interests of facilitating consensus or for any other good reason.

(5) Any thematic committee of the Assembly, or, in exceptional circumstances, the full Assembly, may take submissions from the public on any specific topic on which public view remain unclear.

Records

18.—(1) The Secretariat of the Assembly 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 Assembly 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 Assembly to withhold records in order—

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

(3) The records of the Assembly 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 Assembly, 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.

(4) The Hansard record of the deliberation of the full Assembly shall be made available as soon as possible, including on the website of the Assembly.

Financial resources

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

(2) The members of the Assembly may receive reasonable remuneration and allowances, as determined by the Prime Minister.

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

Audit

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

PART 3—ADOPTION AND ASSENT OF THE CONSTITUTION

Adoption and assent

21.—(1) No later than seven days after the adoption of the draft Constitution by the Assembly, the Assembly shall present the draft Constitution to the President.

(2) Upon receipt of the draft Constitution from the Assembly, the President shall forward the draft Constitution to the Chief Justice, who shall, within seven days upon receipt of the draft Constitution, appoint a five member Tribunal, which shall consider whether the draft Constitution complies with the principles and values contained in paragraphs (d) and (e) of section 3 and subsections (2) and (3) of section 8 of this Decree.

(3) The Tribunal shall comprise of the Chief Justice or his nominee as the Chair of the Tribunal, and four other members, at least two of whom shall be international experts.

(4) The Tribunal shall, within fourteen days of its establishment, review the draft Constitution and submit a report with recommendations to the President, on whether the draft Constitution complies with the principles and values in paragraphs (d) and (e) of section 3 and subsections (2) and (3) of section 8 of this Decree.

(5) In reviewing the draft Constitution, the Tribunal shall regulate its own procedures, and the members of the Tribunal shall receive such remuneration and allowances as the Chief Justice may determine.

(6) If the report of the Tribunal concludes that the draft Constitution does not comply with the principles and values in paragraphs (d) and (e) of section 3 or subsections (2) and (3) of section 8 of this Decree, the President shall refer the draft Constitution, together with the report of the Tribunal, to the Assembly for necessary amendments to the draft Constitution in accordance with the report of the Tribunal, to ensure compliance with the principles and values in paragraphs (d) and (e) of section 3 and subsections (2) and (3) of section 8 of this Decree.

(7) Upon receipt of the draft Constitution and the report of the Tribunal under subsection (6), the Assembly shall, within seven days, make the necessary amendments to the draft Constitution in accordance with the report of the Tribunal and shall present the draft Constitution to the President for assent.

(8) If the report of the Tribunal concludes that the draft Constitution complies with the principles and values in paragraphs (d) and (e) of section 3 and subsections (2) and (3) of section 8 of this Decree, or upon receipt of the draft Constitution from the Assembly under subsection (7) as the case may be, the President shall provide his assent to the draft Constitution within seven days of receipt of the report of the Tribunal under subsection (4) or within seven days of receipt of the draft Constitution from the Assembly under subsection (7) as the case may be, and a public ceremony shall take place at which the President shall display the new Constitution to the persons present and to the

nation by means of television and other media.

(9) The new Constitution shall come into effect on the day following the date of assent by the President, subject to any provision in the new Constitution that postpones the coming into effect of any aspect of the new Constitution until a certain specified date or until the happening of a specified event.

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 CONSTITUENT ASSEMBLY MEMBERS

1. The basic principles applicable to the work of a member are—
 - (a) commitment to the best interests of the nation and people of Fiji as a whole;
 - (b) openness with both the Assembly and (subject to the provisions of this Code and the law) the people of Fiji; and
 - (c) the scrupulous avoidance of any conflict between his or her personal interest and duty as a member.
2. A member should attend all meetings of the Assembly unless there is very good reason for being unable to do so.
3. A member is bound by the decisions of the Assembly and should not express dissent, publicly or privately, other than in a meeting of the Assembly.
4. A member must not accept any bribe, benefit or favour, including hospitality, from any person who would stand to gain from any decision the Assembly 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.
5. Despite paragraph 4 of this Code, if a member believes that to refuse a gift, other than money, would cause unnecessary offence and undermine public trust in the Assembly, 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 Assembly, and the member must ensure that the gift is indeed displayed.

6. Members must respect the role of the Chair of the Assembly as spokesperson for the Assembly. 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 Assembly. The Assembly will discuss how to deal with invitations to write in the press, appear on radio and television programmes and will develop guidelines, which members must respect.
7. Members must take particular care not to reveal any details of discussions that might endanger the development of consensus.
8. Violation of this Code of Conduct may be grounds for removal of a member 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 Constituent Assembly 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.